TAIL; FEE-TAIL.

EVERY person convict of any felony, save murder, and admitted to the benefit of his clergy, shall be marked with a T. upon the brawn of his thumb. Stat. 4 H. 7. c. 13. See title Clergy, Benefit of, I.

TABACUM; See Tobacco.

TABARD, TABARDER; the bachelor scholars on the foundation of Queen's College, Oxford, are called Tabiters or Tabarders; and these scholars were named, Tabiters, from a gown wore by them, called a Tabert, Tabarr, or Tabard: For Verstegar tells us, that Tabert antiently signified a short gown that reached not farther than the middle of the leg; and it remains for the name of such in Germany and other countries, which, with the Teutonic and Saxon Taber signify all a kind of garment, &c.

TABARDUM, A garment like a gown; and used for an herald's coat, but generally taken for the gown of Ecclesiastics. Matt. Paris 164.


TABLE-RENTS, redditus ad mensam.] Rents paid to bishops, &c. reserved and appropriated to their table or house-keeping. See Board-land.

TABLELING OF FINES; See title Fine of Lands I. 1.

TABULA; Vide Ebdomadarius.

TACFREE, Is used, in old charters, as an exemption from payments, &c.—Cum housbold & haybold & tacfree de omnibus propriis forcis suis infra omnes metas de C. that is, they paid nothing for their hogs running within that limit. Blount.

TACITE RELOCATION; Where the lessor suffers the lessee to continue after the lease is expired, paying as formerly during the lease, this is termed a Tacite Relocation, that is a silent or understood reletting of the premises. It is a Scotch term derived from the civil law.

TACK; A lease: Tack-Duty, the rent reserved on a lease. Scotch Law Dict.

TACTARE, For confirmae. Fleta, lib. 2. c. 61.

TAIL; FEE-TAIL.

Feodum talliatum; from the Fr. tailler to cut; either because the heirs general are by this means cut off; or because this estate is a part cut out of the whole. See title Tenures III. 6.

An Estate in Fee-tail, is a limited Fee, as opposed to a Fee-simple: It is that inheritance whereof a man is seised to him and the heirs of his body, begotten or to be begotten; limited at the will of the donor. He that giveth lands in Tail, is called the donor; and he to whom the gift is made, the Donee. Litt. § 18. Estates in Fee-tail are the (com-
TAIL; OR, FEE-TAIL.

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paratively modern) offspring of the conditional Fees at common law. Before the statute de donis, if lands were given to a man and the heirs of his body, it was interpreted to be a Fee-simple presently by the gift, upon condition that he had issue; and if he had issue, the condition was supposed to be performed for three purposes, viz. to alien and disinherit the issue; and by the alienation to bar the donor or his heirs of all possibility of the reversion; to forfeit the estate for treason or felony; and to charge it with rent, &c. But, by the statute de donis, the will and intention of the donor is to be observed; as that the tenant in Tail shall not alien after issue had, or before, or forfeit or charge the lands longer than for his own life, &c and the estate shall remain to the issue of the donee, or to the donor or his heirs, where there is no issue, so that whereas the donee had a Fee-simple before, now he has but an Estate-tail, and the donor a reversion in Fee-exspectant upon that Estate tail. Co. Litt. 19. See post. III.

In this place, without further entering into the origin of these estates, (for which see titles Tenures, above referred to) we shall consider,

I. What Things may or may not be entailed, under the Statute De donis: Westm. 2. (13 E. 1. st. 1.) c. 1.

II. The several Species of Estates-Tail: And further, how they are respectively created.

III. The Incidents to an Estate-Tail: And the Effect of the various Statutes relating thereto.

I. Tenements is the only word used in the statute: and this Coke expounds to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments, which savour of the reality, that is, which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within the same; as rents, estates, commons, and the like. 1 Inst. 19, 20. Also offices and dignities, which concern lands, or have relation to fixed and certain places, may be entailed. 7 Reph. 33. But mere personal chattels, which savour not at all of the reality, cannot be directly entailed. Neither can an office, which merely relates to such personal chattels: nor an annuity, which charges only the person, and not the lands, of the grantor. But in these last, if granted to a man and the heirs of his body, the grantee hath still a Fee conditional at common law, as before the statute; and by his alienation (after issue born) may bar the heir or reversioner. 1 Inst. 19, 20. An estate to a man and his heirs for another's life cannot be directly entailed: For this is strictly no estate of inheritance, and therefore not within the statute de donis. 2 Vern. 225. Neither can a copyhold estate be entailed by virtue of the statute; for that would tend to encroach upon and restrain the will of the lord: But, by the special custom of the manor, a copyhold may be limited to the heirs of the body: for here the custom ascertains and interprets the lord's will. 3 Reph. 8.

If a term for years, or any personal chattel, (except an Annuity, see that title, and title Rents,) be granted or devised by such words as would convey an Estate-tail in real property, the grantee or devisee has the entire and absolute interest, without having issue; and as soon as such interest is vested in any one, all subsequent limitations, of consequence, become null and void. 1 Bro. C. R. 274: 1 Inst. 20: Fearne. See post.
Two things seem essential to an entail, within the statute de donis. One requisite is, that the subject be land, or some other thing of a real nature. The other requisite is, that the estate in it be an inheritance. Therefore neither estates pur autre vie in lands, though limited to the grantee and his heirs during the life of cestui que vie, nor terms for years, are entailable any more than personal chattels; because, as the latter, not being either interests in things real, or of inheritance, want both requisites; so the two former, though interests in things real, yet, not being also of inheritance, are deficient in one requisite.

However, estates, pur autre vie, terms for years and personal chattels, may be so settled as to answer the purposes of an entail, and be rendered unalienable for almost as long a time, as if they were entailable in the strict sense of the word. Thus estates pur autre vie may be devised or limited in strict settlement, by way of remainder, like estates of inheritance, and such as have interests in the nature of estates-tail may bar their issue, and all remainders over, by alienation of the estate pur autre vie, as those who are, strictly speaking, tenants in Tail may do by fine and recovery; but then the having of issue is not an essential preliminary to the power of alienation, in the case of an estate pur autre vie, limited to one and the heirs of his body, as it is in the case of a conditional fee, from which the mode of barring by alienation was evidently borrowed.

The manner of settling terms for years and personal chattels is different from the above; for in them no Remainders can be limited; but they may be entailed by Executory Devise, or by deed of trust, as effectually as estates of inheritance; if it is not attempted to render them unalienable beyond the duration of lives in being, and twenty-one years after, and perhaps, in the case of a posthumous child, a few months more: A limitation of time, not arbitrarily prescribed by our courts of justice, but wisely and reasonably adopted, in analogy to the case of freeholds of inheritance, which cannot be so limited by way of remainder, as to postpone a complete bar of the entail by fine or recovery for a longer space. See titles Executory Devise; Remainder; Limitation.

It is also proper to observe, that in the case of terms of years and personal chattels, the very vesting of an interest, which in reality would be an Estate-tail, bars the issue and all the subsequent limitations as effectually as fine and recovery, in the case of estates entailable within the statute de donis, or a simple alienation in the case of conditional fees and estates pur autre vie; and further, that if the executory limitations of personality are on contingencies too remote, the whole property is in the first taker.

Upon the whole, by a series of decisions, within the two last centuries, and after many struggles, in respect to personality, it is at length settled, that every species of property is, in substance, equally capable of being settled in the way of entail; and though the modes vary according to the nature of the subject, yet they tend to the same point, and the duration of the entail is circumscribed almost as nearly within the same limits as the difference of property will allow.

As to the entail of estates pur autre vie, see 2 Vern. 184. 225; 3 P. Wms. 262; 1 Atk. 524; 2 Atk. 259. 376; 3 Atk. 464; and 2 Ves. 681.——As to the entail of terms for years and personal chattels, see Manning's case, 8 Co. 94; Lampett's case, 10 Co. 46. b: Child v. Bailey, W. Jo. 15; Duke of Norfolk's case 3 C. C. 1.——See also Carth, 267: 1
II. Estates-tail are either general or special.

Tail-general is where lands and tenements are given to one, and the heirs of his body begotten: which is called Tail-general, because how often soever such donee in Tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the Estate-tail, per formam doni. Litt. §§ 14, 15.

Tenant in Tail-special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may happen several ways. One is, where lands and tenements are given to a man, and the heirs of his body, on Mary his now wife to be begotten: Here no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife: and therefore it is called Special-Tail. And here we may observe, that the words of inheritance (to him and his heirs) give him an estate in Fee; but they being heirs to be by him begotten, this makes it a Fee-Tail; and the person being also limited, on whom such heirs shall be begotten, (viz. Mary his present wife,) this makes it a Fee-tail-special. See Litt. §§ 16, 27, 28, 29.

Estates, in general and special Tail, are farther diversified by the distinction of sexes in such entails; for both of them may either be in Tail-male or Tail-female. As if lands be given to a man, and his heirs male of his body begotten, this is an estate in Tail-male-general; but if to a man and the heirs female of his body on his present wife begotten, this is an estate in Tail-female-special. And in case of an entail-male, the heirs female shall never inherit, nor any derived from them; nor è converso, the heirs male, in case of a gift in Tail-female. Litt. §§ 21, 22. Thus, if the donee in Tail-male hath a daughter, who dies leaving a son, such grandson in this case cannot inherit the Estate-tail; for he cannot deduce his descent wholly by heirs male. Litt. § 24. And as the heir male must convey his descent wholly by males, so must the heir-female wholly by females. And therefore if a man hath two estates tail, the one in Tail-male, and the other in Tail-female; and he hath issue a daughter, which daughter hath issue a son; this grandson can succeed to neither of the estates: For he cannot convey his descent wholly either in the male or female line. 1 Inst. 25.

There are other estates-tail within the equity of the statute; as if lands are given to a man and his heirs, males or females, of his body begotten; the issue male or female shall only inherit according to the limitation. By virtue of the statute, here the daughter may be heir by descent, though there be a son. But in the case of a purchase, Lork Coke says, there cannot be an heir-female when there is a son who is right heir at law. 1 Inst. 24. 164. But this doctrine is now disputed, if not over-ruled. See title Heir II. ad fin. And where there is no heir to take according to the gift, as when issue fails, the land shall revert to the donor, or descend to him that is to have it after the estate-tail is spent. 1 Inst. 25.

As the word heirs is necessary to create a fee, so in farther limitation of the strictness of the feodal donation, the word Body, or some other words of procreation, are necessary to make it a Fee-tail, and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance or words of procreation be omitted.
albeit the others are inserted, in the grant, this will not make an Estate-tail. As, if the grant be to a man and his issue of his body, to a man and his seed, to a man and his children, or offspring; all these are only estates for life, there wanting the words of inheritance, *his heirs.* 1 Inst. 20. So, on the other hand, a gift to a man, and his heirs male, or female, is an estate in Fee-simple, and not in Fee-tail, for there are no words to ascertain the body out of which they shall issue. Litt. § 31: 1 Inst. 27. Indeed, in last wills and Testaments, wherein greater indulgence is allowed, an Estate-tail may be created by a devise to a man and his seed, or to a man and his heirs male; or by any words which shew an intention to restrain the inheritance to the descendants of the devisee. 1 Inst. 9. 27. See title Will.

Further, as to the effect of particular words in creating Estates-tail.

If lands are given to the husband and wife, and to the heirs of their bodies, both of them have an estate in special Tail; by reason of the word Heirs, for the inheritance is not limited to one more than the other: Where lands and tenements are given to a man and his wife, and to the heirs of the body of the man, the husband hath an estate in general Tail, and the wife an estate for life; as the word heirs relates generally to the body of the husband: And if the estate is made to the husband and wife, and to the heirs of the body of the wife by the husband begotten; there the wife hath an estate in special Tail, and the husband for term of life only; because the word heirs hath relation to the body of the wife, to be begotten by that particular husband: If an estate be limited to a man's heirs which he shall beget on his wife, it creates a special Tail in the husband; but the wife will be entitled to nothing, &c. Litt. § 26. 28: Co. Litt. 22. 26.

Lands given to a man and woman unmarried, and to the heirs of their bodies, will be an estate in special Tail; for they may marry. 1 Inst. 25: 10 Rep. 50. And though lands are given to a married man and another man's wife, and the heirs of their two bodies, it may be a good estate-tail, for the possibility of their intermarrying. 15 Hen. 7.

A general Tail, and a special Tail, may not be created at one and the same time; if they are, the general, which is greater, will frustrate the special. 1 Inst. 28:

It is the word Body, or other words amounting to it, make the entail: And a gift to the heirs male, or heirs female, without any thing further, is a fee-simple estate, because it is not limited of what body: And hence a corporation cannot be seised in Tail. 1 Inst. 13. 20. 27.

In a devise or last will, an estate-tail may be created without the word body; also begotten shall be supplied and necessarily intended. Nay's Max. 101: 1 Inst. 26. If one gives lands to a man and his issue, or children of his body, without the words; "his heirs," to convey the inheritance, he has but an estate for life: Though such words may be good enough to convey the inheritance in a will; as estates-tail by devise are always more favoured in law, than estates-tail created by deeds. 1 Inst. 20.

The word heirs is necessary to create an estate-tail and inheritance by deed; and where an use was limited to *A. B.* and to his heirs male, lawfully to be begotten; these last words imply that it must be heirs male of his body, because no other heir male can inherit by virtue of his grant, but such who are lawfully begotten by the grantor. 7 Rep. 41. If a man makes a feoffment to the use of himself for life, remainder to the heirs male of his body, this is an estate-tail execu-
ted in him; and so it is if he covenanted to stand seised in the same manner. 1 Mod. 159.

By a marriage settlement and fine levied, &c. to the use of the husband and wife, for their joint lives; remainder to the heirs of the body of the wife by the husband to be begotten, remainder (the wife surviving the husband) to her for life, remainder to the right heirs of the husband: This was held to be an estate-tail, executed in the wife. Raym. 127: 3 Salk. 338. Land is conveyed to the use of a man and his wife for their lives, and after to their next issue male in Tail, then to the use of the husband and wife, and of the heirs of their bodies begotten, they having no male issue; by this conveyance, husband and wife are tenants in special Tail executed, and when they have issue male, they will be tenants for life, remainder to their son in Tail, the remainder to them in special Tail. 1 Inst. 28.

Where a person having an estate in fee, conveys it by lease and re-lease to the use of himself for life, with remainder to trustees for their lives, and remainder to the heirs of his body; he hath an estate-tail in him; but he is only tenant for life in possession: It would be otherwise if there had been no intermediate estate in the trustees for their lives. 2 Ld. Raym. 855. A man seised of land in fee, makes a gift of it in Tail, or lease for life, remainder to the right heirs male of the body of the donor; this remainder, it is said, will be a fee-simple, and not an estate-tail. Dyer 156. See title Remainder. If the gift or grant of the land be to J. S. and his heirs, to hold to him and the heirs of his body, &c. here he will have an estate in Tail, and a fee-simple upon it. Lit. ch. 2: 1 Inst. 21. Lands are given to two brothers, &c. and to the heirs of their bodies begotten; during their lives they shall have joint estates, so that the survivor will have all for his life; and, after their deaths, their heirs have estates in general Tail, by moieties in common one with another. 1 Inst. 25: 1 Rep. 140.

When a remainder is limited to two, and the heirs male of their bodies, they have not joint but several estates-tail: And between baron and feme, it is said, several moieties may be of an estate-tail, as well as of a fee-simple. Cro. Ediz. 220: Moor. 228: 2 Lit. Abru. 551. A feoffment was made to the use of the feoffor for life, remainder to W. R. his son and his heirs; and for want of issue of him, remainder to the right heirs of the feoffor; adjudged W. R. hath only an estate in Tail; for though the first words of the sentence, viz. to his son and his heirs, make a fee simple, the subsequent words in the same sentence, i.e. and for want of issue of him, make an estate-tail, by qualifying and abridging the same. 5 Mod. 266: 3 Salk. 337. See Helt. 57: Dyer 334; and this Dict. title Remainder.

If a person gives land to A. for life, and after his death, without issue, then to another person; though here is an express estate for life, given to A. the subsequent words make an estate-tail. But where lands are devised to A. during life, the remainder to trustees, remainder to his first son, &c.; and if A. dies without issue, then, &c. the limitation upon the devisee’s death, it is said, will not give an estate in Tail to A. but it shall be here intended, that if he died without having a son. 1 P. Wms. 605. A father, having two sons, devised his lands to his youngest son, and if he died without heirs, then to his eldest son and his heirs; the youngest son had an Estate-tail, because the devise to him, and if he died without heirs is the same as if the testator had devised it in these words, viz. If he die without heirs of his body; for otherwise
the remainder limited to the eldest son had been void, as the youngest son cannot die without heirs, so long as the eldest is living. 1 Rot. Abr. 836. See titles Remainder; Executory Devise.

In ejectment the case was, the father, having three sons, devised his lands to his second son, and his heirs for ever; and for want of such heirs, then to the right heirs of the father; then the father died, and his second son entered, and died without issue, leaving the eldest son: It was resolved, that the second son had but an estate-tail, and that the devise over by these words, "and for want of such heirs," is void in point of limitation, for the testator's intent was that the lands should descend from himself, and not from his second son; and the words "want of such heirs" could import no other than want of issue, &c. so that the eldest son takes by descent in this case, and not by the will. 1 Salk. 233. See title Executory Devise.

A person devised land to his wife for life, remainder to his son, and his heirs forever; and if he died without heirs, the same to remain to his two daughters: In this case it was held in equity, that the rule is, where a remainder over is to one, who may be the devisee's heir at law, such limitation will be good, and the first constructed an estate-tail; for the generality of the word heirs shall be restrained to heirs of the body, since the testator could not but know that the devisee would not die without an heir, while the remainder-man, or any of his issue, continued: But where the second limitation is to a stranger, it is merely void, and the first is a fee-simple. Talbot's Chan. Ca. 2. See title Remainder.

There is also another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates in libero maritaggio, or frank-marriage. These are defined to be, where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frank-marriage. Litt. § 17. Now by such gift, though nothing but the word frank-marriage is expressed, the donees shall have the tenements to them, and the heirs of their two bodies begotten; that is, they are tenants in special Tail. For this one word, frank-marriage, does, ex vi termini, not only create an inheritance, like the word frankalmoign, but likewise limits that inheritance; supplying not only words of descent, but of procreation also. Such donees in frank-marriage are liable to no service but fealty; for a rent reserved thereon is void, until the fourth degree of consanguinity be passed between the issues of the donor and donee. Litt. §§ 19, 20. See title frank-marriage.

III. The Incidents to a Tenancy in Tail, under the stat. Westm. 2. are chiefly these. 1. That a tenant in Tail may commit waste on the estate-tail, by felling timber, pulling down houses, or the like, without being impeached or called to account for the same. 2. That the wife of the tenant in tail shall have her dower, or thirds, of the estate-tail. 3. That the husband of a female tenant in Tail may be tenant by the curtesy of the estate-tail. 4. That an estate-tail may be barred, or destroyed, by a fine, by a common recovery, or by lineal warranty descending with assets to the heir: 1 Inst. 254: 10 Rep. 38.

The establishment of this family law (as the statute de donis is properly styled by Pigott) has occasioned, from time to time, infinite difficulties and disputes. Children grew disobedient when they knew they could not be set aside: Farmers were ousted of their leases made
by tenants in Tail; for, if such leases had been valid, then, under colour of long leases, the issue might have been virtually disinherited: Creditors were defrauded of their debts; for, if tenant in Tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth. Innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our antient books are full: And treasons were encouraged; as estates-tail were not liable to forfeiture, longer than for the tenant’s life. So that they were justly branded, as the source of new contentions, and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm. Co. Litt. 19: Moor 156: 10 Ref. 38. But as the nobility were always fond of this statute, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature; and therefore, by the connivance of an active and politic prince, a method was devised to evade it. 2 Comm. c. 7.

About two hundred years intervened between the making of the statute de donis, and the application of common recoveries to this intent, in the twelfth year of Edward IV.; which were then openly declared by the judges to be a sufficient bar of an estate-tail. 1 Ref. 131: 6 Ref. 40. For though the courts had, so long before as the reign of Edw. III., very frequently hinted their opinion that a bar might be effected upon these principles, yet it never was carried into execution; till Edward IV. observing (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had on families, whose estates were protected by the sanctuary of entail, gave his countenance to this proceeding, and suffered Talantarum’s case to be brought before the court; wherein in consequence of the principles then laid down, it was in effect determined, that a common recovery suffered by tenant in Tail should be an effectual destruction thereof. Year-book, 12 Edw. 4. 14. 19: Fitz. Abr. tit. Faux Recov.; 20 Bro. Abr.; Ibid. 30; tit. Recov. in Value, 19; tit. Tail. 36. See further, this Dictionary, titles Recovery; Fine of Lands.

This expedient having greatly abridged estates-tail, with regard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was their freedom from forfeitures for treason. For, notwithstanding the large advances made by Recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture, the rapacious Prince then reigning, finding them frequently re-settled in a similar manner to suit the convenience of families, had address enough to procure a statute, (stat. 26 H. 8. c. 13.) whereby all estates of inheritance (under which general words estates-tail were covertly included) are declared to be forfeited to the King upon any conviction of high treason. 2 Comm. c. 7.

The next attack which they suffered in order of time, was by stat. 32 Hen. 8. c. 28. whereby certain leases made by Tenants in tail, which do not tend to the prejudice of the issue, were allowed to be good in Law, and to bind the issue in Tail. See title Lease II. But they received a more violent blow, in the same session of Parliament, by the construction put upon the statute of Fines, (4 H. 7. c. 24.) by stat. 32 Hen. 8. c. 36, which declares a fine duly levied by Tenant in Tail to be a complete bar to him and his heirs, and all other persons.
claiming under such entail. This was evidently agreeable to the intention of Henry VII. whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his nobles. But as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched, in his act, under covert and obscure expressions. And the judges, though willing to construe that statute as favourably as possible for the defeating of entailed estates, yet hesitated at giving Fines so extensive a power by mere implication, when the statute *De Donis* had expressly declared, that they should not be a bar to Estates-tail. But the statute of Henry 8. when the doctrine of alienation was better received, and the will of the Prince more implicitly obeyed than before, avowed and established that intention. Yet, in order to preserve the property of the Crown from any danger of infringement, all Estates-tail created by the Crown, and of which the Crown has the reversion, are excepted out of this statute. And the same was done with regard to Common Recoveries, by stat. 34 & 35 Hen. 8. c. 20. which enacts, that no feigned recovery had against Tenants in Tail, where the estate was created by the Crown, and the remainder or reversion continues still in the Crown, shall be of any force and effect. Which is allowing, indirectly and collaterally, their full force and effect with respect to ordinary Estates-tail, where the royal prerogative is not concerned. 1 Inst. 372; 2 Comm. c. 7.

Lastly, by stat. 33 H. 8. c. 39. § 75. all Estates-tail are rendered liable to be charged for payment of debts due to the King by record or special contract; as since, by the bankrupt laws, they are also subjected to be sold for the debts contracted by a bankrupt. See stat. 21 Jac. 1. c. 19. and this Dict. title *Bankrupt*. And by the construction put on the stat. 43 Eliz. c. 4. an appointment by Tenant in Tail of the lands entailed, to a charitable use, is good; without Fine or Recovery. See title *Charitable Uses*.

Estates-tail, being thus by degrees unfettered, are now reduced again to almost the same state, even before issue born, as conditional fees were in at Common Law, after the condition was performed by the birth of issue. For first, the Tenant in Tail is now enabled to alien his lands and tenements by Fine, by Recovery, or by certain other means; and thereby to defeat the interest as well of his own issue, though unborn, as also of the reversioner, except in the case of the Crown: Secondly, he is now liable to forfeit them for High Treason: And, lastly, he may charge them with reasonable leases, and also with such of his debts as are due to the Crown on specialties, or have been contracted with his fellow subjects in a course of extensive commerce. 2 Comm. c. 7.

An Estate-tail cannot merge by the accession of the fee-simple to it: But it has been adjudged, that two fees immediately expectant upon one another, (as where a man is Tenant in Tail, and remainder in fee to the Tenant in Tail,) cannot subsist in the same person; and the statute *De Donis* having made Estates-tail a kind of particular estates, they must like all other such estates, be subject to merger and extinguishment, when united with the absolute fee. 8 Rep. 74: 1 Salk. 338. If there be Tenant in Tail, remainder in Tail, and Tenant in Tail enfeoffs the reversioner in fee, it is a discontinuance: And Tenants in Tail can make no greater estate than for their own lives,
unless it be by lease, &c. according to the stat. 32 H. 8. c. 28: 1 Rep. 140.

If Tenant in Tail bargain and sell lands to another and his heirs, or make a lease and release to the use of himself for life, with remainder over to another, &c. these estates may be avoided by entry of the issue in Tail. 7 Mod. 23. 28. Estates-tail are usually created upon settlements: Though an agreement to entail is no entail; for no agreement shall bind the issue in Tail, where there is a first entail, without a fine. Ch. Rep. 236.

TAILZIE or Entail, in Scotland is applied to deeds whereby the legal line of succession is cut off, and an arbitrary one, according to the choice of the proprietor, substituted in its stead. In this view it appears very similar to the Tail or Fee-tail of the English Law: But its operation is governed by very different and peculiar rules, dependent on the different forms of the Scottish Law. See Bell's Scotch Law Dict. title Entail.

TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED, is where lands and tenements are given to a man and his wife in Special Tail, and either of them dies without issue had between them, the survivor hath an estate in Tail after possibility of issue, &c. Also if they have issue, and the issue dies without issue, who is left who may inherit by force of the entail, the survivor of the donees hath an Estate-tail after possibility. Litt. § 32 The Estate of this tenant must be created by the act of God, viz. by the death of either party without issue: none can have this estate but one of the donees, or a donee in Special Tail; for a donee in General Tail may by possibility have issue. Litt. § 32: 1 Inst. 28: 11 Rep. 80. And if one gives lands to a man and his wife, and the heirs of their two bodies in Special Tail, and they live till each of them are 100 years old, and have no issue, yet doth the law see no impossibility of having children, and they continue Tenants in Tail: But if the wife die without issue, there the Law seeth an apparent impossibility. 1 Inst. 28. See this Dict. title Tenures III. 7.

This estate is considered by Blackstone, as an estate for life of the legal kind, contradistinguished from such as are conventional. See this Dict. title Life-Estates. Blackstone also shews the propriety of the long periphrasis which the Law makes use of, as absolutely necessary to give an adequate idea of the nature of this estate. 2 Comm. c. 8. p. 124.

This estate is, by the learned Commentator, said to be of an amphibious nature, partaking partly of an Estate-tail, and partly of an Estate for Life. The Tenant is in truth only Tenant for Life, but with many of the privileges of a Tenant in Tail; or he is Tenant in Tail, with many of the restrictions of a Tenant for Life; as to forfeit his estate if he aliens it in fee-simple: whereas such alienation by Tenant in Tail, though voidable by the issue, is no forfeiture of the estate to the reversioner, who is not concerned in interest till all possibility of issue be extinct. But in general, the Law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life; which exchange can only be made of estates that are equal in their nature. See title Exchange of Lands. And although, like Tenant in Tail, he is not punishable for waste if he cut down trees, yet they are not his property, but will belong to the first person living at the time when
they are cut, who has an estate of inheritance. See title Waste. 2
Comm. c. 8. & n. See also 1 Inst. 27, 28. and the notes there; and 2
P. Wms. 240.

TAINT; See Attaint.
TAKING, felonious or unlawful; See titles Felony; Fraud; Larceny.
TALE; See Count; Declaration; Pleading.
TALENT, A weight of 62 pounds; also a sum of money among
the Greeks, of about 100£ value. Merch. Dict.
TALES, Lat. A supply in case of a jury not appearing, or chal-
 lenged as not indifferent, &c. of one or more such persons present in
court as are equal in reputation to those that were impanelled, in or-
der to make up a full jury. See title Jury.
TALES, The name of the book in the King's Bench Office of such
persons as are admitted of the Tales. 4 Inst. 93.
TALLAGE, Tallagium, from the Fr. Taille.] Is metaphorically
used for a part or a share of a man's substance, carved out of
the whole, paid by way of tribute, toll, or tax. Stat. de Tallagio non concede-
Coke, Tallage is a general word for all taxes. See title Taxes. 2 Inst.
TALLAGERS, Tax or toll gatherers mentioned by Chaucer.
TALLAGIUM FACERE, To give up accounts in the Exche-
quer, where the method of accounting was by Talleys. Mem. in Scacc.
Mich. 6 Edw. 1.
TALLEY, Tallea; Fr. Taille; Ital. Tagliare, i. e. Scindere.] A stick
cut in two parts, on each whereof is marked, with notches or otherwise,
what is due between debtor and creditor; as now used by brewers, &c.
And this was the antient way of keeping all accounts, one part being
kept by the creditor, the other by the debtor, &c. Hence the Tallier
of the Exchequer, whom we now call the Teller. There were two
kinds of Tallies formerly used in the Exchequer; the one termed
Tallies of Debt, which were in the nature of an acquittance for debts
paid to the King; on the payment whereof these Tallies were deliv-
ered to the debtors, who, carrying them to the Clerk of the Pipe-
office, had there an acquittance in parchment for their full discharge.
Stat. 1 R. 2. c. 5. The other, Tallies of Reward or Allowance, being
made to sheriffs of counties, as a recompence for such matters as they
had performed to their charge, or such money as was cast upon them
in their accounts of course, but not leviable, &c. Stats. 27 H. 8. c. 11:
33 & 34 H. 8: 2 & 3 Ed. 6. c. 4. These Tallies are now abolished by
stat. 23 Geo. 3. c. 82; which see under title Exchequer.
TALLOW is subject to certain duties and regulations on impor-
tation and exportation, by various statutes. See titles Customs; Navi-
gation Acts.
TALLYMAN, A person that sells or lets goods, clothes, &c. to be
paid by so much a week. Merch. Dict.
TALWOOD, Talliatura.] Fire-wood cleft and cut into billets of a
certain length; otherwise written Talwood and Talshide, in the an-
tient stats. 34 & 35 H. 8. c. 3: 7 Ed. 6. c. 7: 43 Eliz. c. 14.
TAM QUAM; See titles Actions, Popular; Information; Qui
TANGIER, An antient city of Barbary, formerly part of the do-
minions of the Crown of England, as Gibraltar is at present; men-
tioned in the stat. 15 Car. 2. c. 7. Tangier deemed not to be a plantation, stat. 22 & 23 Car. 2. c. 26.

TANISTRY, Seems to be derived from Thanis; and is a law or custom in some parts of Ireland; on which see Dav. Rep. 28: Antiq. Hibern. p. 38: 1 Inst. and this Dict. title Gavelkind, ad fin.

TANNARE, To dress or tan leather. Plac. Parl. 18 Edw. 1.

TANNERS. No person shall tan leather unless he hath been an apprentice for seven years with a Tanner, or he be the son of a Tanner, &c. on the pain of forfeiting the leather tanned, or the value. Stat. 1 Jac. 1. c. 22.—See also Stat. 48 Geo. 3. c. 60. prohibiting Tanners to be curriers, or vice versa. Tanners over-liming hides, or using in tanning any thing but oak-bark, ash-bark, culver-dung, &c. incur a forfeiture of the leather; and hastening the tanning of the leather by unkind heats, &c. are liable to a penalty of 10l. and to stand in the pillory. Hides for sole-leather are to lie in the wooze twelve months, and upper-leather nine months, or shall be forfeited, &c. Stat. ibid. Tanners shall not shave their hides, 13 & 14 Car. 2. c. 7.

By stat. 9 Ann. c. 11. it is ordained that collar-makers, grovers, bridle-cutters, and others who dress skins in alum, &c. and cut the same into wares, shall be accounted Tawers, and subject to the penalties for frauds and concealments relating to the duty on Leather. See that title.

TAR, See Pitch; Stores.

TARE AND TRET. The first is an allowance in merchandise, made the buyer for the weight of the box, bag, or cask, wherein goods are packed; and the last is a consideration in the weight, for waste in emptying and reselling the goods, by dust, dirt, breaking, &c. Book Rates.

TARGET, From Lat. Targus.] A shield, originally made of leather, wrought out of the back of an ox. Blount.

TARGIA, Tarida.] Was a ship of burden, since called a Tartan, and Tarita. Knighton, anno 1385.

TARIFF, Custom, duties, toll, or tribute, payable upon merchandise exported and imported, are so called. See title Customs on Merchandise.


TAS, Fr.] A Cock, heap, stack, or rick of hay or corn. Law Fr. Dict.

TASSALE, for Casula, A priest's garment covering him over.

TASSUM, A mow of corn or hay, from the Fr. Tasser, to pile up. Tasser, to mow or heap up, ad tassum furcare, to pitch to the mow. Rot. Hil. 25 Edw. 3.

TATH. In the counties of Norfolk and Suffolk, the lords of manors claimed the privilege of having their tenants' flocks or sheep brought at night upon their own demesne lands, there to be folded for the improvement of the ground; which liberty was called by the name of Tath. Selm.

TAVERN; See titles Inns; Drunkenness.

TAU, By Seldon in his notes upon Eadmerus, signifies a cross. Mon. Angl. iii. 121.

TAURI LIBERI LIBERTAS, In antient charters, is used for a common bull; so called, because he is free and common to all the tenants within such a manor or liberty, &c.

TAWERS; See Tanners.
TAXES.

Tax, Taxa, from the Gr. Ταξις, i.e. Ordo, Tributum.] A tribute or imposition laid upon the Subject, which being certainly and orderly rated, was wont to be yearly paid into the King's Exchequer. It differs from what is commonly called a Subsidy, in this, That it is always certain as it is set down in the exchequer book, and levied in general of every town, and not particularly of every man, &c. See Rastal's Abridgment, titles Taxes; Tenths; Fifteenths; Subsidies, &c. and 4 Inst. 26. 33.

A Tax may now be defined to be a certain aid, subsidy, or supply, granted by the Commons in Parliament assembled; constituting the King's extraordinary revenue, and paid yearly towards the expences of government. 1 Comm. c. 8. See Highmore on Excise, Introd. § 2.

It is said, that in antient times, Taxes were imposed by the King at his pleasure; but King Edw. I. bound himself and his successors, in the 25th year of his reign, that from that time forward no Tax should be laid upon the subject, without the assent of the Lord's and Commons in Parliament. Stat. 25 Edw. 1. c. 5, 6. See title Liberty.

Under title King, V. 4. the Taxes are stated from Blackstone, as part of the King's extraordinary revenue, as applicable to the purposes of government: They may, however, more properly be considered as the national revenue applicable to public purposes; The following is a very concise statement of their nature and amount: See more fully under the several titles; Customs; Excise, &c.

The taxes now levied on the subject are applicable to the purpose of supplying the public expenses, resulting from the support of the navy, the army, the interest of the national debt, and the annual expenses of government.—These Taxes in the accounts annually laid before Parliament under the act 42 Geo. 3. c. 70. are distinguished under the two heads of Ordinary Revenues and Extraordinary Resources: The ordinary revenues are either annual or permanent: The annual revenues were heretofore those arising from the land tax, the excise on malt, and a duty on pensions and offices: Since the land-tax has been made perpetual for the purpose of redemption, (see this Dictionary, title Land Tax,) the annual duties are the excise on malt, the duties on pensions and offices, and certain duties of customs on sugar, tobacco, and snuff: With respect to Ireland the duties of customs are also at present (January 1808) annual; as were those of excise and taxes till 47 Geo. 3. The permanent ordinary Taxes in Great Britain, are the customs, excise, stamps, land-tax, assessed taxes, (being those on windows, houses, servants, carriages, horses, dogs, hairpowder, and armorial bearings); postage duties and other articles of trifling amount, such as licences to hawkers, hackney-coaches, &c. The extraordinary resources in Great Britain consist of duties of customs and excise imposed during the continuance of war; and also a duty on income, or the profits of property imposed for a like continuance. These extraordinary resources are aided by annual loans and lotteries. In Ireland, the customs, as before stated, are at present annual: The excise, (which department also includes the taxes on windows, fire-hearths, carriages, servants, horses, and dogs,) stamps and postage, are permanent. These form the ordinary revenues; the extraordinary resources consist chiefly of loans and lotteries. These taxes are under the management of commissioners of customs, of
excise, of stamps, and of taxes. The amount of the revenue is fluctuating, or rather progressively increasing: That of the several branches for the year ending in 5 Jan. 1808 was nearly as follows, stated in round numbers. In Great Britain, customs 12,500,000l. (about 3,000,000l. being war duties): Excise 26,000,000l. (about 6,250,000l. being war duties): Stamps 4,750,000l.: Land tax 1,400,000l.: Assessed taxes 5,600,000l.: Post office 1,500,000l.: Pensions 135,000l.: Property tax (a war duty) 10,000,000l. Total of all receipts (including some small duties not here specified) 66,000,000l. In Ireland, customs 2,500,000l.: Excise 2,000,000l.: Taxes 400,000l.: Stamps 700,000l.: Post-office, 180,000l., making with other small articles about 7,000,000l. The land-tax and property tax have not hitherto been extended to Ireland.

The average expence of collecting the whole revenue has been computed at 7½ per cent. and of that of the excise, at 5½ per cent.; which is less than any other branch of the revenue. The whole revenue is first deposited in the Exchequer, and is thence issued out to the respective officers for payment, and its application is annually accounted for to Parliament, at what is commonly called the Opening of the Budget; that is, the statement of the national revenue and expenditure, by the Chancellor of the Exchequer, who, at the same time, calls for a supply, if necessary.

When the House of Commons have voted a supply to His Majesty, and settled the quantum of that supply, they usually resolve themselves into a committee of ways and means, to consider the ways of raising, and the means for paying the interest of the supply so voted. And in this committee, every member (though: it is looked upon as the peculiar province of the Chancellor of the Exchequer) may propose such scheme of taxation as he thinks will be least detrimental to the public. The resolutions of this committee, when approved by a vote of the house, are in general esteemed to be (as it were) final and conclusive. For though the supply cannot be actually raised upon the subject, till directed by an act of the whole Parliament; yet no monied man will scruple to advance to the government, any quantity of ready cash on the credit of a bare vote of the House of Commons, though no law be yet passed to establish it. 1 Comm. c. 8. p. 307, 8.

The produce of the respective Taxes originally formed separate and distinct funds; being securities for the sums advanced on each several Tax, and for them only. But at last it became necessary, in order to avoid confusion, as they multiplied yearly, to reduce the number of these separate funds, by uniting and blending them together; superadding the faith of Parliament for the general security of the whole. They were therefore reduced to three capital funds:—The Aggregate Fund, The General Fund, so called from such union and addition; and The South Sea Fund, being the produce of the Taxes appropriated to pay the interest of such part of the national debt as was advanced by that company and its annuitants. All these are now united together in The Consolidated Fund, established by stat. 27 Geo. 3. c. 13. § 47. &c. The separate funds, thus united, are become mutual securities for each other, and the whole produce of them, thus aggregated and consolidated, is liable to pay such interest or annuities as were formerly charged upon each different fund: the faith of the legislature being moreover engaged to supply any casual deficiency; and though some of the Taxes may have, now and then,
proved less productive than was expected, the sum total has generally been more than sufficient to answer the charges upon them; and the surplus, in consequence, formed the Sinking Fund, originally destined to sink and lower the national debt; and now enlarged and secured, by the provisions of stat. 26 Geo. 3. c. 31. and other statutes. See this Dictionary, title National Debt.

The consolidated fund, above mentioned, stands mortgaged by Parliament, to raise an annual sum for the maintenance of the King's household and civil list. For this purpose in the late reigns, the produce of certain branches of the excise and customs, the post-office, the duties on wine licences, the revenues of the remaining crown lands, the profits arising from courts of justice, (which articles include all the hereditary revenues of the crown,) and also a clear annuity of 120,000l. were settled on the king for life, for the support of his household, and the honour and dignity of his crown. And as the amount of these several branches was uncertain, (though in the last reign they sometimes raised almost one million,) if they did not arise annually to 800,000l. the Parliament engaged to make up the deficiency. But King George III., having, soon after his accession, spontaneously signified his consent, that his own hereditary revenue might be so disposed of as might best conduce to the utility and satisfaction of the public, and graciously accepted of the limited sum of 800,000l. per annum, for the support of his civil list, the said hereditary and other revenues were carried into, and made a part of the aggregate fund, and afterwards of the consolidated fund, which is charged with the payment of the whole annuity to the crown. This sum being found insufficient, application was, from time to time, made to Parliament to discharge debts contracted on the civil list, and to increase the annual amount of the civil list. See further this Dictionary, title King V. 4.

A short statement of the antient mode of rating property or persons in respect of their property, either by tenths, or fifteenths, subsidies, on land, hydages, scutages, or talliages, may assist the student in understanding our antient Laws and history. See 1 Comm. c. 8.

Tenths and Fifteenths were temporary aids issuing out of personal property, and granted to the King by Parliament, 2 Inst. 77; 4 Inst. 34. They were formerly the real tenth or fifteenth part of all the moveables belonging to the subject; when such moveables, or personal estates, were a very different and a much less considerable thing than what they usually are at this day. Tenths are said to have been first granted under Henry II., who took advantage of the fashionable zeal for Croisades to introduce this new taxation, in order to defray the expense of an expedition to Palestine; which he really, or seemingly, had projected against Saladin, emperor of the Saracens; whence it was originally denominated the Saladin Tenth. Hoved. A. D. 1188: Carte, i. 719: Hume, i. 329. But afterwards fifteenths were more usually granted than tenths. Originally the amount of these Taxes was uncertain, being levied by assessments newly made at every fresh grant of the Commons; a commission for which is preserved by Matthew Paris (A. D. 1232.) But it was at length reduced to a certainty, in the eighth year of Edward III.; when, by virtue of the King's commission, new taxation were made of every township, borough, and city in the kingdom, and recorded in the exchequer; which rate was, at the time, the fifteenth part of the value of every township; the whole amounting to about 29,000l. and therefore it still kept up the
name of a fifteenth, when, by the alteration of the value of money, and
the increase of personal property, things came to be in a very differ-
ent situation. So that, when, of later years, the Commons granted
the King a fifteenth, every parish in England immediately knew their
proportion of it; that is, the same identical sum that was assessed by
the same aid in the eighth of Edward III.; and then raised it by a rate
among themselves, and returned it into the royal exchequer.

The other antient levies were in the nature of the modern land-
tax: For we may trace up the original of that charge as high as to
the introduction of our military tenures; when every tenant of a
knight's fee was bound, if called upon, to attend the King in his
army for forty days in every year. But this personal attendance grow-
ing troublesome in many respects, the tenants found means of com-
pounding for it, by first sending others in their stead, and in process
of time, by making a pecuniary satisfaction to the crown in lieu of it.
This pecuniary satisfaction at last came to be levied by assessments,
at so much for every knights' fee, under the name of Scutages; which
appear to have been levied for the first time in the fifth year of Hen-
ry II., on account of his expedition to Toulouse; and were then, it
seems, mere arbitrary compositions, as the King and the subject could
agree. But this precedent being afterwards abused into a means of
oppression, (in levyng scutages on the landholders by the royal au-
thority only, whenever our Kings went to war, in order to hire
mercenary troops and pay their contingent expenses,) it became there-
upon a matter of national complaint; and King John was obliged to
promise in his Magna Carta, that no scutage should be imposed,
without the consent of the common council of the realm. This clause
was indeed omitted in the charters of Henry III., where we only find
it stipulated, that scutages should be taken as they were used to be
in the time of King Henry II. (c. 37.) Yet afterwards by a variety of
statutes under Edward I., and his grandson, it was provided, that the
King shall not take any aids or tasks, any taillage or Tax, but by the
common assent of the great men and Commons in parliament. See
title Liberty.

Of the same nature with scutages upon Knights'fees were the
assessments of Hydage upon all other lands, and of Taliage upon ci-
ties and burghs. Madox. Hist. Exch. 480.—But they all gradually
fell into disuse upon the introduction of Subsidies, about the time of
King Richard II. and King Henry IV. These were a Tax, not imme-
diately imposed upon property, but upon persons in respect of their
reputed estates, after the nominal rate of 4s. in the pound for lands,
and 2s. 8d. for goods; and for those of aliens in a double proportion.
But this assessment was also made according to an antient valuation;
wherein the computation was so very moderate, and the rental of the
kingdom was supposed to be so exceeding low, that one Subsidy of
this sort did not, according to Coke, amount to more than 70,000L. 4
Inst. 33: Whereas the Land-tax, at the same rate, before any part
of it was redeemed, produced two millions, and the tax on income or
produce of property at 10 per cent. or only 2s. in the pound produced
in the year ending 5 January 1808, the sum of ten millions. It was
antiently the rule never to grant more than one Subsidy and Two
Fifteenths at a time: But this rule was broken through for the first
time on a very pressing occasion, the Spanish Invasion in 1588; when
the Parliament gave Queen Elizabeth two Subsidies and four Fif-
TAXES.

teenths. Afterwards, as money sunk in value, more Subsidies were given; and we have an instance in the first parliament of 1640, of the King's desiring twelve Subsidies of the Commons, to be levied in three years.

The grant of Scutages, Talliages, or Subsidies by the Commons did not extend to spiritual preferments; those being usually taxed at the same time by the clergy themselves in Convocation; which grants of the Clergy were confirmed in Parliament, otherwise they were illegal, and not binding. A Subsidy granted by the Clergy was after the rate of 4s. in the pound according to the valuation of their livings in the King's books; and amounted, as Coke states, to about 20,000l. 4 Inst. 33. While this custom continued, Convocations were wont to sit as frequently as Parliaments; but the last Subsidies, thus given by the Clergy, were those confirmed by stat. 15 Car. 2. c. 10. since which another method of Taxation has generally prevailed, which takes in the Clergy as well as the Laity: In recompence for which the beneficed Clergy have from that period been allowed to vote at the election of Knights of the Shire; and thenceforward also the practice of giving ecclesiastical subsidies hath fallen into total disuse. Dalt. of Sheriff's 418; Gilb. Hist. Exch. c. 4.

The Lay Subsidy was usually raised by Commissioners appointed by the Crown, or the great officers of State; and therefore, in the beginning of the civil wars between Charles I. and his Parliament, the latter having no other sufficient revenue to support themselves and their measures, introduced the practice of laying weekly and monthly assessments of a specific sum upon the several counties of the kingdom; to be levied by a pound rate on lands and personal estates; which were occasionally continued during the whole Usurpation, sometimes at the rate of 120,000l. a month, sometimes at inferior rates. After the Restoration, the antient method of granting Subsidies, instead of such monthly assessments, was, as it seems once, and once only, renewed; viz. in 1663, when four Subsidies were granted by the Temporality, and four by the Clergy; which was, in fact, the last time of raising supplies in that manner. For the monthly assessments being now established by custom, being raised by Commissioners named by Parliament, and producing a more certain revenue; from that time forwards we hear no more of Subsidies, but occasional assessments were granted as the national emergencies required. These periodic assessments, the Subsidies which preceded them, and the more antient Scutage, Hydage, and Talliage, were to all intents and purposes a Land-tax: and the assessments were sometimes expressly called so. Though a popular opinion has prevailed, that the Land-tax was first introduced in the reign of King William III. See title Land-tax.

The learned commentator is of opinion, that the last time of raising Supplies by way of Subsidy, was in 1670; and he seems to have been misled by the title of stat. 22 & 23 C. 2. c. 3. viz. "An act to grant A subsidy to His Majesty for supply of his extraordinary occasions." But although, among a great variety of other Taxes, Is. in the pound is to be raised upon land, yet the mode of collecting it is totally different from the former subsidy assessment; it is to be levied by exactly the same plan and arrangement as were afterwards adopted in stat. 4 W. & M. c. 1. All the material clauses in stat. 22 & 23 C. 2. c. 3. are copied verbatim into stat. 4 W. & M. c. 1. The act of
The modern Tax on Income, or the profits of property, bears a near resemblance to this antient tax. It was first introduced under the Title of a tax on Income, and regulated by statutes. 38 G. 3. c. 16: 39 Geo. 3. c. 13: 39 & 40 G. 3. c. 49. At present it exists as a contribution on the profits of property under the acts 43 Geo. 3. c. 42: 43 Geo. 3. c. 122: 45 Geo. 3. c. 15: 46 Geo. 3. c. 65. Under these latter acts, it was at first 5 per cent. and afterwards increased to 6% and then to ten per cent.; or 2s. in the pound: It has proved a very productive tax; and if duly and equitably levied, it would be the fairest and most desirable of all Taxes; although in some particulars it is certainly at present liable to objections; particularly in the rate being the same on a small income as on a large one; and upon an income merely personal or temporary, as on that which is real and permanent.

The Malt-tax is a sum raised every year by Parliament, ever since 1697, by a duty on every bushel of malt. This is under the management of Commissioners of Excise; and is indeed itself no other than an annual excise: It produced in the year ending 5 January 1808, the sum of 1,350,000l. but in this were included some additional duties of modern date.

The duty on Salt consists in an excise, imposed, per bushel, by several statutes. See title Salt.

As to the duty on the carriage of Letters, see this Dictionary, title Post-Office.

As to the Stamp duties, see this Dict. title Stamps.

As to the duty on Houses and Windows. As early as the conquest, mention is made in Domesday-Book of fumage or luage, vulgarly called smoke-farthings which were paid by custom to the King for every chimney in the house. And we read that Edward the Black Prince, (soon after his successes in France,) in imitation of the English custom, imposed a tax of a florin upon every hearth in his French dominions. But the first parliamentary establishment of it in England was by stat. 13 & 14 Car. 2. c. 10. whereby an hereditary revenue of 2s. for every hearth, in all houses paying to church and poor, was granted to the King for ever. And, by subsequent statutes for the more regular assessment of this tax, the constable and two other substantial inhabitants of the parish, to be appointed yearly, (or the surveyor, appointed by the Crown, together with such constable or other public officer,) were once in every year empowered to view the inside of every house in the parish. But, upon the Revolution, by stat. 1 W. & M. st. 1. c. 10. hearth-money was declared to be "not only a great oppression to the poorer sort, but a badge of slavery upon the whole people; exposing every man’s house to be entered into, and searched at pleasure by persons unknown to him; and therefore, to erect a lasting monument of their Majesties’ goodness in every house in the kingdom, the duty of hearth-money was taken away and abolished." This monument of Goodness remains among us to this day; but the prospect of it was somewhat darkened, (says Blackstone,) when, in six years afterwards, by stat. 7 W. 3. c. 18. a tax was laid upon all houses (except cottages) of 2s., now advanced to 3s. per annum; and a Tax also upon all Windows, if they exceeded nine in such house. Which rates have been, from time to time, varied, being now extended to all Windows exceeding six; and power is given to sur-
veyors, appointed by the Crown, to inspect the outside of houses, and also to pass through any house two days in the year, into any court or yard, to inspect the windows there. A pound rate is also imposed on every dwelling house inhabited, together with the offices and gardens therewith occupied (farm houses and cottages excepted): increasing according to the amount of the rent. See 1 Comm. c. 8.

The duty imposed on Male Servants, retained or employed in the several capacities specifically mentioned in the statutes for that purpose, extends to almost every sort of male domestic, except such as are actually employed only in husbandry or manufacture.

The duty on Offices and Pensions consisting of annual payments of 1s. in the pound, and 6d. in the pound, (over and above all other duties,) out of all salaries, fees, and perquisites of Offices, and out of all pensions and gratuities payable by the Crown, exceeding 100l. per annum, was first imposed by stat. 31 Geo. 2. c. 22.

It is considered as a rule of construction of revenue-acts, in ambiguous cases, to lean in favour of revenue: This rule will be found to be agreeable to good policy and the public interests; particularly when it is considered that disputes as to the meaning and effect of Revenue laws most generally arise in consequence of attempts, often wholly unjustifiable, to evade them. Beyond this, which may be regarded as established law, no one can ever be said to have an undue advantage in the courts of justice. See 1 Comm. c. 8. in n.

TAXATIO BLADORUM, A tax or imposition laid upon corn. Cowell.

TAXATIO NORWICENSIS, the valuation of ecclesiastical benefices made through every diocese in England, on occasion of the Pope's granting to the King the tenth of all spirituals for three years. Which taxation was made by Walter bishop of Norwich, delegated by the Pope to this office in 38 Hen. III., and obtained till the 19 of Ed. 1. when a new taxation, advancing the value, was made by the bishops of Winchester and Lincoln, Cowell.

TAXERS, Two officers yearly chosen in Cambridge to see the true guage of all weights and measures; though the name took rise from taxing or rating the rents of houses, which was antiently the duty of their offices.

TAXT-WARD. An annual payment heretofore made to a superior in Scotland instead of the duties due to him under the tenure of Ward-holding; now abolished: See title Tenures.

TAYLORS, Contracts entered into with journeyman Taylors, for advancing their wages, are declared void; and Taylors, in London, giving greater wages than allowed, shall forfeit 5l. and journeymen accepting the same, or refusing to work for the settled stated wages, the hours appointed, may be sent to the house of correction for two months, &c. Stat. 7 Geo. 1. c. 13.

By stat. 8 Geo. 3. c. 17. Certain new regulations are established as to Master-Taylors and their journeymen. Their hours and price for working are limited within London and five miles thereof. The justices are empowered to call witnesses before them on suspicion that the regulation is broken through, and, on conviction, to commit the offenders. Also the quarter-sessions, in London, are enabled to make new regulations, if requisite, as to wages and hours of work. Masters, within the limits, employing men out of the limits, to evade the act,
are to forfeit 500l. a moiety to the King, the other to the informer. See also title Buttons.

TEA, A pleasant sort of liquor, now much used in England, and introduced from China and the East Indies, being made from the leaf of a shrub growing in those parts: It seems to have been first noticed in the stat. 12 Car. 2. c. 15. It now forms a considerable article of commerce under the direction of the East India company. It is liable to high custom duties on importation. And various statutes have been passed to guard against frauds in smuggling this article; to regulate its importation and exportation; and to prevent frauds in mixing it with prejudicial drugs, &c. &c.

TEAM; THEAME, From the Sax. Tyman propagare, to Teem or bring forth.] A royalty or privilege granted by the King’s charter to the lord of a manor, for the having, restraining, and judging of bondmen and villains, with their children, goods, and chattels, &c. Glanvil, lib. 5. c. 2.

TECHNICAL WORDS, in Indictments; See title Indictments III. See also titles Deed; Conveyance, &c.

TEDING-PENNY; Tething-penny, Tithing-penny; A small duty or payment to the sheriff from each Tithing, towards the charge of keeping courts, &c. from which some of the religious were exempted by charter from the King. Chart. Hen. 1.

TEENAGE, From Sax. Tyman, to inclose or shut.] Is used in many parts of England for wood for fences and inclosures.

TEINDS, Tynan, to Teind Masters, those who are entitled to Tithes. Scotch Law Dict. See this Dict. title Tithes.

TEINLAND, Tainland, or Thainland; See Thane-land.

TELLER, A considerable officer in the Exchequer, of which officers there are four; whose office is to receive all money due to the King; and to give the clerk of the Pells a bill to charge him therewith: They also pay to all persons any money payable by the King, and make weekly and yearly books of their receipts and payments, which they deliver to the Lord Treasurer. See titles Exchequer; Accounts, Public.

TELEGRAPHIE, From Sax. Tellân, dicere, Gr. ὑγιαζε, Scribo, quasi a telling any thing by writing.] Written evidences of things past. Blount.

TELLWORC, That work or labour which the tenant was bound to do for his lord, for a certain number of days; from the Saxon word Tellan, numerare, & worc, opus. Thorn. Ann. 1364.

EMENTALE or TENEMENTALE, a tax of two shillings upon every plough-land. Hov. Hist. f. 419. A Decennary. Leg. Ed. Conf.

TEMPLARS, or KNIGHTS OF THE TEMPLE, Templarii.] A religious order of knighthood, instituted about the year 1119, and so called because they dwelt in part of the buildings belonging to the Temple at Jerusalem, and not far from the sepulchre of our Lord. They entertained Christian strangers and pilgrims charitably, and in their armour led them through the Holy Land, to view the sacred monuments of Christianity, without fear of infidels; for at first their profession was to defend travellers from highwaymen and robbers. This order continuing and increasing for near two hundred years, was far spread in Christendom, and particularly here in England. But at length, some of them at Jerusalem falling away (as some authors
report) to the Saracens from Christianity, or rather because they grew too potent and rich, the whole order was suppressed by Clement V., anno 1307, by the council of Vienna 1312; and their substance given partly to the Knights of St. John of Jerusalem, and partly to other Religious. Cassan de Gloria Mundi, par. 9. Consid. 4. These flourished here in England from the time of Henry II., till they were suppressed, and their lands given to the Knights hospitalers of St. John of Jerusalem. Stat. 17 Edw. 2. st. 3: and these last were suppressed in England and Ireland in the time of Hen. VIII. See English stat. 32 Hen. 8. c. 24: and Irish stat. 33 Hen. 8. st. 2. c. 5. They had in every nation a particular governor, whom Bracton, lib. 1 cap. 10. calls Magistrum Militiae Templi. The master of the Temple here was summoned to Parliament, 49 H. 3. m. 11. in Schedule. And the chief minister of the Temple Church in London, is still called master of the Temple. Of these Knights read Mr. Dugdale's Antiquities of Warwickshire, fol. 706. In antient records they were also called Fratres Militiae Templi Solomontis. Mon. Angl. ii. 554, b. About nine years after their institution, they were ordered by a council held at Triers, to wear a white garment; and afterwards, in the pontificate of Pope Eugenius, they wore a red cross on their garments. The Temples, which we now call the Inns of Courts, was the place where they dwelt; and in the Middle Temple the King's treasure was kept. Cowell. Templars' land shall be forfeit for erecting their crosses, stat. Westm. 2. 13 Edw. 1. c. 33. The jurisdiction of the conservators of their privileges restrained, stat. Westm. 2. 13 Edw. 1. c. 43.

TEMPLE. Dugdale and Stow both tell us that the Temple in London is a place of privilege from arrests, by the grant of the King; but this hath been denied by the Court of B. R. Dugd. 317. 320: 3 Salk. Ref. 43. See title Arrest.

TEMPORALITIES OF BISHOPS, The lay-revenues, lands, tenements, and lay-fees, belonging to the see of bishops or archbishops, as they are barons and lords of Parliament; (including their baronies.) All things which a bishop hath by livery from the King, as manors, lands, tithes, &c. 1 Rol. Abr. 881: 1 Comm. c. 8. It was a custom formerly, that when bishops received from the King their temporalities, they did by a solemn form, in writing, renounce all right to the same by virtue of any provision from the Pope, and acknowledged the receipt of them only from the King; which custom continued from the reign of Edw. 1. to the time of the reformation: And this practice began by occasion of a bull of Pope Gregory VIII., wherein he conferred the see of Worcester on a certain bishop, and committed to him administrationes spiritualium & temporalium episcopatus predict. Anno 31 Edw. 1.

The custody of these temporalities is stated, by Blackstone, as part of the King's ordinary revenue; (See title King, V. 4.) This, upon the vacancy of the bishopric, is immediately the right of the King, as a consequence of his prerogative in church matters; whereby he is considered as the founder of all archbishoprics and bishoprics, to whom during the vacancy they revert. And for the same reason, before the dissolution of abbeys, the King had the custody of the temporalities of all such abbeys and priories as were of royal foundation, (but not of those founded by subjects,) on the death of the abbot or prior. 2 Inst. 15. Another reason may also be given, why the policy of the law hath vested this custody in the King; because as the suc-
cessor is not known, the lands and possession of the see would be liable to spoil and devastation, if no one had a property therein. Therefore the law has given the King, not the Temporalties themselves, but the custody of the Temporalties, till such time as a successor is appointed; with power of taking to himself all the intermediate profits, without any account of the successor; and with the right of presenting, (which the Crown very frequently exercises,) to such benefices and other preferments as fall within the time of vacation. Stat. 17 E. 2, st. 1. c. 14: F. N. B. 32. This revenue is of so high a nature, that it could not be granted out to a subject, before, or even after, it accrued: But by stat. 14 Edw. 3. st. 4. cc. 4, 5. the King may, after the vacancy, lease the Temporalties to the dean and chapter; saving to himself all adowsons, escheats, and the like. Our antient Kings, and particularly William Rufus, were not only remarkable for keeping the bishoprics a long time vacant, for the sake of enjoying the Temporalties, but also committed horrible waste on the woods and other parts of the estate; and to crown all, would never, when the see was filled up, restore to the bishop his temporalities again, unless he purchased them at an exorbitant price. To remedy which, King Henry I. granted a charter at the beginning of his reign, promising neither to sell, nor let to farm, nor take any thing from, the domains of the Church, till the successor was installed. And it was made one of the articles of the Great Charter, that no waste should be committed in the Temporalties of bishoprics, neither should the custody of them be sold. Stat. 9 H. 3. c. 5. The same is ordained by the stat. Westm. 1. 3 E. 1. c. 21. and the stat. 14 Edw. 3. st. 4. c. 4. (which permits, as we have seen, a lease to the dean and chapter,) is still more explicit in prohibiting the other exactions. It was also a frequent abuse, that the King would, for trifling or no causes, seize the Temporalties of bishops, even during their lives, into his own hands: But this is guarded against by stat. 1 Edw. 3. st. 2. c. 2.

This revenue of the King, which was formerly very considerable, is now by a customary indulgence almost reduced to nothing: For, at present, as soon as the new bishop is consecrated and confirmed, he usually receives the restitution of his Temporalties quite entire and untouched, from the King; and at the same time does homage to his Sovereign; and then, and not sooner, he has a fee simple in his bishopric, and may maintain an action for the profits. 2 Inst. 67. 341.

See 1 Comm. caf. 8.

TEMTATATIO or TENTATATIO, A trial or proof. Chart. 20 Edw. 1.

TEMPSUS PESSONIS, Mast-time in the Forest, which is from about Michaelmas to St. Martin's day, Nov. 11.

TEMBUS PINGUEDEINIS ET FIRMATIONIS; The season of killing the buck and the doe. MS. Tempf. H. 3.

TENA, A coif worn by Ecclesiastics. Counc. Lambeth, anno 1281.

TENANECIES, Houses or places for habitation, held of another. Stat. 23 Eliz. c. 4.

TENANT, Tenens, from the Lat. tenere, to hold.] One that holds or possesses lands or tenements by any kind of title, either in fee, for life, years, or at will. The word in law is used with divers additions; thus, Tenant in dower, is she that possesses land by virtue of her dower.—Tenant by statute-merchant, he that holds land by virtue of a statute forfeited to him.—Tenant in frank-marriage, he that holds
lands or tenements by virtue of a gift thereof made to him upon marriage between him and his wife.—Tenant by the curtesy, he that holds for his life, by reason of a child begotten by him of his wife, being an inheritrix, and born alive.—Tenant by elegit, that holds by virtue of the writ called an Elegit.—Tenant in mortgage, that holds by means of a mortgage.—Tenant by the verge in antient demesne, who is admitted by the rod in the court of Antient Demesne. Tenant by copy of court-roll, who is admitted tenant of any lands, &c. within a manor, which, time out of mind, had been demisable according to the custom of the manor. Tenant by charter, that holdeth by feoffment in writing, or other deed.—There were also Tenants by Knights-service, Tenant in burgage, Tenant in socage, Tenant in frank-fee, Tenant in villeinage: So there is Tenant in fee-simple; Tenant in fee-tail; Tenant at the will of the lord, according to the custom of the manor; Tenant at will by the common law; Tenant upon sufferance; Tenant of estate of inheritance; Tenant in chief, that holdeth of the King in right of his crown; Tenant of the King’s, he that holds of the person of the King, or has some honour; very Tenant, that holds immediately of his lord, Kitch. fol. 99.; Tenant peravail.

So there are also joint-tenants, that have equal right in lands and tenements by virtue of one title; Tenants in common, that have equal right, but hold by divers titles; particular Tenant, as Tenant for years, for life, &c. that holds only for his term; sole Tenant, he that hath no other joined with him; several Tenant, as opposite to joint-tenant, or Tenant in common.

So there is Tenant to the præcipe, in case of Fines and Recoveries; Tenant in demesne, which is he that holdeth the demesnes of a manor for a rent, without service; Tenants on service, he that holdeth by service; Tenants by execution, that hold lands by virtue of an execution upon any statute, recognizance, &c. with divers others. Co-well. See this Dict. under the several titles relative to the estates of such Tenants: and this Dict. title Tenure.

Tenants in Common, are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously. Litt. § 292. This tenancy therefore happens, where there is a unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For, if there be two Tenants in common of lands, one may hold his part in fee-simple, the other in tail, or for life; so that there is no necessary unity of interest: One may hold by descent, the other by purchase; or the one by purchase from A., the other by purchase from B.; so that there is no unity of title: One’s estate may have been vested fifty years, the other’s but yesterday; so there is no unity of time. The only unity there is, is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own: otherwise, even this would be soon destroyed. 2 Comm. c. 12.

Tenancy in Common may be created, either by the destruction of two estates, in joint-tenancy and co-parcenary, or by special limitation in a deed. By the destruction of the two estates mentioned, is intended such destruction as does not sever the unity of possession, but only the unity of title or interest: As, if one of two joint-tenants in fee aliens his estate for the life of the alience, the alience and the
other joint-tenant are Tenants in Common; for they now have several titles, the other joint-tenant by the original grant, the alience by the new alienation; and they also have several interests, the former joint-tenant in fee simple, the alience for his own life only. *Litt.* § 293.—So, if one joint-tenant gives his part to *A.*, in tail, and the other gives his to *B.*, in tail, the donees are Tenants in Common, as holding by different titles and conveyances. *Litt.* § 292.—If one of two par- ceners aliens, the alience and the remaining parcener are Tenants in Common; because they hold by different titles, the parcener by descent, the alience by purchase. *Litt.* § 309.—So likewise, if there be a grant to two men, or two women, and the heirs of their bodies, here the grantees shall be joint-tenants of the life-estate, but they shall have several inheritances; because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to a man and a woman, and the heirs of their bodies be-gotten: And in this and the like cases, their issues shall be Tenants in Common; because they must claim by different titles, one as heir of *A.*, and the other as heir of *B.*; and those too not titles by purchase, but descent. See *Litt.* § 283. In short, whenever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a Tenancy in Common. 2 Comm. c. 12.

A Tenancy in Common may also be created by express limitation in a deed: But here care must be taken not to insert words which imply a joint estate; and then if lands be given to two or more, and it be not joint-tenancy, it must be a Tenancy in Common. Land given to two, to be holden, the one moiety to one, and the other moiety to the other, is an estate in Common; and, if one grants to another half his land, the grantor and grantee are also Tenants in Common: Because joint-tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly ex- pressed, that it is impossible they should take a joint interest in the whole of the tenements. But a devise to two persons to hold jointly and severally, has been held to be a joint tenancy; because that is necessarily implied in the word "jointly;" the word "severally" perhaps only implying the power of partition: And an estate given to *A.* and *B.*, equally to be divided between them, though in deeds it hath been said to be a joint-tenancy, (for it implies no more than the Law has annexed to that estate, *viz.* divisibility,) yet in wills it is certainly a Tenancy in Common; because the devisor may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed. See 1 *Eq.* Ab. 291: 1 P. *Wms.* 17: 3 *Ref.* 39: 1 *Vent.* 32. And this nicety in the wording of grants makes it the most usual as well as the safest way, (in them as well as in Wills,) when a Tenancy in Common is meant to be created, to add express words of exclusion as well as description, and limit the estate to *A.* and *B.*, to hold as Tenants in Common, and not as joint-tenants.

It is noticed under title Joint-tenants, that their tenure, though formerly favoured in Law, is now considered as odious. In con-sequence of this, in Wills, the expressions, equally to be divided, share and share alike, respectively between and amongst, have been held to create a Tenancy in Common. 2 *Atk.* 121: 2 *Bro.* C. R. 15: 1 P. *Wms.* 14. And there seems but little doubt that the same construc-
tion would now be put even upon the word severally: But these words certainly are only evidence of intention, and will not create a Tenancy in Common, where the contrary, from the other parts of the will, appears to be the manifest intention of the testator. 3 Bro. C. R. 215.

The words, equally to be divided, make a Tenancy in Common in surrenders of copyholds, and also in deeds which derive their operation from the statute of Uses. 1 P. Wms. 14: 1 Wils. 341: 2 Ves. 257. And though it has formerly been suggested (see 1 Ves. 165: 2 Ves. 257.) that these words are not sufficient to create a Tenancy in Common, in common Law conveyances, yet there seems but little doubt that, in such a case, nothing but invincible authority would now induce the Courts to adopt that opinion, and to decide in favour of a Joint-tenancy. 2 Comm. c. 12. p. 194, n. It is, however, to be observed that, though the words, equally to be divided, share and share alike, and such like, are in general construed to create a Tenancy in Common, yet it is not by force of the words merely, but because it appears to be the intention of the party that there should be no survivorship. 2 Ro. Ab. 90: Salk. 227. 392: 2 Ves. 258. See title Joint-tenants.

As to the incidents attending a Tenancy in Common: Tenants in Common (like Joint-tenants) are compellable by the statutes 31 H. 8. c. 1: 32 H. 8. c. 32, to make partition of their lands; which they were not at Common Law. See title Joint-tenants III. They properly take by distinct moiety, and have no entirety of interest; and therefore there is no survivorship between Tenants in Common. Their other incidents are such as merely arise from the unity of possession; and are therefore the same as appertain to Joint-tenants merely upon that account: Such as being liable to reciprocal actions of waste, and of account, by the stats. Westm. 2. c. 22: 4 Ann. c. 16, and see 8 Term Rep. K. B. 145.—For by the Common Law, no Tenant in Common was liable to account with his companion for embezlling the profits of the estate; though, if one actually turns the other out of possession, an action of ejectment will lie against him. 1 Inst. 199, 200. See 2 Comm. c. 12.

Adverse possession, or the uninterrupted receipt of the rents and profits, is now held to be evidence of an actual ouster. And where one Tenant in Common has been in undisturbed possession for 20 years, in an ejectment brought against him by the Co-tenant, the Jury will be directed to presume an actual ouster; and consequently to find a verdict for the defendant. Cowp. 217.

As for other incidents of Joint-tenants, which arise from the privity of title, or the union and entirety of interest, (such as joining or being joined in actions, unless in case where some entire or indivisible thing is to be recovered,) these are not applicable to Tenants in Common, whose interests are distinct, and whose titles are not joint, but several. Litt. § 811: 1 Inst. 197: 2 Comm. c. 12.

Estates in Common can only be dissolved two ways: 1. By uniting all the titles and interests in one Tenant, by purchase or otherwise; which brings the whole to one severality: 2. By making partition between the several Tenants in Common, which gives them all respective severalties. For indeed Tenancies in Common differ in nothing from sole estates, but merely in the blending and unity of possession.
As to Tenancy in Common of things personal, see title Joint-tenancy in Things personal.

TENDE, To tender, or offer: it is mentioned in our old books; as, to tend a traverse, an averment, &c. Britton, c. 76: Staunf. Prerog. 16.

TENDER, Fr. Tendre.] The offering of money or any other thing in satisfaction; or circumspectly to endeavour the performance of a thing: as a Tender of rent is, to offer it at the time and place when and where it ought to be paid. Also it is an act done to save the penalty of a bond before action brought, &c. Terms de Ley 557. See titles Pleading, particularly I. 4; Money into Court. As to Tender of rent, see title Rents.

There are several statutes which authorise a Tender of amends, where otherwise it would not have been allowable. As stat. 11 Geo. 2. c. 19. § 20. in cases of distress for rent,—Stat. 17 Geo. 2. c. 38. § 10. in cases of distress for poor's rates.—Stat. 24 Geo. 2. c. 44. in actions against Justices of the Peace.—Stat. 23 Geo. 3. c. 70. § 30. in actions against Excise Officers. And stat. 24 Geo. 3. c. 47. § 35. in actions against Custom-House Officers.

Tender of money on a bond is to be made to the person of the obligee at the day appointed, to save the penalty and forfeiture of the bond, and it ought to be done before witnesses; though, if the obligor be sued afterwards, he must still pay it. But if the obligor be to do any collateral thing, or which is not part of the obligation, as to deliver a horse, &c. and the obligor offer to do his part, and the obligee refusest hit, the condition is performed, and the obligation discharged for ever. 1 Inst. 207, 208.

By stat. 4 & 5 Ann. c. 16. § 12. the plea of solvit post diem is granted to an action on bond; but a Tender and refusal of principal and interest at a subsequent day cannot be pleaded, as not being within the equity of the statute: For such construction would be prejudicial; as it would empower the obligor, at any time, to compel the obligee to take his money without notice. Bull. Nī. Pri. 171: Sellon's Pract., TENDER.

If A, B, and C, have a joint demand, and C has a separate demand, on D; and D offers A to pay him both the debts, which A refuses, without objecting to the form of the Tender, on account of his being only entitled to the joint demand, D may plead this Tender in bar of an action for the joint demand; and should state it as a Tender to A, B, and C. 3 Term Rep. 684.

On award, that the defendant should pay money on such a day, and at such a place; the defendant pleaded that he tendered the money at the day and place; and because he did not set forth that he continued there ready to pay it at the last instant of the day till after sun-setting, &c. it was held ill. 2 Cro. 243.

Every Tender at the Common Law, or which is given by statute, must be made before the writ sued out.

If a Tender be in fact made before the bringing of the action, though, by the teste of the writ, it may appear to have been afterwards, (as if Tender in vacation and teste of preceding term,) the exact time when the writ was in fact sued out may be shewn in pleading, or sometimes given in evidence contrary to the teste: But if a bill be filed on the same day the Tender is made, though subsequent thereto, it seems that the defendant can no way avail himself by pleading the prior Tender; as there is no fraction of a day in Law.
See Sellon's Pract., Tender; and this Dictionary, titles Pleading; Latitit; Process.

It is no answer to a plea of Tender before the exhibiting of the plaintiff's bill, that the plaintiff had before such Tender retained an attorney, and instructed him to sue out a writ against the defendant, and that the attorney had accordingly applied, before the Tender, for such writ, which was afterwards sued out. 8 Term Ref. K. B. 629.

A right to damages, on account of the non-payment of a debt, or non-performance of a duty, may, after being taken away by a Tender and refusal, be revived again by a demand subsequent to the Tender and refusal; a new cause of action arises from the non-payment or non-performance thereof upon such demand: And therefore the plaintiff may reply such subsequent demand and refusal by the defendant, which, if proved, the plaintiff must have a verdict. Brownl. 7: Imphey, K. B.

In case of a plea of Tender as to part and non-assumpsit as to the residue, and the issue on the Tender being found for the defendant, the balance proved is under 40s., yet the defendant, though within the jurisdiction of the county court of Middlesex, is not entitled to costs, under stat. 23 Geo. 2. c. 33. § 19. Nor in case of a set-off having the same effect. Doug. 448: See Imphey, K. B.

Wherever the debt or duty arises at the time of the contract, and is not discharged by a Tender and refusal, it is not enough for the party who pleads the Tender, to plead a Tender and refusal, and encore prist, (that he is still ready,) but he must also plead tout tenus prist (that he was always ready). Salk. 622: 12 Mod. 152: Carth. 413. In what cases Tender and refusal shall discharge the debt, see 1 Wils. 117.

A plea of Tender after the day of payment of a bill of exchange, and before action brought, is not good, though the defendant aver that he was always ready to pay from the time of the Tender, and that the sum tendered was the whole money then due, owing, or payable to the plaintiff in respect of the bill, with interest from the time of the default, for the damages sustained by the plaintiff, by reason of the non-performance of the promise. 8 East's Ref. 158.

Every requisite which is in a particular case necessary to the validity of a Tender, must in pleading such Tender, be shewed to have been complied with; else the plea is not good. Salk. 624. A defendant cannot be permitted to plead non assumpsit as to the whole, and a Tender as to part; because, if the general issue be found for the defendant, it will appear on record that no debt is due, though something is admitted by the defendant. 4 Term Ref. 194. But a Tender to the whole declaration is good; and it is usual to plead, as to all, except the sum tendered, non assumpsit and as to that sum, a Tender. And a defendant may plead, not guilty, and a Tender of amends, in trespass. 2 Black. Ref. 1089: Sellon's Pract. A Tender is pleadable on a quantum meruit. 1 Stra. 576: Salk. 622. And a Tender may be pleaded after a Judge's order to plead issuably. 1 Burr. 59.

To an avowry for rent, the plaintiff in replevin may plead a Tender and refusal, without bringing money into court; because, if the distress were not rightfully taken, the defendant must answer the plaintiff his damages. Salk. 584. But if the distress were rightfully taken, the plaintiff cannot plead Tender of rent and costs in bar of an avowry for rent in any case, unless the distress was made of corn,
grass, &c. growing on the premises, and then such plea is given by
stat. 11 Geo. 2. c. 19. § 9. The money cannot be taken out by the de-
fendant, though he has a verdict. Stra. 1027.

On a Tender being pleaded, and the money paid into court,
the plaintiff replied a subsequent demand and refusal, whereupon
issue being joined and tried, a verdict was found for the defendant.
Whereupon he moved to have the money paid into court returned,
in part of his costs; but the Court was of opinion it could not be done.

Hardw. 206.

Though a Tender is made, and the plaintiff refuses the money, yet
the Tender cannot be pleaded in bar of the action, either in debt or
assumpsit; but in bar of the damages only; for the debtor shall never-
theless pay his debt. Ld. Raym. 254.

There is a difference in pleading a Tender in action of debt, and
in action on the case: In an action of debt, the defendant ought to
conclude his plea by praying judgment, if the plaintiff ought to have
or maintain his action to recover any damages against him; for, in
this action, the debt is the principal, and the damages are only acces-
sary. But, in assumpsit, the damages are the principal; and therefore,
in pleading a Tender, the defendant ought to conclude his plea with
a prayer of judgment, if the plaintiff ought to have or maintain his
action, to recover any more or greater damages than the sum tender-
ed, or any damages by reason of the non-payment thereof. 2 Salk. 622:

1 Lord Raym. 254: 3 Salk. 344, 5.

The plaintiff may either admit the Tender or not: if the latter, he
should not take the money out of court; for, by taking it, he admits
the same to be right, and judgment is given for the defendant to go
quit as to that plea: But if he admits it, and goes for further dam-
ages, on the ground that the Tender was not sufficient to cover his
demand, he may take the money out of court, enter an acquittal as to
the Tender, or confess the same in his replication, and proceed on
the general issue for the residue. Ld. Raym. 1744.—If he admits the
Tender and enters an acquittal, without going for further damages,
he must pay the defendant his costs. Barnes 337. See Selton's Prac-
tice, Tender.—The plaintiff may take the money out of court, though
he reply that the Tender was not made before action brought. 1 Bos.
& Pul. 332.

Tender may be of money in bags, without shewing or telling it, if
it can be proved there was the sum to be tendered; it being the duty
of him that is to receive the money to put out and tell it. 5 Rep. 115.
Though where the person held the money on his arm in a bag, at the
time of offering, this was adjudged no good Tender, for it might be
counters or base money. Noy. 74. A Tender in Bank notes is sufficient,
unless the creditor expressly refuses to receive notes, and insists upon
cash. 3 Term Rep. 554. See 1 Burr. 459: 2 Eq. Ab. 319. If a Tender
is made of more than is due, it is good; and the party to whom ten-
dered ought to take out what belongs to him. 5 Rep. 114. Tender
of the money is requisite on contracts for goods sold, &c. to entitle
to action of trover. See title Trover. And a Tender of Stock sold for
so much money, if it be well made, though not accepted, will entitle
the party to the sum agreed to be paid. 3 Salk. 345: Stra. 777. 832.
See title Bond.

TENEMENT, Tenementum.] Signifies properly a house, or home-
stall; but, more largely, it comprehends not only houses, but all cor-
poreal inheritances which are holden of another; and all inheritances
issuing out of or exerciseable with the same. Co. Litt. 6. 19. 134. A
Tenement may be said to be any house, land, rent, or other such like
thing, that is any way held or possessed; but being a word of a large
and ambiguous meaning, and not so certain as message, therefore
it is not fit to be used to express any thing which requires a particu-
lar description. 2 Litt. Abr. 566.

Tenement, in its original, proper, and legal sense, signifies any
thing which may be holden, provided it be of a permanent nature;
whether it be of a substantial and sensible, or of an unsubstantial and
ideal kind. Thus liberum Tenementum, Frank-tenement or Freehold,
is applicable, not only to lands and other solid objects, but also to of-
cices, rents, commons, and the like. 1 Inst. 6. And as lands and
houses are Tenements, so is an advowson to a Tenement; and a fran-
chise, an office, a right of common, a peerage, or other property of
the like unsubstantial kind, are all of them, legally speaking, Tene-
ments. 1 Inst. 19. 20.

TENEMENTARY LAND, Was the outland of manors granted
out to tenants by the Saxon Thanes, under arbitrary rents and servi-
ces. Speelm.

TENEMENTIS LEGATIS, An antient writ, lying to the city
of London or any other corporation, (where the old custom was,
that men might devise by will lands and Tenements as well as goods
and chattels,) for the hearing and determining any controversy touch-
ing the same. Reg. Orig. 244.

TENENDUM, That clause in a deed wherein the tenure of the
land is created and limited. The office of a Tenendum in a deed is, to
limit and appoint the tenure of the land which is held, and how, and
of whom it is to be held. Before the statute called Quia emiptores ter-
rarum, 18 Ed. 1. st. 1. the Tenendum was usually of the sefflor and
his heirs, and not of the chief lord of the fee, whereby lords lost their
escheats, forfeitures, &c. But since the said statute, the Tenendum,
where the fee-simple passes, must be of the chief lord of the fee, by
the customs and services whereby the sefflor held; yet this statute
does not extend to a gift in tail, for the donee shall hold of the donor.
Co. Lit. 6. a: 2 Inst. 66, 67. 500, 501, 502. 505. See titles Tenures;
Tail.

The Tenendum seems now to be incorporated with the Habendum,
for we say, To have and to hold, in which clause the estate is limited,
&c. See title Deed II. 4.

TENENTIBUS in ASSISA non ONERANDIS, A writ for him to
whom a disseissors hath alienated the land whereof he disseised an-
other, that he be not molested in assise for the damages, if the dis-
soever had wherewith to satisfy them. Reg. Orig. 214.

TENHEDED, or TIENHEOFED, Saxon.] Decanus, Caput vel

TENMENTALE: See Tementale.

TENOR, Lat. ] Of writs, records, &c. is the substance or purport
of them; or a transcript or copy. Tenor of a libel hath been held to
be a transcript, which it cannot be if it differs from the libel; and juxta
tenorem imports it, but not ad effectum, &c. for that may import an
identity in sense, but not in words. 2 Salk. 417. In action of debt
brought upon a judgment in an inferior court, if the defendant pleads
null tiet record, the Tenor of the record only shall be certified; and by
Hale, Chief Justice, it may be the same on certiorari "s. 3 Salk. 296.
A return of the Tenor of an indictment from London, on a certiorari to remove the indictment, is good by the city charter; but in other cases it is usual to certify the record itself. 2 Hawk. P. C. c. 27. §§ 26, 76.

**Tenore Indicamentum mittendo.** Is a writ whereby the record of an Indictment, and the process thereupon, is called out of another court into the King's Bench. *Reg. Orig. 69.* See Certiorari.

**Tenore Presentium.** The Tenor of These Presents is the matter contained therein, or rather the intent and meaning thereof; as, to do such a thing according to the Tenor, is to do the same according to the true intent of the deed or writing.


**Tentates Panis.** The essay or assay of bread. *Blount.*

**Tenter.** A stretcher or trier of cloth, used by dyers and clothiers, &c. mentioned in the statutes 1 R. 3. c. 8: 39 Eliz. c. 20.

**Tenth, Decimae.** The tenth part of the annual value of every spiritual benefice, according to the valuation in the King's books; being that yearly portion or tribrate which all ecclesiastical livings formerly paid to the King. They were antiently claimed by the Pope, to be due to him *jure divino,* as High Priest, by the example of the High Priest among the Jews, who had tenths from the Levites. But they had been often granted to the King by the Pope upon divers occasions, sometimes for one year, and sometimes for more; and were annexed perpetually to the Crown by *stats.* 26 H. 8. c. 3: 1 Eliz. c. 4. And at last granted, with the first fruits towards the augmentation of the maintenance of poor clergymen. *Stat. 2 Ann. c. 11.* See title *First Fruits.* Collectors of this revenue are to be appointed by the King, by letters-patent, instead of the bishops; and an office is to be kept for management of the same, in some part of London or Westminster, &c. *stat.* 3 Geo. 1. c. 10.—Tenths likewise signified a tax on the Temporality; and also certain Rents reserved and made payable to the King by such as held lands formerly belonging to dissolved monasteries. See *stat.* 33 H. 8. c. 39.

**Tents.** Robbing of, in fairs and markets, is felony without benefit of clergy, *stat.* 5 & 6 Ed. 6. c. 9. See title *Larceny II.* 1.

**Tenure.**

**Tenura, from the Latin Tenere.]** The manner whereby lands or tenements are held; or the service that the tenant owes to his lord. There can be no Tenure without some service, because the service makes the Tenure. 1 *Inst.* 1. 93. A Tenure may be of houses, and land or tenements: but not of a rent, common, &c.

Under the word *Tenure* is included every holding of an inheritance; but the signification of this word, which is a very extensive one, is usually restrained by coupling other words with it: this is sometimes done by words which denote the duration of the tenant's estate; as, if a man holds to himself and his heirs, it is called Tenure in fee-simple. At other times, the Tenure is coupled with the words pointing out the instrument by which an inheritance is held; thus, if the holding is by copy of court-roll, it is called Tenure by copy of court-roll. At other times, this word is coupled with words that shew the principal service by which an inheritance is held; as, where a man held by knight-service, it was called Tenure by knight-service. 5 *New Abr.*
Almost all the real property of the kingdom is, by the policy of our laws, supposed to be granted by, dependent upon, and holden of, some superior lord; by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore styled a tenement; the possessors thereof, tenants; and the manner of their possession, a Tenure. Thus, all the land in the kingdom is supposed to be holden, mediately or immediately, of the King, who is styled the lord paramount, or above all.—Those that held immediately under him in right of his crown and dignity, were called his tenants in capite, or in chief; which was the most honourable species of Tenure, but at the same time subjected the tenants to greater and more burthensome services than inferior Tenures did; a distinction which runs through all the different sorts of Tenure. 2 Comm. c. 5.

The above maxim, and the whole of the doctrine of Tenures, being founded on the feudal system, some knowledge of that is absolutely necessary, in order to comprehend the nature of Tenures, as they relate either to the antient or present state of the English law.—These subjects are admirably and clearly treated in chapters IV, V, and VI of the 2d book of the Commentaries. The following abridgment from Sir Martin Wright's introduction to the Law of Tenures, (frequently referred to by the learned commentator,) with some extracts from the Commentaries, are submitted to the reader: Having been arranged in the following order, by the editor of this work, it is inserted in this place, (not without some hesitation,) principally because references are made to and from this title in very many titles throughout the Dictionary. An acquaintance with this part of our law is so intimately connected with all that concerns real property, that even an imperfect attempt at thus presenting it, in one arranged and connected view, must be attended with advantage to the student; and will, in a small degree at least, obviate the inconvenience arising from the disjointed nature of the information conveyed, under the several heads, scattered through the Dictionary in alphabetical order.

I. The Law or Doctrine of Feuds, as relates to the present Purpose.

1. Definition.
2. Origin and Progress.
3. Doctrine of Descents.
4. Feuds Proper.
5. Feuds Improper.
7. —— Warranty.
8. —— Aid (and see II. 6.)

II. The Establishment of Feuds or Fees, in England; and their incidents.

1. First Introduction.
2. Effect thereof.
4. —— Marriage.
5. —— Relief.
6. —— Aid.
7. —— Escheats.
8. —— Escuage.
III. The Principles, Qualities, and Rules of Tenure.

1. Principles.
2. Knight-Service.
3. Socage.*
4. In Fee, or for Life.
5. Fee-simple.
6. Fee-tail.
7. For Life.

* [Under this head of Socage, is a short account of the abolition of the Military Tenures in England, Ireland, and Scotland.]

1. Feud, according to Somner, is a German compound, consisting of feh, feo, or feoh, (a salary, stipend, or wages,) and hade, head, or hode, (quality, kind, or nature.)—Feodum, [Fief; or] Fee, or land held in fee, is, therefore, (considered in its primary acceptance,) what was held in fee hode, by contradiction, feod or feud; i. e. in a stipendiary, conditional, mercenary way and nature; with the acknowledgment of a superior, and a condition of returning him some service for it; upon the withdrawing whereof, the land was revertible unto the lord. Somn. on Gav. 106. 111.—Alodial lands were such as the proprietor had the absolute property in; the term being derived from the Northern, odhal, right; so called from odh, proprietas, and all, totum; the syllables being transposed. See 2 Comm. 44. & n. Others derive this word from an and lot, allotment; the mode of dividing what was not granted as stipendiary property. Roberts. Char. V.

Feuds, or Feuda, says Selden, are the same which, in our laws, we call tenancies, or lands held; Feuda, also, are possessions so given and held, that the possessor is bound to do service to him from whom they were given. Seld. tit. Hon. 273.

This service was originally purely military; and the possessor or Feudatory's homage or fealty was, (as it seems,) in the infancy of feuds, a kind of military engagement, rather implied than expressed: to be faithful to his benefactor, and also assistant unto him. Spelman therefore calls a feud, prædium militare; and Somner says that every inheritance is improperly and corruptly called a feod or fee, that is not holden militie gratiâ, the ground of all fees. Spelm. Feuds &c. Id. Gloss. in n: Somn. Gav. 49.

2. Feuds were originally a military policy of the Northern conquering nations, devised as the most likely means to secure their new acquisitions; and were large districts, or parcels of land, given or allotted by the conquering general to the superior officers of his army; and by them dealt out, in less parcels, to the inferior officers and most deserving soldiers. Thus a proper military subordination was, naturally and rationally enough inferred and established; and an army of Feudatories were as so many stipendiaries, always on foot, ready to muster and engage in the defence of their country. So that the feudal returns of fealty or mutual fidelity and aid, seem originally to have been political, or rather natural, consequences, drawn from the apparent necessity these warlike people were under of maintaining their ground, with the same spirit, and by the same means, they had got it. Wright's Law of Tenures, 7—10.

As the princes of Eurofe were every day more and more alarmed by the progress of the Northern standard, many of them (and by degrees all) went into this or a like policy, as the strongest entrench-
ment; and, in imitation of it, they, reserving the dominium or property of the lands they gave, parcelled out some of their own possessions or territories under an express fealty; engaging their beneficiaries or feudataries to make them the like returns of fidelity and aid, as followed from the nature and design of an original feud. From hence, probably, the feudal obligations began to be considered as renders or services of render, calculated for the benefit of the proprietary; who was in respect of the dominium remaining in him, thenceforth called dominus; and military aid or service (as now called) was understood to be the real or fictitious terms or conditions of all propriety or possession in Europe. Wright Ten. 10.—13.

3. Feuds were originally precarious, and held at the will of the lord; they next became certain for one year; and were, some time after, given for life. But though feuds were not at first hereditary, yet the vassals or feudal tenants were called nativi, as if born such; and it was unusual, and even thought hard, to reject the heir of the former feudatary, provided he was able to do the services of the feud, and the lord had no just objection against him. But though the lord did not remove the heir from the feud, yet it is not likely that he succeeded absolutely as of course, but that he paid a fine, or made some acknowledgment in the nature of relief for the renewal of the feud; and though that reason ceased, yet the fine was continued afterwards, became hereditary, and is well known at this day (though by several names) in most countries. Wright 13—15. See post II. 5.

Feuds were afterwards extended, beyond the life of the first vassal or feudal tenant, to his sons, or some or one of them whom the lord should name. In process of time, grandchildren succeeded to sons, and brothers also succeeded to brothers, if the feud was antiquum aut paternum; but not if it was novum, i.e. newly purchased or acquired; not having descended from the father to the brother first dying. At length, not only descendants in the direct line succeeded in infinitum, but collaterals also, without regard to their degree, provided they were descended from, and were of the blood of the first feudatary. Wright 15—18. and the authorities there cited.—See the next division.

Spelman says, that these several conditions of feuds had their several denominations; while precarious they were called munera; when for life, beneficia; and were first called feuda, when they began to be granted in perpetuity, and not before. Spelman on Feuds 4. 6. 9. Somner says, feudum was a word not known until about A. D. 1000. Somner on Gav. 102.

4. Feuds being thus originally in the hands of military persons, who were under frequent incapacities to cultivate their own lands, they found it necessary to commit part of them to persons who, having no feudal possessions of their own, were glad to possess them on any terms. To such persons small portions were let, reserving such returns of service, corn, cattle, or money, as might enable the proprietors to attend to the feudal duties uninterruptedly. By this means the feudal policy was considerably extended; as all persons accepting a feud were, under an express or implied fealty, obliged to answer the stipulated renders, and to promote the peace and welfare of the feudal society. From hence therefore arose the distinctions made by the feudists, of feuds proper and improper, and the many subdivisions of these terms. Wright 19—26.
Proper feuds are such, and such only, as are purely military; and, at this time, hereditary; and, at such as in all respects preserve the nature of an original feud, as before explained. It was the military nature of these feuds that first rendered women and monks incapable of receiving or succeeding to feuds of this sort; and that restrained the alienation, devising, or incumbering of the feud by the feudatory, without the consent of the lord; and of the seigniory by the lord, without the consent of the tenant; the obligations of the superior and inferior being mutual and reciprocal. The feudal course of succession, in all proper feuds, belonged to the sons only, (exclusive of daughters,) and to them equally; until, by a constitution of the emperor Frederic, honorary feuds became indivisible; and, as such, they (and, in imitation of them, military feuds in most countries) began to descend to the eldest son only. Wright 27—32.

5. All feuds, sold or bartered for any immediate or contracted equivalent; or that are granted free of all service; or in consideration of one or more certain services, whether military or not; or upon a cess, or rent, in lieu of service; and all such feuds as are, by express words in their creation or constitution, alienable, or allowed to descend indifferently to males or females; are improper feuds. Wright 32. Of which sort most feuds are at this day.

They are distinguished from proper feuds, by such qualities only as are varied from or superadded to the feud by express provision of the parties; they must appear to be so from the words of the constitution; which solemnity is as necessary to this as to a proper feud. And the custom of the country where the feud lies must be accurately observed.

6. Few of the feudal obligations are, as such, of force with us. First mentioning fealty, those of eviction and aid may deserve some notice; as our laws of warranty and aid may be supposed to depend on them.

Fealty, the essential feudal bond, is so necessary to the very notion of a feud, that it is a downright contradiction to suppose the most improper feud to subsist without it. Craig de Jure Feud. 45—7. 223: 1 Inst. 129. a: Seld. Tit. Hon. 273. See title Fealty.

7. The feudal obligation upon Eviction, ut vel feudum aliud, ejusdem bonitatis, restituat Dominus, vel estimationem præsacet, if considered as a penalty upon the lord for refusing or neglecting, when required, to protect or defend the feudatory's title to the fee, might be always reasonable; otherwise, it rather seems to have prevailed upon the reason of contracted and improper feuds, than by the nature of a pure original feud. And though none of the antient feudists make any strict distinction, yet they must be understood to speak of the times in which they wrote; in which such improper feuds chiefly prevailed; nay, when almost all feuds were alienable and salable as matters of merchandise. Wright 39, 40.

8. Aid, as understood to import an obligation upon the feudal tenant to contribute to the private necessities or occasions of the lord, was not of direct feudal obligation; the original feudal aid seeming to have been purely military, binding the feudatory merely to concur with, and to assist his superior or lord, in defence of the feud, or feudal society. On this ground it can hardly be made out, that the several different Aids which have been exacted, are to be inferred from the reason of feuds; but they rather seem to depend upon the usage or
custom of the several countries where they are established. Wright 40, 42. See post II. 6.

II. It is difficult to determine precisely the time when Feuds or Tenures were first brought into England: Some have thought that they were planted here long before the conquest; others that they were introduced by William I. soon after. The authorities on both sides this question are numerous, and have been thus arranged: That feuds existed before the conquest is contended by the author of the Mirror, Lord Coke, (1 Inst. 76, b.) Selden, (tit. Hon. 510.) The Judges of Ireland in the case of tenures: Nat. Bacon, (Hist. Engl. Gov. 16.) Sir W. Temple (Intro'd. 171.) and Blackstone, though he does not admit that they were a part of the national constitution.—That feuds were first introduced by William the First is asserted by Mat. Paris: Bracton (lib. 2. c. 16.—§ 7.) Spelman (on Feuds); Dugdale; Wilkins; Sir R. Cotton; Lord Hale (H. C. L. 107. 223.) Craig (de Jure Feud. 29.) Somner, (Gavelkind, 100.) and Wright himself. See Saint-John on the Crown Lands.

One observation may be of service in deciding this question; that William the First about the 20th year of his reign, just when the general survey of England, called Domesday book, is supposed to have been finished, and not till then, summoned all the great men and landholders in the kingdom to London and Salisbury, to do their homage, and to swear their fealty to him. Hence we may reasonably suppose, 1st. That this general homage and fealty was done at this time in consequence of something new; or else that engagements so important to the maintenance and security of a new establishment, would have been required long before. 2dly, That as this general homage and fealty was done about the time that domesday book was finished, and not before, it may be supposed that that survey was taken upon or soon after our ancestor’s consent to tenures, in order to discover the quantity of every man’s fee, and to fix his homage. Wright 52—56.

On the whole, therefore, it seems, that it may safely be assumed, that tenures first became a principal branch of the national policy in the time of William I.; for even in the Saxon times, particular proprietors of large tracts of land, which they could not cultivate and manure themselves, might let some part of them to their neighbours, under various acknowledgments or returns of service, not altogether unlike some of the feudal returns; especially as our Saxon ancestors may be supposed to have had some notion of such returns, they being a colony or branch of the antient Goths, who first brought the feudal policy into Europe. Wright 57, n.

2. The establishment of tenures in England may be called an extraordinary alteration of the national policy; not only because it was such in many of its consequences, but likewise because it originally and immediately defeated all supposition or possibility of propriety in any other person than the King; insomuch that it became a fundamental necessary maxim, principle, or fiction of our English law of tenures, (alluded to in the introduction to this title,) that the King is universal lord of his whole territories; and that no man doth or can possess any part thereof, or lands therein, but as either mediately or immediately derived from him. Wright 58. See also 1 Inst. 65, a.

According to this position, of which the truth is undeniable, all the lands in England, except those in the King’s hands, are feudal.
This universality of Tenures, if not quite peculiar to England, certainly does not prevail in several countries on the continent of Europe, where the feudal system has been established; and it seems there are some few portions of allodial land in the northern part of our own island. As to Scotland, Lord Stair expresses himself rather ambiguously on the subject; for he says, that there remains little of allodial land in Scotland; but in a few lines after, observes, that the glebes of the clergy, which seem to come nearest to allodials, are more properly mortified, or, as we should call them, Mortmain Fees. Stair, Inst. See 1 Inst. 65, a. in n.

As William I. however, notwithstanding the monkish relations, and the misapprehensions of some modern writers, did not claim or possess himself of the lands of England, as the spoils of conquest; so neither did he tyrannically and arbitrarily subject them to a feudal dependence; but as the feudal law was at that time the prevailing law in Europe, William, who had always governed by this policy, might probably recommend it to our ancestors, as the most obvious and ready way to put them upon a foot with their neighbours; and to secure the nation against any future attempts from them. We find, accordingly, among the laws of William I. a law enacting the feudal law itself; not indeed ex nomine, but in effect; as it requires from all persons the same engagement to, and introduces the same dependence upon, the King, as Supreme Lord of all the lands in England, as were supposed to be due to a supreme lord by the feudal law. The law meant, is the 52d law of William I. (See Wright 65); the terms of which are absolutely feudal, and are apt and proper to establish that policy with all its consequences: for it requires, "that all owners of lands should expressly engage and swear that they would become Vassals or Tenants, and as such be faithful to William as their lord; and that they would, in consequence thereof, every where faithfully maintain and defend his, their lord's, territories and title, as well as person, and give him all possible aid and assistance against his enemies foreign and domestic." See also the 55th, 58th, 68th, and 69th laws of this King; and Sir M. Wright's ingenious observations upon the whole, in his book, ft. 69, & seq.

3. Although it is certain that Wardship could be no part of the law of feuds before they became hereditary, yet then, as they often descended on infants who were incapable of performing or engaging for the services of the feud, Wardships of the Land, i.e. the custody of the feud itself, was retained by the lord; that out of the profits he might provide a fit person to supply the infant heir's defect of services until he came of age to perform them. Wright 89.

With respect to the custody or Wardship of the Body, there is no clear feudal reason to be given for it; and therefore we may suppose that our Norman ancestors might think it reasonable, rather in regard to the infant heir, than to the lord himself, that the lord who had the custody of the feud, should likewise have the care and maintenance of the infant feudatory; who would thus be most likely to be qualified for the services of the feud. Fortesc. de Li. Ang. c. 44: Smith de Rep. Ang. 264: Cowel, Inst. lib. 1. tit. 17. § 2: 1 Inst. 75, b: Bacon. Hist. Engl. Gov. 148. See 2 Comm. c. 5. ft. 67; c. 6. ft. 87. and this Dictionary, title Guardian.

4. As for Marriage, the lords of our English fees might possibly take the hint from Normandy: though, in the sense of our law, in
which it meant the interest of the guardian in bestowing a ward in marriage, and was understood to be a beneficial perquisite of Tenure, no express notices of it can be found earlier than the statute of Merton, c. 6. 7. (20 H. 3.) By the charter of Henry I., a daughter of any of the King's tenants was not, even in the life-time of her father, to be married without the King's privity; because otherwise she might marry a public enemy. But the King was to take nothing for his consent; nor could he restrain the father from marrying her to any that was not such enemy: but this charter says nothing of the marriage of males, nor does it give the least colour or countenance to any private profit from the marriage of females. Our English lords, however, by an extraordinary construction of Magna Carta, took upon them, not only the absolute marriage of female wards, but of males too, which at length became one of the great feudal grievances. See Ll. H. 1. c. 1: Spelman on Feuds 29: Glanv. lib. 7. c. 12. f. 55, a: Bract. lib. 2. c. 37. § 6. p. 188, a: 2 Comm. c. 5. f. 70. c. 6. f. 88.

5. Relief; [Relevamen, relevatio, releveum; intimating, that the inheritance, which, by the death of the former tenant, became jaces, or caducum, was thus relevatus, lifted or raised up again. See Bracton, lib. 2. c. 56: Britton, c. 69: Spel. Relevamen:] was not a service, but a fruit of feudal tenure. 2 Roll. Abr. 514. D. 3: 3 Rep. 66: 1 Inst. 83, a. These were not arbitrarily introduced by William I., but brought into England with feuds according to the custom of the feudal law, and other nations: And although Lord Coke (2 Inst. 7, 8; but see 1 Inst. 176, a,) supposes Reliefs to have been certain at the Common Law, yet they were probably with us originally uncertain as by the feudal law; and were, no doubt, on this account, another of the great grievances of Tenure; to remedy which, several laws were made, fixing them at certain sums for all lands held by knight-service, till the expiration of that Tenure, under the stat. 12 Car. 2. c. 24. See Ll. W. 1. c. 22: Ll. H. 1. c. 14: Magna Carta, c. 2: ante I. 3. and Wright's Tenures.

The Relief of Sogage lands was fixed by the 40th law of William I. at one year's rent, and remains the same to this day; although it is not taken notice of in any of the charters of Hen. I., John, or Hen. III. Glanv. lib. 9. c. 4: Fleta, lib. 3. c. 17. § 11: Litt. §§ 125, 7: 2 Inst. 232: and see 1 Inst. 93, a. in n.; and title Relief in this Dict. and 2 Comm. c. 5. f. 65; c. 6. f. 87.

6. Aids, (see ante I. 8.) called by Spelman, (Treatise Feuds 59.) "Tribute, and by our old authors Auxilia, were mere benevolences, rendered by a tenant to his superior or lord, in times of difficulty and distress. Bracton, lib. 2. c. 16. § 8: Fleta, lib. 3. c. 14. § 9. These were not of direct feudal obligation; but first obtained out of a regard to the person and occasions of the lord. The kind and quantum therefore of every aid was originally as various and uncertain as the occasion of the lord, and the abilities of the tenant. But as aids grew frequent, they became, in many countries, established renders of duty: Thus, in Normandy, the three most usual and frequent Aids; 1st, To make the lord's eldest son a knight; 2dly, To marry his eldest daughter; and, 3dly, To ransom his person; became fixed and established. Besides these, there was one of an inferior nature, respecting only inferior lords, viz. An Aid to enable the lord to pay his relief, therefore called aid de relief. To all these our ancestors were liable, and thus far went into the Norman notions on this subject, nay they even
went farther; for in the time of King John, inferior lords took Aids to pay their debts, and in the time of King Hen. II. it was doubted whether lords might not require Aids toward their military expeditions; but at length these inferior Aids, together with the aid de relief, and other illegal Aids imposed by the King himself, were effectually abolished by a charter of King John, revived and restored by stat. 25 E. I. c. 5, 6; and the two first of the usual aids before-mentioned were fixed (by stat. Westm. 1. c. 36. extended by stat. 25 Ed. 3. c. 11.) to Aids required by the king,) as follows, viz. The Aid of a knight’s fee at 20s. and of socage lands of 20l. per annum at 20s. and so pro rata. These statutes do not regulate the 3d Aid for ransom of the lord’s person; this was less frequent, and by no means capable of certainty; it being of the highest consequence, with regard especially to the Supreme Lord, that he should at any rate be ransomed as often as he was taken prisoner of war. Wright 105—115. See 2 Comm. c. 5. p. 63, &c.; c. 6. p. 86.

7. When a fee determines for want of heirs or for propter delictum tenentis, the land falling back to the lord is called an Escheat [Escaeta:] and is as such reckoned by our English lawyers among the fruits or perquisites (though it might properly be considered as the absolute determination) of Tenure. Spelman on Feuds 37.

Spelman (ubi supra) divides Escheats into regal and feudal; (in which he is followed by Coke, 3 Inst. 111;) agreeable enough to the import of the word escheat from the French escoir, to happen.—But, strictly speaking, such lands as are not held immediately of the King, and yet happen to him upon the commission of any treason, are not Escheats, but Forfeitures; which were given to the King by the Common Law, and do not depend upon the Law of Feuds or Tenures, but upon Saxon laws made long before their introduction, and which prevail even now. Lambard. Ll. Alf. c. 4. Ll. Canuti, c. 54. See title Forfeiture.

Though this forfeiture to the King may seem severe on the mesne lord, in defeating his seigniory, yet it seems a punishment inflicted upon him, for his want of caution in the choice of his tenant.—The Law having inflicted a similar penalty on the lord, where the tenant is guilty of felony only; the King, in this latter case, having the land a year and a day, to the prejudice of the immediate lord, to whom the land in that case escheats. See Magna Carta, c. 22. 31: 1 Inst. 18. b. in n: 2 Inst. 36, 37: 3 Inst. 111. St. de Praerog. Regis, 17 E. 2. c. 16: Staundford, P. C. l. 3. c. 30. And for further matter, 2 Comm. c. 5, 6; and this Dictionary, title Escheat.

If lands be held of the King, as of an honour come to him by a common escheat, as the tenant’s dying without heir, or committing felony, these lands are part of the honour; otherwise, if forfeited for treason, for then they come to the King by reason of his person and crown; and if he grants them over, &c. the patentee shall hold of the King in chief. 2 Inst. 64.

It was found by special verdict, that the Prior of Merton was seized of a house in Southwark, held of the Archbishop of Canterbury, as of his borough of Southwark; and (anno 30 of his reign) surrendered it to Henry VIII., who granted it and other lands to J. S. and his heirs, to hold of him in libero burgagio, by fealty, for all services and demands, and not in capite; and afterwards Queen Mary granted the manor and borough of Southwark to the mayor and Commonalty of
London; and the tenant of the messuage died without issue; and the question was, whether Queen Eliz. or the patentees of the borough should have the escheat? and adjudged for the Queen; for the first patentee of the messuage held it of the Queen in socage in capite, as of a seigniory in gross; and the words in libero burgagio are merely void; for the land out of the borough cannot be held in libero burgagio; and there shall not be several Tenures, for one Tenure was reserved by the King for all; therefore of necessity it shall be a Tenure in socage of the King. Cro. Eliz. 120.

8. ESCUAGE is reckoned by Lord Hale, among the perquisites of Tenure; and whether so or not, seems one of its most obscure and unintelligible branches.

Escuage, considered as a service, or species of Tenure, was not, as Littleton intimates, (§§ 95, 96,) a direct personal service of attendance upon the King in his wars; nor was it due upon all military occasions, as Knight-Service was: But it was a pecuniary aid, or contribution, reserved by particular lords instead, or in lieu, of personal service; the better to enable them to bear the extraordinary expence of their own attendance and warfare, when the King made war on Scotland or Wales, or upon any foreign country, if the Tenure was so expressed. Bract. l. 2. c. 16; Litt. §§ 95. 97. 100. 103. 155. 158.: Mad. His. Exch. 452: Seld. Notes ad Hengham 113.

As the Lord's service abroad was thus uncertain, the quantum of this aid was seldom ascertained by reservation; but was usually proportioned to the fine received by the King from his tenants in capite, failing to attend in such expeditions. Fleta, lib. 3. fol. 198.

This aid and fine were both of them called Escuage a scuto quod assumitur ad servitium militare (Bract. ubi supra); in respect of the scutum which ought to be borne by both lord and tenant in such wars.

In this view Escuage was a specific service, (of a different kind from knight-service,) in respect whereof only the tenant, on account of its subserviency to the military policy of the nation was esteemed as a knight, or rather as a military tenant. Wright 126, 7.

Escuage, however, it must be allowed, was antiently, as it is at this day, more generally understood to denote a mulet or fine for a military tenant's defect of service; as the feodal severities began to abate. Mad. Hist. Exc. 438. 454. 7. 8. 462: 2 Rol. Abr. 509. § 1: Litt. § 102.

Our Kings antiently taking advantage of, or perhaps complying with, this humour of their tenants, which made their actual services precarious, did sometimes, on occasion of war, without summons, assess a moderate sum upon each knight's fee, as a Scutage or Escuage, by which they might be enabled to provide stipendiaries. But as Escuage of this sort was a previous commutation for service really imposed at the King's will, and not incurred as a fine, it was not long submitted to: In the time of King John, it was not only insisted upon as an undoubted right of the King's tenants, but the barons urged, and the King, by his charter, declared, that no Escuage should be imposed or assessed nisi per commune concilium Regni. See Litt. § 97: 1 Inst. 72, a: Magna Carta, cap. 37.

Escuage thus becoming the only penalty for defect of service, many lords, by agreement between them and their tenants, fixed it a certain sum, to be paid as often as Escuage should be granted, without regard to the rate assessed by Parliament. Thus ascertained, it was called Escuage certain, and because it did in effect discharge the
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Tenures from all military service, the persons who held by such Es-
cuage were looked upon as socage tenants, and no longer esteemed as
tenants by Knight-service. Litt. §§ 98, 120: 1 Inst. 87, a.

As to Esçuage, see also the notes on 1 Inst. 73, 74.—And now Es-
cuage is expressly taken away by the stat. 12 Car. 2. c. 24. (See post.
III. 3;) and had fallen into disuse long before; for there is no instance
of Parliament assessing it since the reign of Edward II. See further
2 Comm. c. 5. p. 74, &c.

III. 1. IT IS SO ABSOLUTE A MAXIM, principle, or fiction of the
law of Tenures, that all lands are holden either mediately or immediate-
ly of the King, that even the King himself cannot give lands in so
absolute and unconditional a manner, as to set them free from Te-
nure.—And therefore, if the King should grant lands without reserv-
ing any particular service or Tenure, or if he should in express
words declare, that his patentee should have lands absque aliquo inde
reddendo; yet the law or established policy of the kingdom would
create a Tenure; and the patentee should antiently (before the stat.
12 Car. 2. c. 24.) have held of him in capite by Knight-service. 1 Inst.
nures, 3. 52. And now, in such case, or if the King release the services
to his tenant, it will not extinguish the Tenure; but the tenant shall,
notwithstanding, hold by fealty, which, as was before observed. (l. 6.)
is an incident essential to every Tenure, and therefore cannot be re-

Lands, thus holden, are called TENURES; which were principally
divided, according to their services, into Tenures by Knight-service
and in Socage.

According to Blackstone, there seem to have subsisted among
our ancestors four principal species of lay Tenures, to which all
others may be reduced: the grand criteria of which were the nature
of the several services or renders, that were due to the lords from
their tenants. The Services, in respect of their quality, were ei-
ther free or base services; in respect of their quantity, and the time
of exacting them, were either certain or uncertain. Free-services
were such as were not unbecoming the character of a soldier, or a
freeman to perform; as, to serve under his lord in the wars, to pay a
sum of money, and the like. Base-services were such as were fit only
for peasants, or persons of a servile rank; as, to plough the lord's
land, to make his hedges, to carry out his dung, or other mean em-
ployments. The certain Services, whether free or base, were such as
were stinted in quantity, and could not be exceeded on any pretence;
as, to pay a stated annual rent, or to plough such a field for three
days. The uncertain depended upon unknown contingencies; as, to do
military service in person, or pay an assessment in lieu of it, when
called upon; or to wind a horn whenever the Scots invade the
realm; which are free services: Or to do whatever the lord should
command; which is a base or villein service. 2 Comm. c. 5.

From the various combinations of these services have arisen the
four kinds of Lay Tenure which subsisted in England till the middle
of the last century; and three of which subsist to this day. Of these,
Bracton (who wrote under Henry the Third) seems to give the clear-
est and most compendious account, of any author antient or modern;
of which the following is the outline or abstract: " Tenements are of
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two kinds, frank-tenement, and villenage. And, of frank-tenements, some are held freely in consideration of homage and Knight-service; others in free-socage with the service of fealty only." And again, "Of villenages some are pure, and others are privileged. He that holds in pure villenage shall do whatsoever is commanded him, and always be bound to an uncertain service. The other kind of villenage is called villein-socage; and these villein-socmen do villein services, but such as are certain and determined.” See Bract. 1. 4. tr. 1. c. 28. Of which the sense seems to be as follows: First, where the service was free, but uncertain, as military service with homage, that Tenure was called the Tenure in chivalry, per servitium militare, or by Knight-service. Secondly, where the service was not only free, but also certain, as by fealty only, by rent and fealty, &c. that Tenure was called liberum socagium, or free socage. These were the only free holdings or tenements; the others were villenous or servile: As, thirdly, where the service was base in its nature, and uncertain as to time and quantity, the Tenure was furum villenagium, absolute or pure villenage. Lastly, where the service was base in its nature, but reduced to a certainty; this was still villenage, but distinguished from the other by the name of privileged villenage, villenagium privilegiarum; or it might be still called Socage, (from the certainty of its services,) but degraded by their baseness into the inferior title of villenum socagium, villein-socage.

2. Tenures by Knight-service differed very little from proper fees; but being now abolished by stat. 12 Car. 2. c. 24. and turned into free and common socage, inquiry shall be made at some length into that existing Tenure. See ante I. 1: II. 1, 2: And 2 Comm. c. 5. 1.

3. Tenures in Socage are holdings by any certain conventional services that are not military; the word Socage, according to Somner, being derived of the Saxon word Soc, (a liberty, privilege, or immunity,) and agium, a legal termination, signifying service or duty. Somn. Gav. 133. 143. 141: Litt. § 117: 1 Inst. 86, a: Britt. c. 66. § 438: Fleta, lib. 1. c. 8.

It seems, however, more probable and consistent to derive Socage from soca a plough; the antient service reserved on this Tenure being to plough the lord’s land; but which is now changed into many other kinds of service. In this sense the Tenure in socage is denominated, (like the Tenure by Knight-service,) simply from the name or nature of the service at first reserved. Wright 141. 4: 1 Inst. 86. (b): Craige de jure Feud. 65: 2 Comm. c. 6. and the notes there.

By the degenerating of Knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feudal constitution were destroyed, and nothing but the hardships remained: These may be collected from the foregoing detail, and are very justly and feelingly stated in 2 Comm. c. 5. ft. 75, 76.

Palliatives were from time to time applied by successive Acts of Parliaments, which assuaged some temporary grievances. Till at length the humanity of King James I. consented, in consideration of a proper equivalent, to abolish them all, though the plan proceeded not to effect; in like manner as he had formed a scheme, and began to put it in execution, for removing the feudal grievance of heritable jurisdictions in Scotland; which has since been pursued and effected by the statute 20 Geo. 2. cc. 43. 50. King James’s plan for exchang-
ing our military Tenures seems to have been nearly the same as that which has been since pursued; only with this difference, that, by way of compensation for the loss which the Crown and other lords would sustain, an annual fee-farm rent was to have been settled and inseparably annexed to the Crown, and assured to the inferior lords, payable out of every Knight's fee within their respective seigniories;—an expedient, seemingly much better than the hereditary excise, which was afterwards made the principal equivalent for these concessions. For at length the military Tenures, with all their heavy appendages, (having, during the usurpation, been discontinued,) were destroyed at one blow by the stat. 12 Car. 2. c. 24. which enacts, "That the Court of Wards and Liveries, and all wardships, liveries, primer seisins, and ouster-le-mains, values and forfeitures of marriages, by reason of any Tenure of the King or others, be totally taken away. And that all fines for alienations, Tenures by homage, Knight's-service, and escuage, and also aids for marrying the daughter or knighting the son, and all Tenures of the King in capite, be likewise taken away. And that all sorts of Tenures, held of the King or others, be turned into Free and Common Socage; save only Tenures in Frankalmoigne, Copyholds, and the honorary services of Grand Serjeanty." A statute which was a greater acquisition to the civil property of this kingdom than even Magna Charta itself: Since that only pruned the luxuriances that had grown out of the military Tenures, and thereby preserved them in vigour; but the statute of King Charles extirpated the whole, and demolished both root and branches. 2 Comm. c. 5. ad fin.

The above expression, in the title and body of the Act, as to Tenures in capite, and which was also repeated by the Speaker of the House of Commons, in his address to the King on presenting the bill, is an inaccuracy of a very extraordinary nature.—For Tenure in Capite signifies nothing more than that the King is the immediate lord of the land-owner; and the land might have been either of a Military or Socage Tenure. See 2 Comm. c. 5. n.: Mad. Bar. Ang. 238:

1 Inst. 108, n. 5; and this Dict. title Serjeanty.

The several changes made in the Tenure of Socage by this stat. 12 Car. 2. c. 24. the benefits of which were fully extended to Ireland by the Irish act 14 and 15 Car. 2. c. 19. are the following; viz. First, it takes away the Aids pur file marier and pur faire fitz chevalier, which were incident to all Socage Tenures. 2. It relieves Socage in capite from the burden of the King's primer seisin, and of fines of alienation to the King, to both of which Socage in capite was equally liable, with Tenure by Knight-service in capite, though not so to Wardship. 3. It extends the father's power of appointing guardians to children of both sexes; and thus supplied the means of still further preventing guardianship in Socage. See this Dict. title Guardian. In all other respects, the Tenure in Socage seems to be under the same circumstances, and attended with the same consequences, as it was before the Restoration.

Having thus reformed and improved this favourite Tenure, the statute, in the next place, provides for the extension of it throughout the kingdom. This it effectually secures, by converting into Socage all Tenures by Knight-service, as mentioned above; and by taking from the Crown the power of creating any other Tenure than Socage in future. 1 Inst. 93, (b) in n: And see Id. 85, (a) in n.
It appears that there is nothing, however, in the above statute which in the least varies the Tenure in Frankalmoigne; it being expressly saved in the statute, § 7. See this Dict. titles Charitable Uses; Frankalmoigne; Mortmain.—Neither does it appear in any way to affect the Tenure by Burgage. See title Burgage Tenure.—And it leaves the Tenure by villeinage as it was before; one of the provisions declaring, that it shall not be construed to alter or change any Tenure by copy of Court-roll, or any services incident thereto. § 7.

4. Thus, therefore, All our English fees, or holdings, fall at present under the notion of Socage-Tenures; which, though they vary in point of service, succession, &c. as improper feuds, yet retain the nature of feuds, as they are holden of a superior by fealty, and usually by some other certain service or acknowledgment; and as they are subject to relief and escheat. Wright 144, 5. See further on the subject of Socage, stat. 37 Hen. 8. c. 20: Bract. lib. 2. cc. 8. 35, 36: 2 Comm. c. 6.

A short statement relative to the antient Tenures of lands in Scotland, and their abolition, may not be irrelevant in this place. The following information is chiefly abstracted and digested from 4 Bell's Dictionary of the Law of Scotland, titles Feudal System; Tenures.

The prevailing Tenure by which most of the land of Scotland was held, was Ward-holding: It was this Tenure which in every case of doubt was presumed; and appears to have been similar to the English Knight's-service in capite: for it was a military Tenure by which the vassal was bound to attend his superior to battle; and the two casualties arising from this holding, viz. wardship, and marriage, had in view the security of the superior. The consequences of this Tenure, (like those of the Tenure of Knight-service in England) were greatly oppressive; and it was not till after the rebellion of 1745 that this Tenure was abolished by the provision of the British act, 20 Geo. 2. cap. 50: by which the lands held Ward of the Crown or of the Prince, were converted into blanch holding; and those which were held Ward of a Subject were converted into feu-holding, at a rate appointed by the Court of Session, under the authority given by the Statute.

Feu-holding was a Tenure, known while Ward existed, which obliged the vassal to return farm-produce to the superior: on the abolition of Ward-holding the whole country became under either feu-holding, composed of the original feu-rights, or of those introduced by the act 20 Geo. 2. and which now consist of a return of farm-produce or money; or blanch-holding which has merely the semblance of a feudal-holding, by the payment of 1d. Scots, or some other elusory duty.

By these abolitions the effect of the feudal system was entirely done away in England, while in Scotland, from circumstances peculiar to the practice there, slight traces of it are preserved in their conveyancing; but attended with such inconvenience and evils to the land rights of that country, as now to require a remedy, and peculiarly to call for the attention of those who are desirous of approving and assimilating the jurisprudence of Scotland with that of England. This, according to the writer above quoted, is an object truly important to the landed interest of Scotland, and one which would touch and harmonize many jarring points of the two systems.

The difference produced in Scotland and England, is stated to have been in a great measure owing to the different effects produced by a
statute common to both countries, the statute Quia Emptores, 18 Ed. I. introduced into Scotland by stat. 2. c. 24. of Robert I. the purport of which in both countries was to put a stop to subinfeudations, by declaring that a vassal might sell his lands, provided he sold them to be held of his superior lord by the tenure and services therefore due: the English act produced the full effect intended, the purchaser by means of the sale holding immediately of the superior: but in Scotland a charter of confirmation expressing the consent of the superior is held necessary to complete the conveyance; and though the superior is compellable to give such consent, yet the time requisite for obtaining it, has introduced modes and forms dangerous and inconvenient in their effect, and wholly unknown in English conveyancing: The transmission of land by the law of Scotland still continuing to be regulated by feudal principles.

The Socage Tenures are now divided by English lawyers, according to their duration, into Estates in fee, for life, for years, and at will: In the present instance it may be sufficient to class them under Estates in fee, and for life only.

Estates in fee are either fees-simple or fees-tail.

5. A Fee-SIMPLE, though it be according to Littleton (§ 1.) Hereditas pura, is not so called, because it imports an estate purely allodial, or free from all tenure; but in opposition to fees-conditional at common law, and fees-tail since the statute de donis. It imports a simple inheritance, clear of any condition, limitation, or restriction, to any particular heirs; and descendible to the heirs general, whether male or female, lineal or collateral. In the express language of our law, "Tenant in fee-simple is he who hath lands or tenements to hold to him and his heirs for ever." Litt. § 1: 1 Inst. 1: Fleta, lib. 3. c. 8.

In conveying, or conferring, these fees or estates in fee, though they are now, contrary to the original purity of proper feuds, become vendible, the antient form of donation is still preserved; and a feoffment, whether constituting or transferring a fief, or fee, retains even at this day the form of a gift. It is perfected and notified by the same solemnity of livery and seisin on investiture, as a pure feudal donation, and is still directed and governed by the same rules. 1 Inst. 9, a; 42, a: Fleta, lib. 3. c. 15. §§ 4, 5: Bracton, lib. 2. c. 17. § 1. See titles Conveyance; Deed; Feoffment; Grant; &c.

Tenures being thus derived from the feudal law, and partaking of their origin, fees, or estates in fees, could not, at common law, be aliened without the licence of the lord: (see ante I. 4.) This introduced Sub-infeudations by the tenant to hold of himself; which were so far restrained by Magna Charta, c. 32. as to compel the tenant of an inferior lord to keep in his own hands so much of the fee as would be sufficient to answer his services to the lord. The first statute that materially varied from this law of feuds, was the statute of Quia emptores, 18 Ed. I. c. 1. which enabled such tenants to sell all or part of their lands, to hold of their lords, by the same services as the feoffor had held. The King's tenants were, however, under several disabilities of alienation, but which were all finally removed by stat. 54 Ed. 3. c. 15; and fines for alienation were paid to the King by his tenants, till abolished by the stat. 12 Car. 2. c. 24. already so often alluded to. See 1 Comm. c. 5. p. 71; c. 6. p. 89.

As a tenant could not alien, so neither could he subject the tenancy or fee to his debts, until the stat. Westm. 2. (13 Ed. 1. st. 1.) c. 18. sub-
jected a moiety of lands to execution; leaving the other to enable the
tenant to do the services of the Tenure. But several other statutes,
as 13 E. 1. st. 3. de Mercatoribus; 27 E. 3. c. 9; 23 H. 8. c. 6. were af-
terwards made, by which lands were subjected, in a special manner, to
the particular liens created by those statutes. Vide 2 Inst. 394; and
this Dictionary, title Execution.

As tenants could not, by the feudal or common law, alien their te-
nancies without the licence or consent of the lord; so neither could the
lord himself alien his seigniory without the consent of his tenant.
Hence sprung the doctrine of Attornment, now quite abolished by
stat. 4 Ann. c. 16. § 9. See title Attornment.

For the feudal restraints on devise, see title Wills.

The rules which at present operate on the law of descents to the
coldest son, and the general preference of males to females, as well
as those which exclude the immediate ascending line of relations,
are all deducible from these feudal foundations of the law; and are
very ably explained by Sir Martin Wright in his treatise, pp. 173—
185. See this Dictionary, title Descent; and further, as to Estates in
Fee-simple, this Dictionary, title Fee and Fee-simple.

6. A Fee-tail, (feudum talliatum;) as distinguished from a fee-
simple, is a fee limited and restrained to some particular heirs, ex-
clusive of others. It is so denominated from the French, tailler, to
cut, or cut off, on account of the particular restriction by which the
heir-general, was often, and collateral or remote heirs were always,
cut off. Fleta, lib. 3. c. 3: Bract. lib. 2. c. 5. § 3. Brit. c. 34: Litt. §§
13. 18: 1 Inst. 18, b: Spelm. Gloss. ad v. Feodum; and this Diction-
ary, title Tail.

A Fee thus limited was at common law known by the name of a fee
conditional; so called from the condition, express or implied in the
gift or constitution of the fee, that in case the donee died without
such particular heirs, the land or fee should revert to the donor. But
our ancestors were, after heir or issue had, suffered at common law
to alien such fee, and to defeat the donor as well as the heir; on a
supposition that the condition was, for this purpose, satisfied or per-
formed by the donee’s having issue. See 1 Inst. 19, a: Plowd. Comm.
242. 5, b; 247. a.

This practice being manifestly contrary to the intent of the gift,
was restrained by Stat. Westm. 2. (13 E. 1. st. 1.) c. 1; commonly called
the Statute De donis conditionalibus; (or shortly, the Statute De do-
nis;) which required that the will and intent of the donor should be
observed, and the fee so given should go to the issue, and for want of
issue revert to the donor. So that, though Littleton says (§ 13.) that
a Fee-tail is by force of this statute, yet it is not to be understood as
creating any new fee, but only severing and distinguishing the limi-
tation from the condition, and restoring the effect of each; i. e. the
limitation to the issue, and the reversion to the donor; yet as by
means of this statute the limitation was raised above the condition,
the fee might thenceforth be denominated from the limitation, which
thus became the substance, as it had before been the immediate end,
of the gift. But this was at length eluded by the legal fictions of Fines
and Recoveries. See this Dictionary, under that title, and also title
Forfeiture: and for further matter on this head of Estates-tail, and
the policy of making them alienable, title Tail and Fee-tail. Wright,
186. 9.
7. Estates for Life are either conventional or legal; of the former sort are such estates as are, in their creation, expressly given or conferred for life of the tenant only. These are of a feudal nature, held by fealty, and liable to conventional services. Of the other sort are, 1. Tenancies in tail after possibility of issue extinct. 2. Tenancies in dower, and by the curtesy. See the several titles, and title Life-Estate, in this Dictionary.

The first of these is distinguished by the particular description merely to suggest the legal disadvantages cast on such estate-tail, when turned to a hopeless inheritance. It arises where lands and tenements are given to a man and his wife in special tail, and either of them dies without issue had between them. The survivor is tenant in tail after possibility, &c. See Litt. § 32: 1 Inst. 28: 11 Rep. 80; and this Dictionary, title Tail after Possibility, &c.

8. Dower, called by Craig, Triens, and Tertia, and known to the feudalists by several other names, was probably brought into England by the Normans, as a branch of their doctrine of fiefs or tenures; for we find no footslopes of dower in lands until the time of the Normans: But, on the contrary, provision is made by one of the laws of the Saxons, Edmund, for the support of the wife surviving her husband, out of his goods only. Wright 191, 2. See this Dictionary, title Dower.

9. Tenancies by the Curtesy, or her legem terrae, though so called as if they were peculiar to England, were known not only in Scotland, but in Ireland, and in Normandy also; and the like custom is to be found amongst the antient Almain laws; and yet it does not seem to have been feudal, nor does its original any where satisfactorily appear. Some English writers (Mirror, Selden, Cowell) ascribe it to Henry I.; but Nat. Bacon calls it a law of counter-tenure to that of Dower, and yet supposes it as antient as from the time of the Saxons; and that it was therefore rather restored than introduced by Henry I. Eng. Gov. 105. 147. But as there are no notices of this curtesy among the laws of the Saxons, or among those we have of Hen. 1. we may, perhaps, with safety rely on Craig's conjecture, that it is derived from the civil law. Craig de Jure Feud. 312: Wright 192. 5.

10. Forfeitures of estates in fee, though they were very many by the feudal and common law, [vide Spebm. in v. Felonid, & Ll. H. 1. c. 43: Glanv. l. 9. c. 4: Bract. l. 2. c. 35. §§ 11, 12.] are reduced, as the law now stands, to forfeitures by Attainders of treason; and by Cessae.

Of the former enough has been said at present. Ante II. 7; and this Dictionary, titles Escheat; Forfeiture; Treason. The latter, which depended on true feudal principles, and introduced many feudal hardships, was at length regulated by the statute of Gloucester, 6 Ed. 1. c. 4; and stat. Westm. 2; 13 E. 1. c. 21. These statutes provided, that in case a tenant should cease to pay his rent for two years, and there should not, during that time, be sufficient distress on the land, the lord might have a Cessavit; and by means thereof, if the tenant did not tender his arrears before judgment, the lord should upon such cesser recover the land, or fee itself, and bar the tenant for ever. See 2 Inst. 295. 400. 460: Booth's Real. Act 133, 4: F. N. B. 208, 9: Wright 196—202; and this Dictionary, titles Cessavit; Rent.

Estates for life are also forfeitable by waste, and by all such acts as tend to defeat the reversion. 1 Inst. 251, 2. See title Life-Estates.

There are yet two kinds of Estates which, though they fall under
the head of Socage, are denominated and usually treated as particular species of Tenure, viz, Burgage and Gavelkind.

11. Burgage-Tenure, so called to denote the particular service or Tenure of houses in antient cities or boroughs, is certainly a species of Socage-tenure. The tenements being holden by a certain annual rent in money, or by some service relating to trade, and not by military or other service that had no such relation. The qualities of this Tenure vary according to the particular customs of every borough, and that without prejudice to the feudal nature of it. See Wright 204; 5: Mad. firma Burgi. Litt. §§ 162, 3, 4, 5, 6, 7: Co. Litt. 109: Somn. on Gav. 142. 8. Taylor on Gav. 171: 1 Inst. 109, a; Specim. Craig. de Jure Feud. 68: Jenk. Cent. 127: 2 Comm. c. 6. ¶ 82; and this Dictionary, title Burgage.

12. The properties of Gavelkind Tenure are so many, and the qualities of it so different from those of any other Tenure, that it seems to have been doubted whether it be a Tenure of feudal nature or not. The Gavelkind tenant retains strong marks of propriety; as power to alien even at the age of 15; Somn. Gav. 8, 9; Freedom from forfeiture for felony; and many other privileges unknown to persons holding their lands by any other kind of Tenure.

It is however certain that the Tenure is strictly feudal, and, like the more usual Tenures by Knight-service and Socage, is denominated from the kind or nature of the prevailing service, which was, as the name imports, tributary or censual; the word Gavelkind being (according to Somner on Gav. 12. 35. 37; and see Blount in v.) a compound of the Saxon words, gavel, gafel, or gable, a tribute, tax, or rent; and geeynde, kind, sort, or quality: thus directly importing that such lands are censal or rented: Although they are also subject to other kinds of service, this Tenure in fact being, like Burgage, a kind of Socage Tenure, and liable to the same feudal burdens and forfeitures. See Wright 206—212.

As for the famous particle quality of most of the lands in Kent, [not all, see Hale Hist. C. L. 225: Stat. 31 H. 8. c. 3: but sec 1 Mod. 98: 2 Sid. 153: Cro. Car. 463: Lutw. 236. 754; by which it appears that all lands in Kent shall be presumed, without pleading, to be gavelkind; unless they can be proved to be disgavelled;] it was not a particular or proper effect of gavelkind Tenure. But it was rather the antient course of descent retained and continued in that county. Somn. on Gav. 89, 90. And however particular this course of descent (whereby the lands of the father are equally divided among all the sons; and of a brother dying without issue, among all his brethren; Litt. § 210; Co. Litt. 140.) may now appear to us; yet, if we consider gavelkind as a species of socage Tenure, and that all Tenures by socage, or of that nature, were antiently in point of succession divisible, and that they might, without prejudice to their feudal nature, descend equally or otherwise, as best suited the genius and usage of every county; it will appear much more extraordinary that all other counties should depart from this, the more antient and natural course of descent, than that this particular county should retain it. Wright 213. See further, 2 Comm. c. 6; and this Dict. title Gavelkind.

13. Under this head, Tenure, something ought to be said of copyholds; though they are not reducible to any of the preceding divisions of the subject.

Copyholds are the remains of Villenage; which, considered as a tenure, was not entirely Saxon, Norman, or feudal, but a tenure of a
mixed nature, advanced by the Normans upon the Saxon bondage, and which gradually superseded it. See F. N. B. 12. C. 1 Inst. 58, a: Bacon's Use of the Law 42, 3: Litt. tit. Villenage; Old Ten.: Somn. Gav. 65, 6.

The Normans, according to Sir William Temple, "finding among us a sort of people who were in a condition of downright servitude, used and employed in the most servile works, and belonging (they, their children, and effects) to the lord of the soil, like the rest of the stock or cattle upon it;" enfranchised all such as fell to their share; by admitting them to fealty in respect of the little livings they had hitherto been allowed to possess, merely as the scanty supports of their base condition; and which they were still suffered to retain upon the like service as they had in their former servitude been used and employed in. But this possession, as now cloathed with fealty, and by that means advanced into a kind of tenure, differed very much from the antient servile possession, and was from henceforth called Villenage. See Temp. Introd. 59: Mirror, b. 2. c. 28: Bract. lib. 2. c. 8. § 1; Litt. §§ 206, 7: Leg. W. 1. cc. 29. 33; in which last the word Vilain seems first applied to such tenant. See also this Dictionary, title Villein; and Spelm. Glos. v. servus.

Our Saxon ancestors having submitted to the feudal law, which to them was A Law of Liberty, perhaps imitated the Normans in this particular: But neither did our Saxon or Norman ancestors mean to increase or strengthen the possession of their villeins; but to leave that altogether as dependent and precarious as before; save only that, as by their admission to fealty, their possession was put, in some measure, upon a feudal footing, the lords could not deal with them so wantonly as before: (vide ante I. 4:) And at length the uninterruptedly benevolence and good nature of the successive lords of many manors, having, time out of mind, permitted them, or them and their children, to enjoy their possessions in a course of succession, or for life only, became customary and binding on their successors, and advanced such possession into the legal interest or estate we now call Copyhold; which yet remains subject to the same servile conditions and forfeitures as before, they being all of them so many branches of that continuance or custom which made it what it is. Somn. Gav. 58: Spelm. Gloss. v. Feudum; Bro. title Villenage.

From this view of the origin and nature of copyhoids we may possibly collect the ground of the great variety of customs that influence and govern those estates in different manors; it appearing that they are only customary estates, after the antient will of the first lords, as preserved and evidenced by the Rolls, or kept on foot by the constant and uninterrupted usages of the several manors wherein they lie. Litt. § 73. 75. 77. Wright 220.

As to Copyholds, see further, 2 Comm. c. 6. III: and this Dictionary, titles Antient Demesne; Copyholds; Manors; Villeins, &c.

From the above compeous view of the principal and fundamental points of the doctrine of Tenures, both antient and modern, may be observed the mutual connection and dependence that all of them have upon each other. And upon the whole it appears, that whatever changes and alterations these Tenures, in the progress of time, underwent, from the Saxon æra to 12 Cha. II. all Lay-Tenures are now in effect reduced to two species: Free Tenure in common Socage, and Base Tenure by Copy of Court Roll. There is one other species of Tenure Vol. VI. 2 D
reserved by the statute of Charles II. which is of a Spiritual nature, and called the Tenure in Frankalmoigne. See this Dictionary under that title.

TERCE, thirds: the Scotch term for Dower.

TERM, Terminus.] Signifies commonly the limitation of time or estate; as a lease for term of life, or years, &c. Bract. lib. 2. Term is also a space of time, wherein the superior courts at Westminster sit. See Terms.

TERMINUM QUI PRETERIIT: See Ad Terminum; Ejectment.

TERMOR, Tenens ex Termino.] He that holds lands or tenements for term of years or life. Litt. § 100. A Termor, for years cannot plead in assise like tenant of the freehold; but the special matter, viz. his lease for years, the reversion in the plaintiff, and that he is in possession, &c. Dyer 246: Jenk. Cent. 142. See title Lease I. 1.

TERMS, those spaces of time, wherein the Courts of Justice are open, for all that complain of wrongs or injuries, and seek their rights by course of law or action, in order to their redress; and during which, the courts in Westminster-Hall sit and give judgments, &c. But the High Court of Parliament, the Chancery, and inferior Courts, do not observe the terms; only the Courts of King's Bench, the Common Pleas, and the Exchequer, the highest Courts at Common Law. Of these Terms there are four in every year, viz. Hilary Term, which begins the 23d of January, and ends the 12th of February (unless on Sundays, and then the day after); Easter Term, that begins the Wednesday fortnight after Easter Day, and ends the Monday next after Ascension Day; Trinity Term, which begins the Friday after Trinity Sunday, and ends the Wednesday fortnight after; and Michaelmas Term, that begins the 6th of November, and ends the 28th of November (unless on Sundays, and then the day after).

These Terms are supposed by Selden to have been instituted by William the Conqueror: But Selden hath clearly and learnedly shewn, that they were gradually formed from the canonical constitutions of the Church; being indeed no other than those leisure seasons of the year, which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business. Throughout all Christendom, in very early times, the whole year was one continual Term for hearing and deciding causes. For the Christian Magistrates, to distinguish themselves from the Heathens, who were extremely superstitious in the observation of their dies fasti et nefasti, went into a contrary extreme, and administered justice upon all days alike. Till at length the Church interposed and exempted certain holy seasons from being profaned by the tumult of forensic litigations. As, particularly, the time of Advent and Christmas, which gave rise to the winter vacation; the time of Lent and Easter, which created that in the spring; the time of Pentecost, which produced the third; and the Long Vacation, between Midsummer and Michaelmas, which was allowed for the hay time and harvest. All Sundays also, and some particular festivals, as the days of the Purification, Ascension, and some others, were included in the same prohibition: which was established by a canon of the church, A. D. 517, and was fortified by an imperial constitution of the younger Theodosius, comprised in the Theodosian code. Seldm. of the Terms.

Afterwards, when our own legal constitution came to be settled, the commencement and duration of our Law Terms were appointed
with an eye to those canonical prohibitions; and it was ordered by
the laws of king Edward the Confessor, (c. 3. de temporibus et diebus
faciis,) that from the Advent to the octave of the Epiphany, from Sep-
tuagesima to the octave of Easter, from the Ascension to the octave of
Pentecost, and from three in the afternoon of all Saturdays till Mon-
day morning, the peace of God and of Holy Church shall be kept
throughout all the kingdom. And so extravagant was afterwards the
regard that was paid to these holy times, that though the author of
the Mirror mentions only one vacation of any considerable length,
containing the months of August and September; yet Britton is ex-
press, that in the reign of King Edward I. no secular plea could be
held, nor any man sworn on the Evangelists in the times of Advent,
Lent, Pentecost, harvest and vintage, the days of the great Litanies,
and all solemn festivals. But he adds that the bishops did nevertheless
grant dispensations, (of which many are preserved in Rymer’s Fede-
rais,) that Assises and Juries might be taken in some of these holy
seasons. And soon afterwards a general dispensation was established
by stat. Westm. 1. 3 Edw. 1. c. 51. which declares, that “by the assent
of all the prelates, Assises of novel dossesin, mort d’ancesor, and
darrein presentment shall be taken in Advent, Septuagesima, and Lent;
and at the special request of the King to the bishops.” The portions
of time, that were not included within these prohibited seasons, fell
naturally into a fourfold division, and, from some festival day that
immediately preceded their commencement, were denominated the
Terms of St. Hilary, of Easter, of the Holy Trinity, and of St. Michael;
which Terms have been since regulated and abbreviated by several
acts of Parliament; particularly Trinity Term by stat. 32 Hen. 8. c.
21. and Michaelmas Term by stat. 16 Car. 1. c. 6. and again by stat.
24 Geo. 2. c. 48.

There are in each of these Terms stated days called Days in Bank;
(dies in banco,) that is, days of appearance in the court of Common
Bench. They are generally at the distance of about week from each
other, and have reference to 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: whereof
every Term has more or less, said by the Mirror to have been originally
fixed by King Alfred, but certainly settled as early as the statute of
51 Hen. 3. st. 2. Now Easter Term hath five returns; and all the other
Terms four. But though many of the return days are fixed upon Sun-
days, yet the Court never sits to receive these returns till the Monday
after; and therefore no proceedings can be held, or judgment can be
given, or supposed to be given, on the Sunday. See Salik. 627: 6 Mod.
250: 1 Jon. 156, Swan v. Broome, Bro. P. C.

The first return in every Term is, properly speaking, the first day
in that Term; as, for instance, the octave of St. Hilary, or the eighth
day inclusive after the feast of that Saint: which falling on the thir-
teenth of January, the octave therefore or first day of Hilary Term
is the twentieth of January. And thereon (one Judge of) the Court
sits to take essoigns, or excuses, for such as do not appear according
to the summons of the writ: wherefore this is usually called the Es-
soign Day of the Term. But on every return day in the Term, the
person summoned has three days of grace, beyond the day named in
the writ, in which to make his appearance; and if he appears on the
fourth day inclusive, (quarto die post,) it is sufficient. For our sturdy


THE ISSUABLE TERMS ARE HILARY AND TRINITY TERMS ONLY; THEY ARE SO CALLED, BECAUSE IN THEM THE ISSUES ARE JOINED AND RECORDS MADE UP OF CAUSES, TO BE TRIED AT THE LENT AND SUMMER ASSISES, WHICH IMMEDIATELY FOLLOW. 2 LILL. ABR. 568. SEE TITLE ASSISES, &c.

BY STAT. 24 Geo. 2. C. 48. SPECIAL DAYS AND RETURNS MAY BE APPOINTED BY THE JUDGES IN SUCH CASES AS HAVE BEEN USUAL. THE DAYS OF ASSISE IN DARREIN PRESENTMENT, AND IN A PLEA OF QUARE IMPEDIT APPOINTED BY THE STATUTE OF MARBLEBRIDGE; AND THE DAYS TO BE GIVEN IN ATTAIN'D BY STAT. 5 E. 3. AND ALSO IN STAT. 23 H. 8. NOT BEING CONTRARY TO THIS ACT, SHALL BE IN FORCE. DAY FOR SWEARING THE LORD MAYOR OF LONDON IS APPOINTED FOR NOVEMBER 9TH, UNLESS IT BE SUNDAY; AND THEN THE NEXT DAY. THE MORROW OF ST. MARTIN YEARLY, APPOINTED FOR NOMINATING SHERIFFS IN THE EXCHEQUER.

THE TERMS IN SCOTLAND ARE MARTINMAS, CANDLEMAS, WHITSUNTIDE, AND LAMMAS: AT WHICH TIMES THE COURT OF EXCHEQUER, &c. THERE IS TO BE KEPT. STAT. 6 ANN. C. 6. THE TERMS OF OUR UNIVERSITIES FOR STUDENTS, ARE DIFFERENT IN TIME FROM THE TERMS OF THE COURTS OF LAW.


TERMS FOR PAYMENT OF RENT, OR RENT TERMS: THE FOUR QUAR-
terly feasts upon which rent is usually paid. Cartular. Sti. Edmund. 238. See titles Rent; Lease.

TERMS FOR YEARS, To secure payment of mortgages, and Terms to attend the inheritance. See titles Mortgage; Trust; Use.

TERRA, In all the Surveys in Domesday Register, is taken for arable land, and always so distinguished from the Pratum, &c. Ken-net's Gloss.

TERRA AFFIRMATA, Land let to farm.
TERRA BOSCALIS, Woody lands; according to an inquisition, an. 8 Car. 1.
TERRA CULTA, Land that is tilled or manured, as Terra Inculata is the contrary. Mon. Ang. i. 500.
TERRA DEBILIS, Weak or barren ground. Inq. 22 R. 2.
TERRA EXCULTABILIS, Land which may be ploughed. Mon. Ang. i. 426.
TERRA EXTENDENDA, A writ directed to the escheator, &c. willing him to inquire and find out the true yearly value of any land, &c. by the oath of twelve men, and to certify the extent into the Chance-ry, &c. Reg. of Writs 293.
TERRA FRUSCA, Fresh-land, or such as hath not been lately ploughed; likewise written Terra frisca. Mon. Ang. ii. 327.
TERRA HYDATA, Land subject to the payment of Hydage; as the contrary was terra non hydata. Selden.
TERRA LUCRABILIS, Land that may be gained from the sea, or inclosed out of a waste, to a particular use. Mon. Ang. i. par. fol. 406.
TERRA NORMANORUM, Such land in England as in the beginning of Henry III. had been lately held by some noble Norman, who by adhering to the French King, or Dauphin, had forfeited his estate; which, by this means became an escheat to the Crown, and restored, or otherwise disposed of at the King's pleasure. Paroch. Antiq. p. 197.
TERRA NOVA, Land newly asserted and converted from wood ground to arable; terra noviter concessa. Spelman.
TERRA PUTURA, Land in forests held by the tenure of furnishing man's meat, horse meat, &c. to the keepers therein. See Putura.
TERRA SABULOSA, Gravelly or sandy ground. Inq. 10 Ed. 3. n. 3.
TERRA VESTITA, Is used in old charters for land sown with corn. Cowell.
TERRA WAINABILIS, Tillable land. Cowell.
TERRA WARENNATA, Land that has the liberty of free warren. Rot. Part. 21 Ed. 1.
TERRÆ BOSCALES, Woody lands. Inq. 2. par. 8 Car. 1. num. 71.
TERRÆ TESTAMENTALES, Lands that were held free from feodal services, in allotdio; or in socage, descendible to all the sons, and therefore called Gavel-kind, being devisable by will, were thereupon called Terra Testamentales, as the Thane who possessed them was said to be testamento dignus. See Spelman of Feuds, c. 5.
TERRAGE, Terragium.] Seems to be an exemption à precariis, viz. Boons of ploughing, reaping, &c. and'perhaps from all land taxes, or from money paid for digging and breaking the earth in fairs and markets. Cowell.
TERRAR, or Terrier; Terrarium, catalogue Terrarum.] A land
roll, or survey of lands, either of a single person, or of a town; containing the quantity of acres, tenants' names, and such like; and in the Exchequer, there is a Terrar of all the glebe lands in England, made about 11 E. 3. See stat. 18 Eliz. c. 17.


TERRARIUS, CÆNOBIALIS, An officer in Religious Houses, whose office was to keep a terrier of all their estates, and to have the lands belonging to the houses exactly surveyed and registered; and one part of his office was to entertain the better sort of convent-tenants, when they came to pay their rents, &c. *Hist. Dunelm.*

TERRE-TENANT, TERTENANT, *Terra Tenens.*] He who hath the actual possession of the land: For example, a Lord of a manor has a freeholder, who letteth out his freehold to another, to be possessed and occupied by him, such other is called the Tertenant. *West. Symb. jur. 2:* Britton, c. 29. In the case of a recognition, statute, or judgment, the heir is chargeable as Tertenant, and not as heir; because, by the recognition or judgment, the heir is not bound, but the ancestor concedit that the money de terris, &c. levetur. 3 Rept. 12. Vide *Cro. Eliz.* 872; *Cro. Jac.* 506; and this Dictionary, titles *Scire facias;* *Elegit;* Execution.

TERRIS, Bonis et Catalillis rehabindis post Purgationem; A writ for a clerk to recover his lands, goods, and chattels formerly seized, after he had cleared himself of the felony of which he was accused, and delivered to his Ordinary to be purged. *Reg. Orig.* 68.

TERRIS et Catalillis tenitis ultra debitum levatum, A judicial writ for the restoring of lands or goods to a debtor that is distrained above the quantity of the debt. *Reg. Judic.* 38.

TERRIS LIZERANDIS, A writ lying for a man convicted by attain'd, to bring the record and process before the King, and take a fine for his imprisonment, and then to deliver him his lands and tenements again, and release him of the strip and waste. *Reg. Orig.* 232. It is also a writ for the delivery of lands to the heir, after homage and relief performed; or upon security taken that he shall perform them. *Ibid.* 293. 313.

TERTIAN, A measure of eighty-four gallons; so called, because it is a third part of a tun. See *state.* 2 *H. 6.* c. 11: 1 3. c. 13.

TEST. To bring one to the Test, is to bring him to a trial and examination, &c. For the Test-Act, see titles *Non-conformists;* *Oaths;* *Papists.*

TESTA DE NEVIL, An antient Record, in two volumes, in the custody of the King's Remembrancer in the Exchequer of England, more properly called Liber Feodorum; supposed to have been compiled by John de Nevil, a Justice Itinerant in the 18 & 24 of King Henry III. or as others imagine by Ralph de Nevil an Accountant in the Exchequer. But it appears that the volumes were not compiled till near the close of the reign of Edw. II. or the beginning of Edw. III. and then partly from Inquests taken on the presentments of jurors of hundreds before the Justices Itinerant, and partly from Inquisitions upon writs awarded to the sheriffs for collecting of scutages, aids, &c. The entries which are specifically entitled Testa de Nevil are evidently quotations, and form comparatively a small part of the whole: they were probably copied from a roll bearing that name, a part of which is still extant in the Chapter-House at Westminster.
containing 10 counties: This Roll appears to be of the time of Edw. I. and agrees verbatim with the entries in the books at the Exchequer.

These books contain principally accounts. 1. of Fees holden either immediately of the King, or of others who held of the King in capite, and if alienated whether the owners were enfeoffed ab antiquo, or de novo, as also fees holden in frankalmoigne, with the values thereof respectively. 2. Of serjeanties holden of the King, distinguishing such as were rented or alienated, with the values of the same. 3. Of widows and heiresses of tenants in capite whose marriages were in the gift of the King, with the values of their lands. 4. Of churches in the gift of the King, and in whose hands they were. 5. Of Escheats, as well of the lands of Normans as others, in whose hands the same were, and by what services holden. 6. Of the amount of the sums paid for Scutage and Aid, &c. by each tenant.

In the cover of each book is the following memorandum in an antient hand: “Contenta: pro Evidentitiis habeantur hic in Scaccio & non pro Recordo.”

TESTAMENT, Testamentum.] Is defined by Plowden to be testatio mentis; a witness of the mind: But Aulus Gellius, lib. 6. c. 12. denies it to be a compound word, and saith, It is verbum simplex, as Testamentum, Plaudamentum, &c. And therefore it may be thus better defined, Testamentum est ultime voluntatis justa sententia, de eo quod quis post mortem suam fieri vult, &c. See Wills.

Testament was antiently used (according to Shelman) pro scripto charta vel instrumento, quo praediiorum rerumque aliarum transactiones perficiuntur, sic dictum quod de ea re vel Testamentum ferret vel testamentum nominet. —Si quis contra hoc mea authoritatis Testamentum aliquid machinari implementum praesumptit, Charta Croylandiae abÆthelbaldore Rege. Anno Domini 716. Cowell.

Testamentary Causes, A species of Causes belonging to the Ecclesiastical jurisdiction. They were originally cognizable in the King’s Courts of Common Law, viz. the County Courts; and afterwards transferred to the jurisdiction of the Church by the favour of the Crown, as a natural consequence of granting to the bishops the administration of intestates’ effects. 3 Comm. c. 7: See title Courts-Ecclesiastical.

As observed by Lindewode, the ablest canonist of the fifteenth century, Testamentary Causes belong to the Ecclesiastical Courts, “de consuetudine Anglice & super consensu regio & suorum procurer in talibus ab antique concesso.” Provincial l. 3. t. 13. fo. 176.

Testamentary Guardian; See Guardian I. 4.

Testamentary Jurisdiction in Equity; See Chancery.

Testamento annexo, Administration cum. See title Executor II.

TESTATOR, Lat. He that makes a testament. See title Wills.

TESTATUM-CAPIAS; See title Capias.

TESTE; (Witness) That part of a writ wherein the date is contained; which begins with these words, Teste meipsos, &c. if it be an original writ; or Teste the Lord Chief-Justice, &c. if judicial. See Co. Litt. 134; and this Dictionary, title Original Writs.

TESTIMONIAL, A certificate under the hand of a Justice of the Peace, testifying the place and time, when and where a soldier or mariner landed, and the place of his dwelling and birth unto which he is to pass. 39 Eliz. c. 17. See title Vagrants. Formerly Testimo-
nials were to be given by mayors and constables to servants quitting
their services, &c. Stat. 5 Eliz. c. 4. See title Servants.

TESTIMONIALS OF CLERGY, Are necessary to be made by persons
present, that a Clergyman inducted to a benefice hath performed all
things according to the act of uniformity; to evidence that the clerk
hath complied with what the Law requires on his institution and in-
duction, which in some cases he shall be put to do. Count. Pars. Compt.

TESTIMOIGNES, French, Witnesses; So Testimoignage, Testi-
mony. Law. Fr. Dict.

TESTON, or TESTOON, Commonly called Tester, a sort of
money which among the French did bear the value of 18d. but being
made of brass lightly gilt with silver, in the reign of King Henry
VIII., it was reduced to 12d. and afterwards to 6d. Lownde’s Ess. on
Coins, p. 22.

TEXTUS, A Text or subject of a discourse; it is mentioned by
several ancient authors to signify the New Testament; which was
written in golden letters, and carefully preserved in the churches.

TEXTUS MAGNI ALTARIS, We read of in Domesday and Cartular
S. Edmund.

TEXTUS ROFFENSIS, An antient manuscript containing the rights,
customs, and tenures, &c. of the church of Rochester, compiled by
Erunulphus, who became bishop of that see, anno 1115.

THAMES; See titles Rivers; London; Police.

THANAGE OF THE KING, Thanagium Regis.] Signifies a
certain part of the King’s land or property, whereof the ruler or gov-
ernor was called Thane. Cowell.

THANE, From Sax. Thenian, ministrare.] Was the title of those
who attended the English Saxon Kings in their Courts, and who held
their lands immediately of those Kings; and therefore, in Domesday,
they were promiscuously called thani et servientes Regis, though not
long after the Conquest the word was disused; and, instead thereof,
those men were called Barones Regis, who, as to their dignity, were
inferior to Earls, and took place next after Bishops, Abbots, Barons,
and Knights. There were also Thani minores, and those were like-
wise called Barons: These were lords of manors, who had a particu-
lar jurisdiction within their limits, and over their own tenants in their
Courts, which to this day are called Courts Baron: But the word sig-
nifies sometimes a nobleman, sometimes a freeman, sometimes a magis-
trate, but more properly an officer, or minister of the King.—

Edward King grete mine Biscops, and mine Eorles, and all mine Thes-
gnes, on that shiren, wher mine Prestes in Paulus minister habbard land.
Charita Edw. Conf. Pat. 18 H. 6. m. 9. per Inspect. Lambard, in his
Exposition of Saxon words, verb. Thanes; and Skene de verbor. sig-
nif. say, That it is a name of dignity, equal with the son of an Earl.

This appellation was in use among us after the Norman Conquest,
as appears by Domesday, and by a certain writ of William the First.

Willielmus Rex salutat Hermannum episcopum, & Stewartum, &
Brisii, & omnes Thanos meos in Dorsetensis pago amicabiliter. MSS.
de Abbatsbury.—Camden says, They were ennobled only by the office
which they administered. Thanus Regis is taken for a Baron, in 1
Inst. fol. 5. 1. And in Domesday, tenens, qui est cautus manerii. See
Mills de Nobilitate, fol. 132. A Thane, at first, (in like manner as an
Earl,) was not properly a title of dignity, but of service. But accord-
ing to the degrees of service, some of greater estimation, some of less. So those that served the King in places of eminence, either in Court, or Commonwealth, were called Thani majores and Thani Regis. Those that served under them, as they did under the King, were called Thani minores, or the lesser Thanes. Cowell. See Spelman of Feuds, cap. 7.

THANE-LANDS, Such lands as were granted by charter of the Sax-
on Kings to their Thanes; which were held with all immunities, except the threefold necessity of expeditions, repairs of castles, and mending of bridges.—Thane signified also land under the government of a Thane. Skene. See title Tenures; Reveland; Bockland.

THASCIA, A certain sum of money or tribute imposed by the Romans on the Britons, and their lands. Leg. H. I. c. 78.

THEATRES; See Play-houses.

THEFT, Furtum.] An unlawful felonious taking away of another man's moveable and personal goods, against the will of the owner. See titles Larceny; Robbery.

THEFT-BOTE, From the Sax. Theof, i. e. Fur, & Bote, compensa-
tio.] The receiving a man's goods again from a thief, after stolen, or other amends not to prosecute the felon, and to the intent the thief may escape; which is an offence punishable with fine and imprisonment, &c. H. P. C. 130. In Scotland by the act 1436, c. 137. Sheriffs, justices, and barons guilty of this crime were to lose life and goods: And by the act 1515. c. 3. private persons found guilty were to be punished in the same manner as the thief. See titles Compounding of Felony; Misprison.

THELONIUM; or BREVE ESSENDI QUIETI DE THELONIO, A writ lying for the citizens of any city, orburgesses of any town, that have a charter or prescription to free them from toll, against the offi-
cers of any town or market, who would constrain them to pay toll of their merchandize, contrary to their said grant or prescription. F. N. B. fol. 226. See title Toll.


THELONIO RATIONABILIBI HABENDO; PRO DOMINIS HABENTIBUS DOMINICA REGIS AD FIRMAM, A writ for him that hath of the King's demesne in fee farm to recover reasonable toll of the King's tenants there, if his demesne hath been accustomed to be tolled. Reg. Orig. 87.

THEMMAGIUM, A duty or acknowledgment paid by inferior tenants in respect of theme or team. Cowell.


THEODEN, In the degrees or distinctions of persons among the Saxons, the Earl or prime Lord was called Thane, and the King's Thane; and the Husbandman or inferior tenant was called Theodan, or under Thane. See Spelm.; and ante, title Thane.

THEOWES. The slaves, captives, or bondmen among our Saxons were called Theowes and Esnes, who were not counted members of the commonwealth, but parcels of their master's goods and substance. Spelman of Feuds, cap. 5.

THESAURUS, Was sometimes taken in old charters for thesau-
rium, the treasury; and hence the Domeaday register preserved in the treasury or exchequer, when kept at Winchester, hath been often called Liber Thesauri Chart. Q. Maud, wife of King Henry I.

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THETHINGA, A word signifying a tithing: Tithingmannus, a tithingman. Sax.

THEW, THEOWE; See Theowes.

THIEF-TAKER; See titles Felony; Rewards.

THIGSTERS, A sort of gentle beggars. Old Scotch Dict.

THINGUS, The same with Thanus; a nobleman, knight, or free-

THIRDBOROW, Is used for a constable, by Lambard in his
Duty of Constables. p. 6. And in the stat. 28 H. 8. c. 10. See Con-
stable.

THIRDINGS, i. c. The third part of the corn growing on the
ground, due to the lord for a heriot on the death of his tenant, within

THIRD-NIGHT-AWN-HINDE, trium noctium hospites.] By the
laws of St. Edward the Confessor, if any man lay a third night in an
inn, he was called a Third-Night-Awn-Hinde, for whom his host was
answerable, if he committed an offence. The first night, Forman-
Night, or Uncuth, (Sax. Unknown,) he was reckoned a stranger; the
second night, Twa-Night, a guest; and the third night, an Agen-
Hinde, or Awn-Hinde, a domestic. Bract. lib. 3.

THIRD-penny; See Denarius Tertius Comitatus.

THIRLAGE. A Servitude or Tenure in Scotland by which the
possessor of certain lands is bound to carry all his grain growing on
certain lands to a certain mill to be ground, for which he is bound to
pay a proportion of the flour or meal, varying in different places from
a 30th part, to a 12th part, which is termed Multure. Besides this,
which is due to the miller or proprietor of the mill, there are smaller
perquisites due to the servants termed sequels, called knaveship,
bannock, lock, or gowpen, uncertain in their amount, and ascertained
only by the practice of the mill; Besides these there are services due to
the mill, such as carrying home mill-stones, and repairing the mill-
house, mill-dam, &c. This service was found to be hurtful to agri-
culture, not only by its weight, but by the circumstance of its con-
tinuing to increase with the additional produce of the farm. By Sta-
tute 39 Geo. 3. c. 55, therefore, provisions were enacted for commut-
ing this servitude for an annual payment in grain, to be ascertained
by the verdict of a jury, after proof before the Court of Session, of
the nature and extent of the servitude in each particular instance:
This act has been found advantageous, not only by ascertaining and
commuting the amount of Thirlage in cases where it heretofore ex-
isted, but also in preventing the institution of such a tenure or ser-
v ice in future cases.

THISTLE-TAKE, it was a custom within the manor of Halton,
in the county palatine of Chester, that if, in driving beasts over the
common, the driver permits them to graze or take but a thistle, he
shall pay a halfpenny a beast to the lord of the fee. And at Fiskerton
in Nottinghamshire, by antient custom, if a native or a cotager killed
a swine above a year old, he paid to the lord a penny, which purchase
of leave to kill a hog was also called Thistle-take. Reg. Priorat. de
Thurgarton. Cowell.

THOKES, Fish with broken bellies, stat. 22 E. 4. c. 2. which by
the said statute are not to be mixt or packed with tale-fish.

THORP, THREP, TROP, Either in the beginning or end of
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names of places, signifies a street or village, as Aldestrofie: From the Saxon Thorp, villa, vicus.

THRAVE OF CORN, Trava bladi, from the Saxon Thraeav, a bundle, or the British drefa, twenty-four.] In most parts of England, consists of twenty-four sheaves, or four shocks, six sheaves to every shock, stat. 2 H. 6. c. 2. yet in some counties they reckon but twelve sheaves to the Thraeav. King Athelstan, anno 923, gave by his charter to St. John of Beverley's church, four Thraives of corn, from every plough-land in the East-Riding of Yorkshire. Cowell.

THREATENING LETTERS. By stat. 9 Geo. 1. c. 22. (amended by stat. 27 Geo. 2. c. 15.) Knowingly to send any Letter without a name, or with a fictitious name, demanding money, venison, or any other valuable thing, or threatening (without any demand) to kill, or fire the house, out-houses, barns, or ricks of any person, is made felony without benefit of clergy. This offence was formerly high treason, by the stat. 8 Hen. 5. c. 6. It has been deterinied that if the writer of a Threatening Letter delivers it himself, and does not send it by any other, he is not guilty of felony under this act. Leach 351.

By stat. 30 Geo. 2. c. 24. If any person shall knowingly send or deliver any Letter or Letters, threatening to accuse any person of a crime punishable with death, transportation, pillory, or other infamous punishment, with a view to extort from him any money or other valuable chattels, he is punishable at the discretion of the court with fine, imprisonment, pillory, whipping, or transportation for seven years.

THREATS. Threats and menaces of bodily hurt, through fear of which a man's business is interrupted, are a species of injury to individuals. A menace alone, without a consequent inconvenience, makes not the injury, but to complete the wrong, there must be both of them together. The remedy for this is in pecuniary damages, to be recovered by action of trespass vi et armis, this being an inchoate, though not an absolute violence. 3 Comm. c. 8. ft. 120. As to Threats or menaces where bodily harm is justly feared, See title Surety of the Peace, &c.

THRENGES, Quia vero non erant adhuc tempore Regis Willielmi milites in Anglia, sed Threnges, praecipit Rex ut de eis milites fie-runt ad defendendum terram, fecit autem Lanfrancus Threngos suas milites, &c. Sonner’s Gavelk. 123. 210. They were vassals, but not of the lowest degree, of those who held lands of the chief lord; the name was imposed by the conqueror; for when one Edward Sharnburn of Norfolk, and others were ejected out of their lands, they complained to the conqueror, insisting, that they were always on his side, and never opposed him, which upon inquiry he found to be true, and therefore he commanded that they should be restored to their lands, and for ever after be called Drenches. Spelm. See titles Drenches; Sharnburn.

THRIMSA, Sax. Thrim. Three.] An old piece of money of three shillings, according to Lambard, or the third part of a shilling, being a German coin passing for 4d. Seld. Tit. Hon. 604.


THUDE-WEALD, Sax.] A woodward, or person that looks after the woods.
THUMELUM, A thumb. Leg. Ina, cap. 55. apud Bromton.

THWERTNICK, A Saxon word, which in some old writers is taken for the custom of giving entertainments to the sheriff, &c. for three nights. Rot. 11 & 12 Rich. 2.

TIDESMEN, Are certain officers of the custom-house, appointed to watch or attend upon ships, till the customs are paid; and they are so called because they go aboard the ships at their arrival in the mouth of the Thames, and come up with the tide. See title Customs.

TIERCE, Fr. Tiers, i. e. a third.] A measure of wine, oil, &c. containing the third part of a pipe, or forty-two gallons. Stat. 32 H. 8. c. 14.

TIGH, Sax. Teag.] A close or inclosure, mentioned in antient charters; which word is still used in Kent in the same sense. Chart. Eccl. Cant.

TIHLA, Sax.] An accusation: Ll. Canuti.

TILES; See Bricks and Tiles.

TILLAGE, Agricultura.] Is of great account in Law, as being very profitable to the commonwealth; and therefore arable land hath the preference before meadows, pastures, and all other ground whatsoever: And so careful is our Law to preserve it, that a bond or condition to restrain Tillage, or sowing of lands, &c. is void. 11 Reft. 53. There are divers antient statutes for encouragement of Tillage and husbandry, now become in a great measure, if not altogether, obsolete.

TIMBER, Wood fitted for building, or other such like use; in a legal sense it extends to oak, ash, and elm, &c. 1 Roll. Abr. 649. See Post. Lessees of land may not take Timber-trees felled by the wind; for thereby their special property ceases. 1 Keb. 691.

The importation, &c. of Timber is regulated by divers statutes.

Against cutting up, barking, or destroying of Timber; stat. 1 Geo. 1, st. 2. c. 48. See title Woods.

Oak Timber, (except for building) to be felled in April, May, and June; stat. 1 Jac. 1. c. 22. s. 20.

By stat. 6 Geo. 3. c. 36. Any one who shall, in the night-time, lop, top, cut down, break, throw down, bark, burn, or otherwise spoil or destroy, or carry away, any oak, beech, ash, elm, fir, chesnut, or asp, Timber-tree, or other tree or trees, standing for Timber, or likely to become Timber, without the consent of the owner; or shall, in the night-time, pluck up, dig up, break, spoil or destroy, or carry away, any root, shrub, or plant, roots, shrubs, or plants, of the value of five shillings, and which shall be growing, standing, or being in the garden-ground, nursery-ground, or other inclosed ground of any person or persons whomsoever; shall be deemed and construed to be guilty of felony, and the offenders may be transported. Those who are assisting, and purchasers, knowing the things to be stolen, shall be liable to the same punishment, as if they had stolen the same.

By stat. 6 Geo. 3. c. 48. Every person convicted of damaging, destroying, or carrying away any Timber-tree, or trees, or trees likely to become Timber, without the consent of the owner, &c. shall forfeit for the first offence not exceeding 20l. with the charges attending; and on non-payment, are to be committed for not more than twelve, nor less than six months; for the second offence, a sum not exceeding 30l. and, on non-payment, are to be committed for not more than eighteen, nor less than twelve months; and for the third offence are to be transported for seven years.
All oak, beech, chesnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore, and birch-trees, shall be deemed and accounted as Timber trees, within the meaning of the act. Persons convicted of plucking up, spoiling, or taking away any root, shrub, or plant, out of private cultivated ground, shall forfeit for the first offence any sum not exceeding 40s. with the charges; for the second offence a sum not exceeding 5l. with the charges; and for the third offence, are to be transported for seven years. Persons hindering, or attempting to prevent seizing offenders, forfeit 10l. to the person convicting them; and, if not paid down, to be committed to hard labour, not exceeding six months. See title Mischief, Malicious.

Timber for the Navy. An act for the increase and preservation of Timber, within the forest of Dean, stat. 20 Car. 2. c. 3.—Two thousand acres of land in the New Forest to be inclosed, for preserving Timber for the Navy Royal, stat. 9 & 10 W. 3. c. 36. See title Forests.

Timberlode. A service by which tenants were to carry Timber felled from the woods to the lord's house. Thorn's Chron.

Time and Place, Are to be set forth, with certainty in a declaration; but Time may be only a circumstance when a thing was done, and not to be made part of the issue, &c. 5 Mod. 286. It has been held, that an impossible Time is no Time; and where a day or Time is appointed for the payment of money, and there is no such, the money may be due presently. Hob. 189: 5 Rep. 22.

If no certain Time is implied by Law for the doing of any thing, and there is no Time agreed upon by the parties, then the Law doth allow a convenient Time to the party for the doing thereof, i. e. as much as shall be adjudged reasonable, without prejudice to the doer of it. 2 Litt. Abr. 572. In some cases one hath time during his life for the performance of a thing agreed, if he be not hastened to do it by request of the party for whom it is to be done; but if in such case he be hastened by request, he is obliged to do it in convenient Time, after such request made. Hil. 22 Car. 1. B. R.

Time, taken generally, hath also its time: What is done in Time of peace, the law doth more countenance than in time of war, in case of bar of an entry, or claim by fine, and of descents, &c. 1 Inst. 249: 10 Rep. 82: 4 Sheft. Abr. 6.

Regularly, there cannot be any fraction in a day. See 20 Vin. Abr. and this Dict. title Year, and other apposite titles.

Tinckings, are signals given to forwarn people of the approach of the enemy. Scotch Dict.

Tinel Le Roy. Fr.] The King's hall wherein his servants used to dine and sup. Stat. 13 R. 2. st. 1. c. 3.

Tineman, or Tieman, a petty officer in the forest, who had the nocturnal care of vert and venison, and other servile employments. Constitut. Foresta & Camuit Regis, cap. 4.

Tinet, Tinettum.] Brushwood and thorns, to make and repair hedges: In Herefordshire to spite a gap in a hedge, is to fill it up with thorns, that cattle may not pass through it. Chart. 21 Hen. 6.

Tinewald, The antient Parliament or annual convention of the people of the Isle of Man, of which this account is given:—The governor and officers of that island do usually call the twenty-four Keys, being the chief commons thereof, especially once every year, viz. upon Midsummer-day, at St. John's Chapel, to the court kept
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There, called the Tinewald Court; where, upon a hill near the said chapel, all the inhabitants of the island stand round about, and in the plain adjoining, and hear the laws and ordinances agreed upon in the chapel of St. John, which are published and declared unto them; and at this solemnity the lord of the island sits in a chair of state with a royal canopy over his head, and a sword held before him, attended by the several degrees of the people, who sit on each side of him, &c.

Tinkermens. Those Fishermen who destroyed the young fry on the river Thames, by nets and unlawful engines, till suppressed by the mayor and citizens of London. Of which, see Stow's Survey of London, p. 18.

Tinpenny. A tribute so called, usually paid for the liberty of digging in Tin-mines. But some writers say it is a customary payment to the tithingman from the several friburghs, contracted from Teding-penny, which see.

TinseL of the Feu. The loss of the estate held by feu duty in Scotland from allowing two years feu duty to remain unpaid. Scotch Law Dict. To tyne in Scotch is to lose.

Tipstaffs. Officers appointed by the Marshall of the King's Bench, to attend upon the Judges with a kind of rod or staff tipt with silver, who take into their custody all prisoners, either committed, or turned over by the Judges at their chambers, &c. See title Baston; and stat. 1 R. 2.

Tithes.

Decim.*; from the Sax. Teotha; i. e. tenth.] In some of our Law-books are briefly defined to be an ecclesiastical inheritance, or property in the Church, collateral to the estate of the lands thereof: But in others they are more fully defined to be a certain part of the fruit, or lawful increase of the earth, beast and men's labour, which in most places, and of most things, is the tenth part, which, by the law hath been given to the Ministers of the Gospel, in recompence of their attending their office. 11 Reph. 13: Dyer 84.

Tithes are classed by Blackstone, as a species of incorporeal hereditaments; and defined to be a tenth part of the increase, yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants: The first species being usually called predial; as of corn, grass, hops, and wood: The second mixed; as of wool, milk, pigs, &c. consisting of natural products, but nurtured and preserved in part by the care of man; and of these two sorts the tenth must be paid in gross: The third, personal; as of manual occupations, trades, fisheries, and the like, and of these only the tenth part of the clear gains and profits is due. 2 Comm. c. 3.

Tithes, with regard to value, are divided into great and small. Great Tithes are chiefly corn, hay, and wood: Small Tithes are the predial Tithes of other kinds, together with mixed and personal Tithes. Burn's Justice, title Tithes.

Great Tithes generally belong to the Rector; and Small Tithes to the Vicar. Cro. Car. 20.

Some things may be great or small Tithes, in regard of the place; as hops in gardens are small Tithes, and in fields may be great Tithes; and it is said the quantity will turn a small Tithe into a great
one, if the parish is generally sown with it. 1 Roll. Abr. 643: 1 Cro. 578: Wood's Inst. 162.

Great Tithes are commonly called Parsonage Tithes—Small Tithes, Vicarage Tythes; as being, in general, payable the one to the Parson, the other to the Vicar.

In Scotland personal Tithes have never been acknowledged, and the system of predial Tithes is so regulated, that the proprietor of land, the inheritor, can purchase his tithes in some cases at 9, and in others at 6 years' purchase: except such Tithes as belong to the Crown or to Colleges or Schools. Where the Tithes exist, they are not in the hands of the Clergy, who are all Stipendiaries, and paid according to a stipend modified or regulated by the Commission of Teinds, whose powers in this respect are defined and regulated by stat. 48 G. 3. c. 138. The oppressions therefore which in certain instances may result from the system of Tithes in England, (to which that of Ireland is in many instances similar), is unknown in Scotland; while the liberal views of the Commission and the Legislature unite in supporting the clergy in their proper rank in society.

I. Of the Origin of Tithes; and to whom they are payable.

II. Of what Tithes are in general due; and where personal Tithes are due.

III. Of what predial Tithes are due; and herein, of the Tithe of Agistment, Corn, Hay and Wood.

IV. Of what mixed Tithes are due.

V. Of recovering Tithes in the Ecclesiastical or Temporal Courts; or in a summary Way; against Quakers; and in London.

VI. Of particular Things, for which Tithes are paid, and for which not; in Alphabetical Order.

VII. Who may be discharged, either totally or in part, from paying Tithes.

I. Bishop Barlow, Selden, Father Paul, and others, have observed, that neither Tithes nor ecclesiastical benefices, (which are correlative in their nature,) were ever heard of for many ages in the Christian church, or pretended to be due to the Christian Priesthood; and, as that bishop affirms, no mention is made of Tithes in the grand cedex of canons, ending in the year 451, which, next to the bible, is the most authentic book in the world; and that it thereby appears, during all that time, both churches and churchmen were maintained by free gifts and oblations only. Barlow's Remains, p. 169: Selden of Tithes, 82: See Watson's Complete Incumbent, p. 3, 4, &c.

Selden contends, that Tithes were not introduced here into England, till towards the end of the eighth century, i.e. about the year 786; when parishes and ecclesiastical benefices came to be settled; for, it is said, Tithes and ecclesiastical benefices being correlative, the one could not exist without the other; for whenever any ecclesiastical person had any portion of Tithes granted to him out of certain lands, this naturally constituted the benefice; the granting of the Tithes of such a manor, or parish being, in fact, a grant of the benefice; as a grant of the benefice did imply a grant of the Tithes: And
TITHES, I.

thus the relation between patrons and incumbents was analogous to that of lord and tenant by the feudal law. Selden of Tithes, 86, &c.

About the year 794, Offa, King of Mercia, (the most potent of all the Saxon kings of his time in this island,) made a law, whereby he gave unto the church the Tithes of all his kingdom; which the historians tell us was done to expiate for the death of Ethelbert, King of the East Angles, whom in the year preceding he had caused basely to be murdered. But that Tithes were before paid in England by way of offerings, according to the antient usage and decrees of the church, appears from the canons of Egbert, archbishop of York, about the year 750; and from an epistle of Boniface, archbishop of Mentz, which he wrote to Cuthbert, archbishop of Canterbury about the same time; and from the seventeenth canon of the general council held for the whole kingdom at Chalcedon, in the year 787. But this law of Offa was that which first gave the church a civil right in them in this land, by way of property and inheritance, and enabled the clergy to gather and recover them as their legal due, by the coercion of the civil pow- er. Yet this establishment of Offa reached no further than the kingdoms of Mercia, (over which Offa reigned,) and Northumberland, until Ethelwulf, about sixty years after, enlarged it for the whole realm of England. Prideaux on Tithes, 166, 167. See post.

It is said, Tithes. oblations, &c. were originally the voluntary gifts of Christians, and that there was not any canon before that of the fourth council of Lateran, anno Dom. 1215, that even supposed Tithes to be due of common right. 2 Wils. 182: But this seems very contrary to other opinions.

Blackstone says, he will not put the title of the clergy to Tithes upon any divine right; though such a right certainly commenced, and as certainly ceased, with the Jewish Theocracy. Yet an honour- able and competent maintenance for the ministers of the gospel is, undoubtedly, jure divino; whatever the particular mode of that main- tenance may be. For, besides the positive precepts of the New Testa- ment, natural reason will tell us, that an order of men, who are se- parated from the world, and excluded from other lucrative profes- sions, for the sake of the rest of mankind, have a right to be furnish- ed with the necessaries, conveniences, and moderate enjoyments of life, at their expence for whose benefit they forego the usual means of providing them. Accordingly all municipal laws have provided a liberal and decent maintenance for their national priests or clergy; ours, in particular, have established this of Tithes, probably in imita- tion of the Jewish law; and perhaps, considering the degenerate state of the world in general, it may be more beneficial to the Eng- lish clergy to found their title on the law of the land, than upon any divine right whatsoever, unacknowledged and unsupported by tem- poral sanctions. 2 Comm. c. 3.

We cannot (continues the commentator) precisely ascertain the time when Tithes were first introduced into this country. Possibly they were contemporary with the planting of Christianity among the Saxons, by Augustin the monk, about the end of the sixth century. But the first mention of them in any written English law appears to be in a constitutional decree, made in a synod held A. D. 786, where- in the payment of Tithes in general is strongly enjoined. Selden, c. 8. § 2. This canon, or decree, which at first bound not the laity, was effectually confirmed by two kingdoms of the Heptarchy, in their
parliamentary conventions of estates, respectively consisting of the Kings of Mercia and Northumberland, the Bishops, Dukes, Senators, and People; which was a few years later than the time of Charlemagne established the payment of them in France, (A.D. 778,) and made that famous division of them into four parts; one to maintain the edifice of the church, the second to support the poor, the third the bishop, and the fourth the parochial clergy. Seld. c. 6. § 7: Spirit of Laws, b. 31. c. 12.

The next authentic mention of them is in the Redus Edwardi et Guthruni; or the laws agreed upon between King Guthrun the Dane, and Alfred and his son Edward the elder, successive Kings of England, about the year 900. This was a kind of treaty between those monarchs, which may be found at large in the Anglo-Saxon laws: Wherein it was necessary, as Guthrun was a Pagan, to provide for the subsistence of the christian clergy under his dominion; and, accordingly, we find the payment of Tithes not only enjoined, but a penalty added upon non-observance. Which law is seconded by the laws of Athelstan, about the year 930. And this is as much as can certainly be traced out, with regard to their legal original. See Wilkins, p. 51: 2 Comm. c. 3.

Upon the first introduction of Tithes, though every man was obliged to pay Tithes in general, yet he might give them to what priests he pleased; which were called arbitrary consecrations of Tithes: Or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the Church, which were then in common. 2 Inst. 646: Hob. 296: Seld. c. 9. § 4. But, when dioceses were divided into parishes, the Tithes of each parish were allotted to its own particular minister; first by common consent, or the appointments of lords of manors, and afterwards by the written law of the land. Ll. Edgar, cc. 1 & 2: Canut. c. 11.

However, arbitrary consecrations of Tithes took place again afterwards, and became in general use till the time of King John. Selden, c. 11. This was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under archbishop Dunstan and his successors; who endeavoured to wean the people from paying their dues to the secular or parochial clergy, (a much more valuable set of men than themselves,) and were then in hopes to have drawn, by sanctimonious pretences to extraordinary of purity of life, all ecclesiastical profits to the coffers of their own societies. And this will naturally enough account for the number and riches of the monasteries, and religious houses which were founded in those days, and which were frequently endowed with Tithes. For a layman, who was obliged to pay his Tithes somewhere, might think it good policy to erect an abbey, and there pay them to his own monks; or grant them to some abbey already erected; since, for this donation, which really cost the patron little or nothing, he might, according to the superstition of the times, have masses for ever sung for his soul. But, in process of years the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of Tithes, it was remedied by Pope Innocent III. about the year, 1200, in a decretal epistle sent to the Archbishop of Canterbury, and dated from the palace of Lateran; which has occasioned Sir Henry Hobart and others to mistake it for a decree of the Council of Lateran, held A. D. 1179, which only prohibited what was called the in-
feodation of Tithes, or their being granted to mere laymen, whereas this letter of Pope Innocent to the Archbishop enjoined the payment of Tithes to the parsons of the respective parishes where every man inhabited, agreeable to what was afterwards directed by the same Pope in other countries. This epistle, says Coke, bound not the lay subjects of this realm; but, being reasonable and just, (and, he might have added, being correspondent to the antient law,) it was allowed of, and so became *Lex terrae*. 2 Inst. 641. This put an effectual stop to all the arbitrary consecrations of Tithes; except some footsteps which still continue in those portions of Tithes, which the parson of one parish hath, though rarely, a right to claim in another; for it is now universally held, that Tithes are due, of common right to the parson of the parish, unless there be a special exemption. *Regist.* 46. *Hob.* 296. This parson of the parish, we have formerly seen, may be either the actual incumbent, or else the appropriator of the benefice; appropriations being a method of endowing monasteries, which seems to have been devised by the regular clergy, by way of substitution to arbitrary consecrations of Tithes. In extraparochial places, the King, by his royal prerogative, has a right to all the Tithes. 2 *Rept.* 2. 44: 2 Inst. 64. See 2 *Comm.* c. 3.

II In general, Tithes are to be paid for every thing that yields an annual increase, as corn, hay, fruit, cattle, poultry, and the like: but not for any thing that is of the substance of the earth, or is not of annual increase; as stone, lime, chalk, and the like: nor for creatures that are of a wild nature, as deer, hawks, &c.; whose increase, so as to profit the owner, is not annual, but casual: though for deer and rabbits Tithes may be payable by special custom. 2 *Comm.* c. 3, & n.

Tithes are due either de jure, or by custom: All tithes which are due de jure, arise from such fruits of the earth as renew annually; or from the profit that accrues from the labour of a man. Hence it follows, that such Tithes can never be part of, but must always be collateral to, the land from which they arise. 11 *Rept.* 13, 14.

Nay, Tithes due de jure are so collateral to every kind of land, that if a lease is made of the glebe belonging to a rectory, with all the profits and advantages thereof; and there is besides a covenant, that the rent to be paid shall be in full satisfaction of every kind of exaction and demand, belonging to the rectory; yet, as the glebe is not expressly discharged of Tithes, the lessee shall be liable to the payment thereof. 11 *Rept.* 13, 14: 1 *Roll. Abr.* 655. *pl.* 1: *Cro. Eliz.* 162. 261: *Cro. Car.* 362.

No Tithe is due de jure of the produce of a mine or of a quarry; because this is not a fruit of the earth renewing annually; but is the substance of the earth, and has perhaps been so for a great number of years. *F. N. B.* 53: *Bro. Dism.* *pl.* 18: 2 *Inst.* 631: 1 *Roll. Abr.* 637: *Cro. Eliz.* 277.

No Tithe is due de jure of any thing (generally) which is part of the soil, and does not renew annually; but it may be due by custom. Vide 2 *Vern.* 46: 1 *Roll. Abr.* 637. *pl.* 5: 2 *Mod.* 77: 1 *Mod.* 35: 1 *Roll. Abr.* 642. *s. pl.* 7, 8.

No Tithes are due de jure of houses; for Tithes are only due de jure of such things as renew from year to year. 11 *Rept.* 16, *Graunt’s* case. But houses in London are, by decree, which was confirmed by an Act of Parliament, made liable to the payment of Tithes. 2 *Inst.* 659. See *stats.* 37 *H. 8.* c. 12: 22 & 23 *C. 2.* c. 15. Before this decree,
houses in London were by custom liable to pay Tithes; the quantum to be paid being thereby only settled, as to such houses for which there was no customary payment. 2 Inst. 659: Hard. 116: Gibb. Eq. Rep. 193, 194. See post V. There is likewise in most antient cities and boroughs, a custom to pay Tithes for houses; without which there would be no maintenance in many parishes for the Clergy. 11 Rep. 16: Bunb. 102.

It was held by three Barons of the Exchequer, Price, Montague, and Page, contrary to the opinion of Bury, Chief Baron, that two Tithes may be due of the same thing, one de jure, the other by custom. Bunb. 43.

In § 7. of stat. 2 & 3 Ed. 6. c. 13. common day-labourers are exempted from the payment of personal Tithes. No personal Tithes are due from servants in husbandry; for by their labour the Tithes of many other things are increased. 1 Roll. Abr. 646. pl. 1. It was settled, by a decree of the House of Lords, upon an appeal from a decree of the Court of Exchequer, that only personal Tithes are due from the occupier of a corn-mill. 1 Eq. Abr. 366: 2 P. Wms. 463: Bro. P. C.

The stat. 9 Ed. 2 st. 1. c. 5. (as to occupiers of mills, paying Tithes,) provides, that new erected mills shall be liable to the payment of Tithes. But, as nothing therein is said concerning antient mills, there can be no doubt, that such antient mills, as before the making of this statute were liable to pay Tithes, continued afterwards to be liable. 12 Mod. 243: 3 Bulst. 212.

No personal Tithe is due of the profit which a man receives without personal labour, or of the profit which one man receives from the labour of another. 1 Roll. Abr. 655. pl. 1. pl. 2: 2 Inst. 621. 6. 9. If a man lets a ship to a fisherman, no personal Tithe is due of the money received for the use of such ship; because this is a profit without personal labour. 1 Roll. Abr. 656, n. pl. 2. Vide 1 Roll. Abr. 656, n. pl. 3: 2 Bulst. 141.

Personal Tithes are only payable by a special custom; and perhaps are now paid no where in England; except for fish caught in the sea, and for corn-mills. 3 Burn’s Eccl. Law, 473.

III. Such Tithes as arise immediately from the fruits of the earth, as from corn, hay, hemp, hops; and all kinds of fruits, seeds, and herbs, are called Predial Tithes. 2 Inst. 649. They are so called because they arise immediately from the fruits of the farm, (predium,) or earth. 2 Inst. 647. By the Ecclesiastical Law, many things are liable to the payment of predial Tithes, which by the Common Law, or in the Courts of Equity, are not held to be so. 2 Inst. 621: 4 Mod. 344. This may cause, and has caused some confusion. In the former case, the last resort is to the delegates, in the latter, to the house of lords. Shaw’s Law of Tithes, 139. The canons must, in all cases, give way to the custom of the place. Id. 112.

The design, under this head, is to shew what things are liable by the common law to pay predial Tithes.

In doing this, it will appear, that some things, which are in the general exempted therefrom, become, by custom, liable to the payment of predial Tithes. 1 Roll. Abr. 637. E. pl. 2: 642. S. pl. 7. pl. 8.

It will also appear, that divers things, which are in the general liable thereto, are, under particular circumstances, exempted from the payment of such Tithes. 1 Roll. Abr. 645. pl. 11: Cro. Eliz. 475: Freem. 335: 12 Mod. 235.
But wherever any fraud is used, to bring a thing under those circumstances, by reason of which it would, if it had come fairly under them, have been exempted from the payment of predial Tithes, it is by such fraud rendered liable thereto. Cro. Eliz. 475: Freem. 335.

The predial great Tithes now appear to be corn, grain, hay, clover, grass (when made into hay), wood, underwood, and beans and pease (when sown in the fields). The predial small Tithes are flax, hemp, madder, hops, garden roots, and herbs, as potatoes, turnips, parsley, cabbage, saffron; and the fruits of all kinds of trees, as apples, pears, acorns, &c. All kinds of seeds, as turnip-seed, parsley-seed, rape-seed, carraway-seed, aniseed, clover-seed, and beans and pease if sown in a garden. Shaw's Law of Tithes.

As it would be tedious to enumerate all the things which are liable to predial Tithes, only those shall be mentioned concerning the Tithes of which some question has arisen; but, from such as will be mentioned, it may be easily collected of what other things predial Tithes are due.

Agistment. Agisting, in the strict sense of the word, means the depasturing of a beast the property of a stranger. But this word is constantly used, in the books, for depasturing the beast of an occupier of land, as well as that of a stranger. 5 New Abr. 53. The Tithe of agistment is the tenth part of the value of the keeping or depasturing such cattle as are liable to pay it. Agistment is derived from the French geyser, gister (jacere;) because the beasts are levant and couchant during the time they are on the land. Agistment Tithe seems rather a mixed than strictly a predial Tithe.

An occupier of land is not liable to pay Tithe for the pasture of horses, or other beasts, which are used in husbandry in the parish in which they are depastured, because the Tithe of corn is by their labour increased. 1 Roll. Abr. 646. pl. 2. pl. 3. pl. 6. pl. 7: Cro. Eliz. 446: Ld. Raym. 130. But, if horses or other beasts are used in husbandry out of the parish in which they are depastured, an Agistment Tithe is due for them. 7 Mod. 114: Ld. Raym. 130.

It seems to be the better opinion, that no Tithe is due for the pasture of a saddle-horse, which an occupier of land keeps for himself or servants to ride upon: 1 Roll. Abr. 642. pl. 4: Cro. Jac. 430: Bulst. 171: Bunb. 3. No Tithe is due for the pasture of milch cattle, which are milked in the parish in which they are depastured; because Tithe is paid of the milk of such cattle. 1 Roll. Abr. 646. pl. 2: Ld. Raym. 150: Cro. Eliz. 446.

Milch cattle, which are reserved for calving, shall pay no Tithe for their pasture whilst they are dry. But, if they are afterwards sold, or milked in another parish, an Agistment Tithe is due for the time they were dry. Hett. 100: Ld. Raym. 130. No Tithe is due from an occupier of land, for the pasture of young cattle, reared to be used in husbandry, or for the pail. Cro. Eliz. 476. But if such young beasts are sold, before they come to such perfection as to be fit for husbandry, or before they give milk, an Agistment Tithe must be paid for them. Hett. 86.


But if any cattle which have neither been used in husbandry, nor
for the pail, are, after being kept some time, killed, to be spent in the family of the occupier of the land on which they were depastured, no Tithe is due for their pasture. Jenk. 281. pl. 6: Cro. Eliz. 446. 476: Cro. Car. 237.—It is in general true, that an Agistment Tithe is due, for depasturing any sort of cattle the property of a stranger. Cro. Eliz. 276: Cro. Jac. 276: Bunb. 1: Freem. 329. No Tithe is due for the cattle, either of a stranger or an occupier, which are depastured in grounds that have in the same year paid Tithe of hay. Bunb. 10: 79: Poph. 142: 2 Roll. Refp. 191.

No agistment Tithe is due for such beasts, either of a stranger or an occupier, as are depastured on the headlands of ploughed fields; provided that these are not wider than is sufficient to turn the plough and horses upon. 1 Roll. Abr. 646. pl. 9. No Tithe is due for such cattle as are depastured upon land that has the same year paid Tithes of corn. Bro. Dism. 18: 1 Mod. 216. If land, which has paid Tithe of corn in one year, is left unsown the next year, no Agistment is due for such land; because, by this lying fresh, the Tithe of the next crop of corn is increased. 1 Roll. Abr. 642. pl. 9: But if land, which has paid Tithe of corn, is suffered to lie fallow longer than by the course of husbandry is usual, an Agistment Tithe is due for the beasts depastured upon such land. Stch. Abr. 1008.

As the question, whether an Agistment Tithe is due for sheep does not seem to be quite settled, it will not be amiss to refer to the principal cases in which this has been agitated, which are, 1 Roll. Refp. 63. pl. 7: 1 Roll. Abr. 641, 642. pl. 8: Poph. 197: Cro. Car. 207: 1 Roll. Abr. 647. pl. 13: Bunb. 90: Gilb. Refp. in Equity 231: Bunb. 313.

This depends upon the question, whether there is a new increase; as if, after shearing, the sheep are fed on turnips, which, if severed, would be tithable. See Show. P. C. 192: Bunb. 314.

There is a peculiar difficulty attending this Tithe, that it cannot be taken in kind; custom is therefore the principal rule to go by in payment of it; and the old decisions on the subject vary so much, that it would be difficult to obtain any general inference from them.—Burn says, in all cases, the Tithe of Agistment of barren and unprofitable cattle is to be paid according to the value of the keeping of each per week; and the value of the keeping of a sheep, beast, or horse, upon any particular lands, is easily ascertained from the usual prices given for their depasture per week in the neighbourhood, where profitable cattle are kept at the same time upon the lands together with them, or not. 3 Burn. Ec. L. 448.

The parson, vicar, or other proprietor of the Tithes, is entitled to agistment Tithe de jure; because the grass which is eat is of common right tithable. Ld. Raym. 137: 2 Salk. 655: 2 Inst. 651.

CORN.—It is laid down in some books, that no Tithe is due of the rakings of corn involuntarily scattered. 1 Roll. Abr. 645. pl. 11: Cro. Eliz. 278: Freem. 335: Moor 278. But if more of any sort of corn is fraudulently scattered, than, if proper care had been taken, would have been scattered, Tithe is due of the rakings of such corn. Cro. Eliz. 475: Freemem 335. And it has been said by Holt, Ch. J. that Tithe is due of the rakings of all corn, except such as is bound up in sheaves. 12 Mod. 233. No Tithes are due of the stubbles left in corn-fields, after mowing or reaping the corn. 2 Inst. 261: 1 Roll. Abr. 640. pl. 14. See post VI.
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Hay.—Tithes of hay is to be paid, although beasts of the plough or pail, or sheep, are to be foddered with such hay. Cro. Jac. 47, Webb. v. Warner: 1 Roll. Abr. 650. pl. 12: 12 Mod. 497. But no Tithe is due of hay grown upon the head-lands of ploughed grounds, provided that such head-lands are not wider than is sufficient to turn the plough and horses upon. 1 Roll. Abr. 646. pl. 19. See post. VI. It is laid down in one old case, that if a man cuts down grass, and, while it is in the swathes, carries it away and gives it to his plough cattle, not having sufficient sustenance for them otherwise, no Tithe is due thereof. 1 Roll. Abr. 645. Crawley v. Wells, Mich. 9 Car. 1. In one case, the Court of Exchequer seemed to be of opinion, that no Tithe is due of vetches or clover, cut green, and given to cattle in husbandry. Bunb. 279. But in another case, it was afterwards held, that the right to Tithe of hay accrues upon mowing the grass, and that the subsequent application of this, while it is in grass, or when it is made into Hay, shall not, although beasts of the plough or pail are fed with it, take away this right. 12 Mod. 498. And the doctrine of this last case coincides with that of an old case, in which it was held, that tares cut green, and given to beasts of the plough, may, by special custom, be exempted from the payment of Tithes; from whence it follows that such tares are not exempted de jure. 12 Mod. 498. See post VI.

It is laid down in some books, that no Tithe is due of aftermath Hay; because Tithe can only be due once in the same year from the same land. J. N. B. 53: Bro. Dism. pl. 16: 2 Inst. 262; 11 Rep. 16: Cro. Jac. 42: Lord Raym. 243. But it is held in other books, that Tithe is due of aftermath Hay. 1 Roll. Abr. 64, pl. 11: Cro. Eliz. 660: Cro. Jac. 116: Cro. Car. 403: 12 Mod. 498: Bunb. 10. And the principle upon which the doctrine, that no Tithe is due of aftermath hay, is founded, is denied in some modern cases.

In some of these it is laid down, that Tithes shall be paid of divers crops grown upon the same land in the same year. Bunb. 19. 314. In others it is held, wherever there is, in the same year, a new increase from the same thing, Tithe is due. Bunb. 9: Gilb. Rep. in Eq. 231.

Wood.—Tithe of wood is not due of common right, because Wood does not renew annually: But it was, in very antient times, paid in many places by custom. 2 Inst. 642: 12 Mod. 111: Salk. 656: Comb. 404: Bunb. 61.

A constitution was made, in the seventeenth year of the reign of Edward the Third, by John Stratford, archbishop of Canterbury, that Tithes shall be paid within this province, of Silva caedua. 2 Inst. 642: Patm. 37, 38.

Several petitions having been presented to the King, complaining of the clergy for taking Tithe of gross-wood and underwood, by virtue of this constitution; at length, a statute was made in these words; "At the complaint of the great men and commoners, shewing by their petition that when they sell their gross-wood, of the age of 20 or 40 years, and of a greater age, to merchants, to their own profit, and to the aid of the king in his wars, the parsons and vicars of holy church do implead and trouble the said merchants, in court christian, for the Tithe of the said wood, under the denomination of Silva caedua, by the reason of which they cannot sell their wood for the real value, to the great damage of themselves and the realm; it is ordained and established, that a prohibition in this case shall be grant-
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ed, and upon the same an attachment, as it hath hitherto been." Stat.
45 Ed. 3. c. 3.

From the petitions and answers, from this statute, and from books
of the best authority, it appears plainly, that no Tithe of gross-wood
was due de jure at the common law; and that the demand thereof
as such, by virtue of the constitution made by the archbishop was an
encroachment. 2 Inst. 642: Stat. 45 Ed. 3. c. 3: Plowd. 470: Bro. Pa-

After the making of this statute, prohibitions were constantly
granted to suits instituted in spiritual courts for Tithes of gross-
wood. But two questions often arose; what is gross-wood? and of
what age gross-wood must be, before it is exempted from the pay-
ment of Tithe? 2 Inst. 643, 644, 645.

For the putting an end to these, it hath been long settled, that by
gross-wood is not meant small wood nor large wood, but such wood
as is generally, or by the custom of a particular part of the country,
used as timber; and that all such wood, if of the age of 20 years, is
exempted from the payment of Tithe. 2 Inst. 642, 643: Cro. Eliz. 1:
12 Mod. 524: Bunb. 127. Oaks, ashes, and elms, being universally
used as timber, it hath been always held, that such trees, if of the age
of 20 years, are gross-wood. 2 Inst. 642. It hath been held, upon
great deliberation, (notwithstanding what is laid down to the contrary
in Plowd. 470.) that a hornbean tree, if of the age of 20 years, is
gross-wood, because this is used in building and repairing. It has for
the same reason been held, that an aspen-tree, of the age of 20 years,
is gross-wood. 2 Inst. 643.

A difficulty often occurs in fixing the exact age of timber; to avoid
this, in many places where wood is plentiful, it is the custom to esti-
mate the same by measuring round the middle part of the tree; and
if it is 24 inches in circumference, it is deemed 20 years growth; but
if under that measure it is accounted underwood. Shaw's Law of
Tithes.

Tithes are not in the general due of beech, birch, hazel, willow,
sallow, alder, maple, or white-thorn trees, or of any fruit trees, of
whatsoever age they are; because these are not timber Plowd. 470:

But, if the wood of any of these trees is used in a particular part of
the country, where timber is scarce, in building and repairing, no
Tithe is due of such wood, if of the age of 20 years, in that part of
the country. Hob. 289: Brownl. 94. It is laid down in several old
books, that if a timber-tree, after it is of the age of 20 years, decays
so as to be unfit to be used in building, no Tithe is due of the wood
of this tree, because it was once privileged. 11 Rep. 48: Cro. Eliz.

If the wood of a coppice has been usually felled for firing, such
Wood shall pay Tithe, although it stands till it be 40 years of age.
Sid. 300: 1 Lev. 189.

If, when the wood of coppice is felled, some trees growing therein,
which are of the age of 20 years, and have never been lopped, are
lopped, and these loppings are promiscuously bound up in faggots
with the coppice-wood, Tithe must be paid of the whole; because it
would be very difficult to separate the tillable wood from that which
is not so, and the owner ought to suffer for his folly in mixing them.
Walton v. Tryon, 5 Bac. Abr.
If the wood of a timber-tree is sold for firing, it was determined in one case, that although the tree was of the age of 20 years, it was liable to pay Tithe. *Bunb. 99. Greenaway v. The Earl of Kent.* The Reporter of this case mentions four others, in which the same had been held; and says, that it was in one of them laid down, that the wood of timber-trees is only exempted from the payment of Tithe, on the account of its being used in building.

The contrary doctrine, however, of the old books, was confirmed by a subsequent case in the court of chancery. A bill being brought for Tithe of the loppings of timber-trees, which had been sold for firing, it was insisted that this wood, which would otherwise have been exempted from the payment of Tithe, was liable thereto, because it was sold to be used for firing; and the cases just now cited were relied upon. But the bill was dismissed; and by *Hardwicke* chancellor.

—in the case in *1 Lev. 189,* and *Seld. 300,* the wood, in question was coppice-wood, which had been usually felled for firing; and such wood, of whatever age it is, is always tithable. The case of *Greenaway* and the Earl of *Kent* is quite a singular one, and is not law: for in the case of *Bibye* and *Huxley,* *Hil. 11 Geo. 1.* it was agreed, that no Tithe is due of the wood of a timber-tree, which has been once privileged from the payment of Tithe, although such Wood is sold to be used for firing. *Walton v. Tryon,* *Mich. 25 Geo. 2:* 5 Bac. Abr. See farther, *Bro. Dism. pl. 14:* 11 *Ref. 4:* *Cro. El. 4:* *Godb. 173:* *Roll. Abr. 640,* *pl. 3.* Held also in the said case of *Walton v. Tryon,* that whenever a tree has been lopped before it was of the age of 20 years, all future loppings; although ever so old, are liable to pay Tithe. If a tree which was once privileged from paying Tithe, is felled, the germins that spring from the root of such tree are also privileged. *11 Ref. 48.* *Lisford’s case.* But in the case already cited, it was said by *Hardwicke,* chancellor, that all germins which spring from the roots of trees that have been felled, are tithable. *Walton v. Tryon.*

IV. Such Tithes as arise from beasts or fowls which are fed with the fruits of the earth, are called *mixed* Tithes. *2 Inst. 649:* 1 *Roll. Abr. 635.* Many things are, by the ecclesiastical law, liable to pay such Tithes, which by the common law are not. *2 Inst. 621:* 4 *Mod. 344.*

The design under this head is to shew, of what mixed Tithes are due by the common law.

The same general observations as to *custom,* *frauds,* and exemption, apply here as to the former kind of *predial* Tithes.

The Tithes of colts, calves, lambs, kids, pigs, milk, cheese, agimtment or pasturage, eggs, chickens, &c. are mixed Tithes. *Shaw’s Law of Tithes.*

Tithes are in general due of the young of all beasts, except such as are *fere nature.* But none are due of young hounds, apes, or the like, because such beasts are kept only for pleasure. *Bro. Dism. pl. 20.* No Tithe is due of the young of deer, for these are *fere natura.* *2 Inst. 651.* And, for the same reason, none is due, but by custom, of young conies. *1 Roll. Abr. 635. C. pl. 3:* *Cro. Car. 339:* 1 *Ventr. 5.*

The young of all birds and fowls, except such as are *fere nature,* are in the general liable to pay Tithes; unless the eggs of such birds
or fowls have before paid tithes. 1 Roll. Abr. 642. pt. 6: 2 P. Wms. 463. But no tithes are due either of the eggs or young of any birds or fowls which are kept only for pleasure. Bro. Dism. pl. 20. No tithes are due of the eggs or young of partridges or pheasants, because these are feræ nature. Moor 599: 2 P. Wms. 463. If a man keeps pheasants, in an inclosed wood, whose wings are clipped, and from their eggs hatches and brings up young ones, no tithe is due of these young pheasants, although none was paid for their eggs; because the old ones are not reclaimed, and would go out of the inclosure if their wings were not clipped. 1 Roll. Abr. 636. pt. 5.

It was heretofore held, that neither the eggs nor young of turkeys are titheable, turkeys being feræ nature. Moor 599. But it is now held that, as turkeys are now as tame as hens or other poultry, tithe is due of their eggs or young. 2 P. Wms. 463. No tithe is due of such young pigeons as are spent in the house of the person who breeds them. 1 Roll. Abr. 644. Z. pt. 4. pt. 6: 1 Ventr. 5: 12 Mod. 77: 12 Mod. 47. But if any young pigeons are sold, tithe is due of them. 1 Roll. Abr. 644. Z. pt. 5. pt. 6.

If a man pay tithe of young lambs, at Marks-tide, and at Midsummer assises shears the other nine parts of the lambs, tithe is due of the wool; for although there are but two months between the time of paying tithe-lambs which were not shorn, and the shearing of the residue, there is in this case a new increase. 1 Roll. Abr. 642. R. pt. 7: Bunb. 90. If a man shears his sheep about their necks at Michaelmas time, to preserve their fleeces from the brambles, no tithe is due of this wool; for it appears that this, which is done before their wool is much grown, can never be for the sake of the wool. 1 Roll. Abr. 645. pt. 16. If a man, after their wool is well grown, shear his sheep about their necks to preserve them from vermin, no tithe is due of the wool. 1 Roll. Abr. 645. pt. 14.

If a man, a little before shearing time, cuts dirty locks of wool from his sheep to preserve them from vermin, no tithe is due of such wool. 1 Roll. Abr. 646. pt. 17.

But in any of these cases, if more wool than ought to have been cut off, is fraudulently cut off, tithe must be paid of the wool. 1 Roll. Abr. 645. pt. 15; 646. pt. 17. Tithe is due of the wool of such sheep as are killed to be spent in the house. 1 Roll. Abr. 646. pt. 18: Cont. Litt. Refi. 31.

Fish taken in a pond, or in any inclosed river, are liable to pay tithe. 1 Roll. Abr. 636. pt. 4. pt. 6. pt. 7. But no tithe is due, except by custom, of fish taken in the sea, or in any open river, although they are taken by a person who has a several fishery, because such fish are feræ nature. Noy 108: 1 Roll. Abr. 636. pt. 4. pt. 6. pt. 7: Cro. Car. 332: 1 Lev. 179: Sid. 278. Honey and bees-wax are both titheable. Fitz. N. B. 51: 1 Roll. Abr. 635, C. pt. 1: Cro. Car. 559. But where the tithe of their honey and wax has been paid, no tithe is due of the bees. Cro. Car. 404. No tithe is due of the milk spent in the house of a farmer, provided such house stands in that parish in which the cows are milked. Ld. Raym. 129. See post VI.

V. The Subtraction of withholding of tithes from the parson or vicar, whether the former be a clergyman or a lay appropriator, is among the pecuniary causes cognizable in the ecclesiastical court.—But herein a distinction must be taken; for the ecclesiastical courts
have no jurisdiction to try the right of tithes, unless between spiritual persons; but in ordinary cases, between spiritual men and lay-men, are only to compel the payment of them, when the right is not disputed. 2 Inst. 354, 489, 490. By the statute, or rather writ, of circumspecte agaris, it is declared, that the court christian shall not be prohibited from holding plea, "si rector petit versus parochianos oblationes et decimas debitas et consuetas." So that if any dispute arises whether such Tithes be due and accustomed, this cannot be determined in the ecclesiastical court, but before the king's courts of the common law; as such question affects the temporal inheritance, and the determination must bind the real property. But where the right does not come into question, but only the fact, whether or no the Tithes allowed to be due are really subtracted or withdrawn, this is a transient personal injury, for which the remedy may properly be had in the spiritual court; viz. the recovery of the Tithes, or their equivalent.

By stat. 2 & 3 Ed. 6. c. 13. it is enacted, that if any person shall carry off his predial Tithes, (viz. of corn, hay, or the like,) before the tenth part is duly set forth, or agreement is made with the proprietor, or shall willingly withdraw his Tithes of the same, or shall stop or hinder the proprietor of the Tithes, or his deputy, from viewing or carrying them away; such offender shall pay double the value of the Tithes, with costs, to be recovered before the ecclesiastical judge, according to the King's ecclesiastical laws. By a former clause of the same statute, the treble value of the Tithes, so subtracted or withheld, may be sued for in the temporal courts; which is equivalent to the double value to be sued for in the ecclesiastical: For one may sue for and recover in the ecclesiastical courts, the Tithes themselves, or a recompence for them, by the antient law; to which the suit for the double value is superadded by the statute: But as no suit lay in the temporal courts for the subtraction of Tithes themselves, therefore the statute gave a treble forfeiture, if sued for there; in order to make the course of justice uniform, by giving the same reparation in one court as in the other. 2 Inst. 250.

In an action on this statute, 2 & 3 Ed. 6. c. 13, for the treble value of corn omitted to be set out, it is not enough for the defendant to shew the existence in fact of a custom in the parish to set out the 11th instead of the 10th mow: for the validity as well as existence of such a custom is properly triable in this form of action, though penal in its nature: being given to the party grieved, and his only remedy at common law for subtraction of the Tithe due to him. 8 East's Rep. 178.

By stats. 27 H. 8. c. 20: 32 H. 8. c. 7: upon complaint by the ecclesiastical judge, of any contempt or misbehaviour by a defendant in any suit for Tithes, any privy counsellor or any two justices of the peace, (or, in case of disobedience to a definitive sentence, any two justices of the peace,) may commit the party to prison, without bail or mainprise, till he enters into a recognizance, with sufficient securities, to give due obedience to the process and sentence of the court.

However, it now seldom happens that Tithes are sued for at all in the spiritual court; for if the defendant pleads any custom, modus, composition, or other matter whereby the right of tithing is called in question, this takes it out of the jurisdiction of the ecclesiastical judges; for the law will not suffer the existence of such a right to be
decided by the sentence of any single, much less an ecclesiastical, judge; without the verdict of a jury. 3 Comm. c. 7.

The following statutes have also operated to abridge the power of the ecclesiastical court in this respect.

By stat. 7 & 8 W. 3. c. 6. § 1: it is for the more easy recovery of small Tithes, where the same do not amount to above the yearly value of 40s. from any one person, enacted, "that if any person shall fail in payment for twenty days after demand, the parson may make complaint in writing to two justices of the peace, (neither being patron, nor interested,) who, after summoning the party, are to hear and determine the complaint, give a reasonable allowance for the Tithes, and costs, not exceeding 10s.

"If the person complained against insists on any prescription, composition, modus decimandi, or other title, delivers the same in writing to the justices, and gives to the party complaining sufficient security to pay costs at law, if the title is not allowed, the justices are not to give judgment. The justices have power to give costs, not exceeding 10s., to the party prosecuted, if they find the complaint false and vexatious. The act not to extend to Tithes within the city of London, or in any other place where the same are settled by any act of parliament. An appeal is given to the sessions, and no proceedings or judgment, had by virtue of this act, to be removed or superseded, by any writ of certiorari, or other writ whatsoever, unless the title of such Tithes shall be in question."

By stat. 7 & 8 W. 3. c. 34. § 4. where any Quaker shall refuse to pay, or compound for, his Great or Small Tithes, it shall be lawful for the two next Justices of the Peace of the same county, other than such Justice of the Peace as is patron of the church or chapel to which the Tithes belong, or any ways interested, upon complaint, to convene before them such Quaker, and to examine upon oath the truth of the complaint, and to ascertain what is due from such Quaker, and by order under their hands and seals to direct the payment thereof, so as the sum ordered do not exceed 10l.; and, upon refusal of the Quaker to pay, to levy the money. Any person aggrieved, may appeal to the next General Quarter Sessions.

No proceedings, or judgment, had by virtue of this act, shall be removed or superseded by any writ of certiorari, or other writ out of His Majesty’s Courts at Westminster, or any other Court whatsoever, unless the title to such Tithes shall be in question.

The material point as to granting a certiorari is, whether the title to the Tithes is really in question or not. The general denial of a right to Tithes, by a Quaker, is not such a controverting the title, as shall enable him to have a certiorari. 1 Burr. 485.

By stat. 1 Geo. 1. st. 2. c. 6. § 2. the like remedy is given for the recovery of all Tithes and all other ecclesiastical dues from Quakers, as by stat. 7 & 8 W. 3. c. 34. is given for Tithes to the value of 10l.

And such Justices of the Peace, upon complaint of any parson, vicar, curate, farmer or proprietor of such Tithes, or other person who ought to have, receive, or collect any such Tithes or dues, may proceed in a similar manner as directed by the former act, touching Quakers.

The Tithes of houses in London, which are regulated by stat. 37 H. 8. c. 12. may be recovered in the Court of Exchequer. Bennet v. Treffpass, Bro. P. C.—Under stat. 22 & 23 Car. 2. c. 15. The Tithes
of all the Parishes in London, injured by the great fire in 1666, are settled, to be levied by an equal rate; and, on non-payment, the Lord Mayor is to grant a warrant of distress for the same; or, on his refusal, the Lord Chancellor, or two Barons of the Exchequer, may grant such warrant; and all Courts Ecclesiastical and Temporal are ousted of their jurisdiction in this case, by this statute.—These Tithes are a real charge on the houses, payable though they are empty, and leivable on the goods of the succeeding occupier; and appeal lies from the Lord Mayor to the Lord Chancellor. 3 Atk. 639.

VI. Acorns, as they yearly increase, are liable to the payment of Tithes; but this is where they are gathered and sold, and reduced to a certain profit; not when they drop, and the hogs eat them. 2 Inst. 643: Heil. 27.

After mawth, or After Pasture, paysno Tithes, except by custom; being the remains of what was before tithed. 2 Inst. 652: 2 Danv. Abr. 589, title Dismes.—Agistment of cattle upon pasture land, which hath paid no other Tithes that year, pays Tithe for the cattle. See ante III.—Alder trees pay Tithes, notwithstanding they are above 20 years' growth, not being timber.—Ash is timber, and therefore, if these trees are above twenty years' growth, they are Tithe free.—Asp or Aspin Trees are exempted, if beyond that growth, in places where they are used for timber. 2 Cro. 199: 2 Inst. 643.

Bark of Trees is not tithable, if the trees wherein produced were timber. 1 Rep. 49.—Barren Land, which is so of itself nature, pays no Tithe; where land is barren, and not manurable without some extraordinary charge, in respect of such charge, and for the advancement of husbandry, such land being converted to tillage, shall, for the first seven years after the improvement, be discharged from Tithes; by stat. 2 & 3 Ed. 6. c. 13. But the barren land, during the seven years of improvement, shall pay such Small Tithes as have been accustomedly paid before; and afterwards to pay the full Tithe according to the improvement. And if land is over-run with bushes, or become unprofitable by bad husbandry, it cannot properly be called barren land; for if it be grubbed, or ploughed and sowed, it immediately pays Tithes. 2 Inst. 656: Cro. Eliz. 475.—Beech Trees, where timber is scarce, and these trees are used for building, if above twenty years' growth, to be timber are privileged from Tithes, by stat. 45 Edw. 3. c. 3. though this tree is not naturally timber, for it is necessity makes it so. 2 Danv. Ab. 589. Bees are tithable for their Honey and Wax, by the tenth measure and tenth pound. It has been a question, whether the tenth Swarm can be demanded for Tithes of Bees, because Bees are fera natura; but when the Bees are gathered into hives, they are then under custody, and may pay Tithe by the Hive or Swarm; but the Tithe is generally paid in the tenth part of the Honey or Wax. 1 Roll. Abr. 651: 3 Cro. 404. 559.—Birch Wood is tithable though of above 20 years' growth. 2 Inst. 643.—Briars pay not Tithes, for they are made of parcel of the freehold, and are of the substance of the earth, not an annual increase, 1 Cro. 1.—Broom shall pay Tithe; but it may be discharged by custom, if burnt in the owner's house, or kept for husbandry. 2 Danv. Abr. 597.

Calves are tithable, and the Tenth Calf is due to the Parson, when weaned; and he is not obliged to take it before; but if in one year a person hath not the number of ten Calves, the Parson is not entitled
to Tithes in kind for that year, without special custom for it; though he may take it in the next year, throwing both years together; and it is a good custom to pay one Calf in seven, where there hath been no more in one year; and where a man sells a Calf to pay the tenth of the value, or for the Parson to have the right shoulder, &c. 1 Rol. Abr. 648: Raym. 277.

Cattle sold pay Tithe; but not Cattle kept for the plough or pail, which shall pay no Tithe for their pasture, by reason the parson hath the benefit of the labour of Plough-Cattle in tilling the ground, by the Tithe of Corn, and Tithe Milk for those kept for the pail; yet if such Cattle bought are sold before used; or if, being past their labour, the Cows are barren, and afterwards fatted in order to sell, Tithes shall be paid for them; though if the owner kill and spend the Cattle in his own house, no Tithe is due for them, being for his provision, to support him in his labour about other affairs for which the Parson hath Tithes. Cattle feeding on large commons, where the bounds of the parish are not certainly known, shall pay Tithes to the Parson of the parish where the owner lives; and if fed in several parishes, and they continue above a month in each parish, Tithes shall be paid to the two Parsons proportionably. 1 Rol. Abr. 635. 646, 647: Hardr. 35: Stat. 2 & 3 Ed. 6. c. 13. § 3.—Chalk and Chalk-Pits are not tithable; nor is Clay or Coal as they are part of the freehold, and not annual, to pay Tithes. 2 Inst. 651.—Cheese pays Tithe by custom, where Tithe is not paid for the Milk; but if the milk pays a Tithe, the Cheese pays none; and it may be a good custom to pay the tenth Cheese made in such a month, for all Tithe Milk in that year. 1 Rol. Abr. 651.—See Milk.—Chickens are not tithable, if Tithe is paid for the Eggs. 1 Rol. Abr. 642.—Colts pay Tithes in the same manner as Calves. Ibid.—Conies are tithable only by custom, for those that are sold, not for such as are spent in the house. 2 Danv. Abr. 583.—Corn pays a predial Tithe; it is tithed by the tenth cock, heap, or sheaf; which, if the owner do not set out, he may be sued in an action upon the Stat. 2 & 3 Ed. 6. c. 13. And if the Parishioner will not sow his land usually sown, the Parson may bring his action against him. When Tithe Corn is set forth, the Law gives the Parson a reasonable time to carry it away, and if he suffer the same to lie too long on the land, to the prejudice of the owner thereof, he may be liable to an action; but the Parson may not set out the Tithes himself, or take them away without leave. 1 Roll. Abr. 644: 1 Sid. 283: 2 Vent. 48: Ley 70.

Deer are not tithable, for they are ferae naturae; though in parks, &c. they pay Tithes by custom. 2 Inst. 651.—Doves kept in a dove-house, if they are not spent in the owner's house, are tithable. 1 Vent. 5.

Eggs pay Tithes when Tithes are not paid for the young. 1 Roll. Abr. 642. Elm trees, being timber, are discharged from the payment of Tithes, but not if under twenty years' growth. 2 Inst. 643.

Fallow Ground is not tithable for the pasture in that year in which it lies fallow, unless it remain beyond the course of husbandry; because it improves and renders the land more fertile by lying fresh. 1 Roll. Abr. 642.—Fens being drained and made manurable, or converted into pasture, are subject to the payment of Tithes. 1 Roll. Ref. 354.—Fish taken in the sea, or common rivers, are tithable only by custom, and the Tithe is to be paid in money; and not the tenth fish;
but fish in ponds and rivers inclosed, ought to be set forth as a Tithe in kind. 2 Danv. Abr. 583, 584.—Flax; every acre of flax or hemp sown shall pay yearly 5s. for Tithe, and no more. Stat. 11 & 13 W. 3. c. 16. A former act (3 & 4 W. & M. c. 3.) fixed the modus at 4s. Forest lands shall pay no Tithes while in the hands of the King, though such lands in the hands of a subject shall pay Tithes; and if a forest shall be disafforested, and within a parish, it shall pay Tithes. 1 Roll. Abr. 655: 3 Cro. 94. Fowls, as hens, geese, ducks, are to pay Tithes, either in eggs or the young, according to custom, but not in both; So of Turks it is now resolved, that Tithes are due of their eggs or young. 2 P. Wms. 463.—Fruit, apples, pears, plumbs, cherries, &c. pay Tithes in kind when gathered, and ought to be set out according to the statute. 2 Inst. 621.—Fruit Trees cut down and sold, are not tithable, if they have paid Tithe-fruit that year before cut. Ibid. 652.—Furzes, if sold, pay Tithe, not if used for fuel in the house, or to make pens for sheep, &c. Wood's Inst. 166.

Gardens are tithable as lands, and therefore Tithes in kind are due for all herbs, plants, and seeds sowed in them; but money is generally paid by custom or agreement.—Grass mown is tithable by payment of the tenth cock, or according to custom; but for grass cut in swaths for the sustenance of plough cattle only, not made into hay, no Tithe is to be paid. Grass or corn, &c. when sold standing, the buyer shall pay the Tithes; and if sold after cut and severed, the seller must pay it. The parson is not obliged to take Tithe of grass the day it is cut, but may let it lie long enough to make it into hay; 1 Strange 245: 1 Roll. Abr. 644, 645. See post. Hay.

Hazle, Holly, and Maple Trees, &c. are regularly tithable, although of twenty years' growth. 2 Danv. Abr. 589.—Hay pays a pre-dial Tithe; the tenth cock is to be set out and paid, after made into hay, by the custom of most places; and by custom generally, but not of common right, the parishioners shall make the grass cocks into hay for the parson's Tithe; but if they are not obliged to make the Tithe into hay, they may leave it in cocks, and the parson must make it, for which purpose he may come on the ground, &c. A prescription to measure out and pay the tenth acre, or part of grass standing, in lieu of all Tithe hay, may be good: And if meadow ground is so rich, that there are two crops of hay in one year, the parson, by special custom, may have Tithe of both. 1 Roll. Abr. 643. 647. 950.—Heads-lands are not tithable, if only large enough for turning the plough; but if larger, Tithe may be, and generally is, payable. 2 Inst 653.—Hemp; see Flax.—Herbage of ground is tithable for barren cattle kept for sale, which yield no profit to the parson. Wood's Inst. 167.

-Honey pays a Tithe, see Bees.—Hops are tithable, and the tenth part may be set out after they are picked. It is now settled, on appeal to the House of Lords, that hops ought to be picked and gathered from the Bines before they are tithable: And then measured in baskets, before being dried, and every tenth basket set out for the Tithes; and no usage can vary this rule. 2 Bos. and Pull. 172. 7 Term Rep. K. B. 86: And see Bro. P. C. title Tithes.—Horses kept to sell, and afterwards sold, Tithes shall be paid for their pasture; though not where horses are kept for work and labour. Hutt. 77.—Houses for dwelling are not properly tithable: A modus may be paid for houses in lieu of Tithes of the land upon which they are built; and a great many cities and boroughs have a custom to pay a modus for their
houses: as it may be reasonably supposed that it was usual to pay so much for the land, before the houses were erected on it. 11 Rep. 16: 2 Inst. 659. See title London (Tithes); and ante V.

Kids pay a Tithe as calves, the tenth is due to the parson. Wood. 167.

LAMBS are tithable in like manner as calves; but if they are yeaned in one parish, and do not tarry there thirty days, no Tithe is due to the parson of that place.—If there be a custom that the parishioners, having six lambs or under, shall pay so much for every lamb; and if he have above that number then to pay the seventh, it is good. S Cro. 403.—LEAD may pay Tithe by custom, as it does in some counties; but it doth not without it. 2 Inst. 651.—By custom only, LIME and LIME-KILNS are tithable. 1 Rol. Abr. 642.

Madder is now tithable in kind: It was liable for 28 years only, to a modus of 5s. but the statutes for that purpose are now expired. Stats. 31 Geo. 2. c. 12: 5 Geo. 3. c. 18.—Mast of oak and beech pays Tithes as under Acorns. MILK is tithable when no Tithes are paid for cheese, all the year round, except custom over-rules; and it is payable by every tenth meal, not tenth quart or part of every meal; and it was formerly held, that it was to be brought to the house of the parson, &c. in which particular this Tithe differs from all others, which must be fetched by the receiver. But this is only where there is a special custom; and it seems now decided that the Tithe of milk is by setting out every tenth morning and evening's meal, in clean vessels, belonging to the owner of the milk, and leaving the same therein till the vessels are again wanted by the owner.—And if not fetched away by the parson, prior to that time, the owner is at liberty to throw it on the ground; and in the intermediate time, the owner is not answerable for any accident that may happen to it. Dr. Bosworth v. Limbrick, Bro. P. C. In some places they pay Tithe cheese for milk, and in others some small rate, according to custom. Cro. Eliz. 609: 2 Danv. Abr. 596.—Mills, as there are several sorts of them, the Tithes are different; the Tithes of corn-mills driven by wind or water, have been paid in kind, every tenth toll-dish of corn to the parish of the parish wherein the mills are standing: But antient corn-mills are Tithe-free, being suggested that they are very antient, and never paid Tithes, &c. And it is questioned whether Tithe is due for any corn-mills, unless by custom, because the corn hath before paid Tithe; and it seems rather a personal Tithe where due: The Tithes of fulling-mills, paper-mills, powder-mills, &c. are personal, charged in respect to the labour of men, by custom only; and these are regarded more as engines of several trades than as mills. 1 Roll. Abr. 656: 2 Inst. 621. It is now settled that Tithes of all mills are personal Tithes; and only a tenth part of the clear profits, deducting all charges and expences, is payable as Tithe. Newte v. Chamberlain, Bro. P. C.; and see 2 P. Wms. 463.—Mines pay no Tithes but by custom, being of the substance of the earth, and not annually increasing. 2 Inst. 651.

NURSERIES OF TREES shall pay Tithes, if the owner dig them up and makes profit of them by selling. 2 Danv. Abr. 585: 1 Co. 526: 2 Jon. 416: Godb. 431: Hard. 380.

OAK TREES are privileged as timber from the payment of Tithes by the statute of Silva Cadua, 45 Edw. 3. c. 3; if of or above twenty year's growth; and if oaks are under that age, it is the same when
they are apt for timber. Moor, 541. See ante III. Offerings, &c. are in the nature of personal Tithes. 2 Inst. 659. 661. See titles Offerings; Oblations.—Orchards pay Tithes both for the fruit they produce, and the grass or grain, if any be sown or cut therein. 2 Inst. 652.

Parks are tithable by custom, for the deer and the herbage; and when disparked and converted into tillage, they shall pay Tithes in kind: The Tithes of Parks may be in part certain, and part casual; and 2s. a year, and a shoulder of every third deer, hath been paid as Tithe for a Park. 1 Roll. Reg. 176; Hob. 37. 40.—Partridges and Pheasants, &c. as they are fera nature, yield no Tithes of eggs or young. 1 Roll. Abr. 636.—Pease, if gathered for sale, or to feed hogs, pay Tithes; but not green pease spent in the house. 1 Roll. Abr. 647. Pease are generally a Great Tithe, but the vicar may be endowed of them. See Part. Ca. tit. Tithes.—Pigeons ought to pay Tithes when sold, and this holds good if they lodge in holes about an house, as well as in a dove-house; and by custom, if spent in the house, they may be tithable, though not of common right. 2 Danv. Abr. 583. 597. —Pigs are tithable, as calves: Ibid.—Pollard Trees, such as are usually lopped, and distinguished from timber-trees, pay Tithes.—Plowd. 470.

Quarries of stone, &c. are not subject to pay Tithes; because they are part of the inheritance, and Tithes ought to be collateral to the land, and distinct from it. 1 Roll. 644.

Rabbits; See Conies.—Rackings of Corn are not tithable, for they are left for the poor, and are properly the scatterings of the corn whereof the Tithes have been paid, left after the cocks set out are taken away. Cro. Eliz. 660. See ante III; (Corn).

Saffron pays a pre dial and small Tithe. 1 Cro. 467.—Salt is not tithable, but by custom only. 1 Bumb. 10—Sheep, a Tithe is paid for, of lambs and wool, and therefore they pay no Tithe for their feeding. But see ante III. Agistment. If sheep are in the parish all the year, they are to pay Tithe wool to the parson; but if removed from one parish to another, (without fraud,) the parson of each parish to have Tithe pro rata, where they remain thirty days in a parish; and if they are fed in one parish, and brought into another to be shorn, the same tithing is to be observed. 1 Roll. Abr. 642. 647: 3 Cro. 237. It seems now that the rule is, that Tithe of the wool shall be paid where the sheep are shorn; and agistment Tithe in other parishes where they have been depastured. Shaw’s Law of Tithes.—Stubble pays no Tithe under aftermath. 2 Inst. 652.

Tares, vetches, &c. are tithable; but if they are cut down green, and given to the cattle of the plough, where there is not a sufficient pasture in the parish, no Tithe shall be paid for them. 1 Cro. 139.—Tiles are no yearly increase, and not tithable. 2 Inst. 651.—Timber Trees, such as oaks, ashes, and elms, and in some places beech, &c. above the age of twenty years, were discharged of Tithes by the common law, before the statute 45 Edw. 3. c. 3. and the reason of it is, because such trees are employed to build houses, and houses when built are not only fixed to, but part of the freehold; loppings of Timber Trees above twenty years’ growth, pay no Tithes, for the branch is privileged as well as the body of the tree; and the roots of such trees are exempted as parcel of the inheritance. Trees cut for ploughbote, cart-bote, &c. shall not pay Tithes, although they are no Tim—
ber; but all trees not fit for Timber, and not put to those uses, pay Tithes. 1 Roll. Abr 630: Cro. Elmz. 477. 499. See ante III.—Turfs used for fuel are part of the soil, and Tithe-free. 2 Inst. 651.—Turfs are reckoned among the small predial Tithes; and the Tithes of them shall be paid as often as they are sown, though twice or more on the same land in the same year. So if eaten off the land by barren cattle. Bynb. 10. See III. Agistment.

Underwood is titheable, though the Tithe is not of annual payment; and is set out while standing, by the tenth acre, pole, or perch; or when cut down, by tenth faggot or billet, as custom directs; and if he that fells the wood doth not set out the Tithe, he is liable to the treble damages by stat. 2 & 3 Ed. 6. c. 13. But if the Underwood is used for firing in a house of husbandry, or to burn brick to repair the house, or for hedging and fencing the lands in the same parish, it may be discharged from Tithe. 2 Inst. 642, 643. 632: Hob. 250: 2 Danv. Abr. 597.

Warrens where titheable, see Conies.—Waste Ground. Whereon cattle feed, is liable to the payment of Tithes. 2 Danv. Abr.—Wood growing in the nature of an herb is a predial and small Tithe. Hutt. 77: Cro. Car. 28:—Woon is generally esteemed to be a great Tithe. If wood grounds have likewise timber trees grown on them, and consist for the most part of such trees, the timber trees shall privilege the other wood; but if the wood is the greatest part, then it must pay Tithes for the whole, 13 Rep. 13. If wood be cut to make hop-poles, where the parson hath Tithe hops, no Tithe shall be paid for it. Hughes's Abr. 689. See ante III.—Wool is a mixed small Tithe, paid when clipped; one fleece in ten, or in some places one in seven, is given to the parson. If there is under ten pounds of wool at the shearing, a reasonable consideration shall be paid, because the Tithes are due of common right; and if less than ten fleeces, they shall be divided into ten parts, or an allowance be otherwise made. All sheep killed, and sheep which die, pay Tithe-wool; and neck-wool cut off for the benefit of the wool, but not if it is to preserve the sheep from vermin, &c. Also the wool of lambs shorn at Midsummer, though Tithe was paid for the lambs at Mark-tide, is titheable. 1 Roll. Abr. 646, 647: 2 Inst. 652. See Sheep, and ante IV.

VII. Lands, and their occupiers, may be exempted or discharged from the payment of Tithes, either in part, or totally, first, by a real composition; or secondly, by custom or prescription.

First, A real composition is when an agreement is made between the owner of the lands, and the parson or vicar, with the consent of the ordinary and the patron, that such lands shall for the future be discharged from payment of Tithes, by reason of some land or other real recompense given to the parson, in lieu and satisfaction thereof. A Inst. 490: Regist. 38: 13 Rep. 40. This was permitted by Law, because it was supposed that the clergy would be no losers by such composition; since the consent of the ordinary, whose duty it is to take care of the church in general, and of the patron, whose interest it is to protect that particular church, were both made necessary to render the composition effectual: and hence have arisen all such compositions as exist at this day by force of the Common Law. But, experience shewing that even this caution was ineffectual, and the possessions of the church being, by this and other means, every day
diminished, the disabling statute, 13 Eliz. c. 10. was made; which prevents among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches, other than for three lives or twenty-one years. So that now, by virtue of this statute, no real composition made since the 13 Eliz. is good for any longer term than three lives, or twenty-one years, though made by consent of the patron and ordinary; nor is it binding on the succeeding incumbent, though confirmed by a decree in Chancery. 2 Wood. 137. This has indeed effectually demolished this kind of traffic; such compositions being now rarely heard of, unless by authority of Parliament. 2 Comm. c. 3.

No evidence is sufficient to support a real composition, unless it bear some reference to a deed of composition. 2 Bos. and Pull. 172.

With regard to compositions entered into between the Tithe-owner and any parishioner, for the latter to retain the Tithes of his own estate, it has been decided, that they are analogous to leases from year to year between landlord and tenant; and if they are paid without or beyond an agreement for a specific time, they cannot be put an end to without six months' notice before the time of payment, and the parishioner may avail himself of the defect of notice, at the same time that he controverts the right of the incumbent to receive Tithes in kind: an objection not permitted to a tenant, who denies the right of the landlord. See title Rent. 2 Bro. C. R. 161.

The mode of making composition for Tithes, either by portions of land applied to the purpose, or by corn rents adjusted from time to time on an average of a certain number of years, has of late been very extensively adopted in acts of inclosure: the provisions of many of which acts for this purpose extend, not only to lands newly inclosed, but also to all Tithes, and moduses, and compositions for Tithes throughout the whole of many parishes. Most of those acts are local, and many of them private and not printed, being considered as relative merely to the place over which they operate, without advertising to their effect on the general system of law in this particular.

Secondly, A discharge by custom or prescription, is where, time out of mind, such persons or such lands have been, either partially or totally, discharged from the payment of Tithes. And this immemorial usage is binding upon all parties; as it is in its nature an evidence of universal consent and acquiescence, and with reason supposes a real composition to have been formerly made. This custom or prescription is either de modo decimandi, or de non decimando.

A Modus decimandi, commonly called by the simple name of a Modus only, is where there is by custom a particular manner of tithing allowed, different from the general law of taking Tithes in kind, which are the actual tenth part of the annual increase. This is sometimes a pecuniary compensation, as two-pence an acre for the Tithe of land: sometimes it is a compensation in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him; sometimes, in lieu of a large quantity of crude or imperfect Tithe, the parson shall have a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of Tithe eggs; and the like. Any means, in short whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a modus decimandi, or special manner of tithing.

To make a good and sufficient Modus, the following rules must
be observed. 1. It must be certain and invariable, for payment of different sums will prove it to be no modus, that is, no original real composition; because that must have been one and the same, from its first original to the present time. 1 Keb. 602. 2. The thing given, in lieu of Tithes, must be beneficial to the parson, and not for the emolument of third persons only: thus a modus to repair the church in lieu of Tithes, is not good; because that is an advantage to the parish only; but to repair the chancel is a good modus, for that is an advantage to the parson. 1 Roll. Abr. 649. 3. It must be something different from the thing compounded for; one load of hay, in lieu of all Tithe hay, is no good modus: for no parson would bond fide make a composition to receive less than is due in the same species of Tithe: and therefore the Law will not suppose it possible for such composition to have existed. 1 Lev. 179. 4. One cannot be discharged from payment of one species of Tithe, by paying a modus for another. Thus a modus of 1d. for every milch cow will discharge the Tithe of milch kine, but not of barren cattle; for Tithe is, of common right due for both; and therefore a modus for one, shall never be a discharge for the other. Cro. Eliz. 446: Salk. 657. 5. The recompence must be in its nature as durable as the Tithes discharged by it; that is, an inheritance certain: and therefore a modus that every inhabitant of a house shall pay 4d. a year, in lieu of the owner's Tithes, is no good modus; for possibly the house may not be inhabited, and then the recompense will be lost. 2 P. Wms. 462. 6. The modus must not be too large, which is called a rank modus; as if the real value of the Tithes be 60l. per ann. and a modus is suggested of 40l. this modus will not be established; though one of 40s. might have been valid. 11 Mod. 60. Indeed, properly speaking, the doctrine of rankness in a modus, is a mere rule of evidence drawn from the improbability of the fact, and not a rule of Law. Pyke v. Dowling, Hil. 19 Geo. 3. C. B. For, in these cases of prescriptive or customary modus's it is supposed that an original real composition was antiently made; which being lost by length of time, the immemorial usage is admitted as evidence that it once did exist, and that from thence such usage was derived. Now time of memory hath been long ago ascertained by the Law to commence from the beginning of the reign of Richard the First; and any custom may be destroyed by evidence of its non-existence in any part of the long period from that time to the present; wherefore, as this real composition is supposed to have been an equitable contract, or the full value of the Tithes, at the time of making it, if the modus set up is so rank and large, as that it beyond dispute exceeds the value of the Tithes in the time of Richard the First, this modus is (in point of evidence) felo de se, and destroys itself. For, as it would be destroyed by any direct evidence to prove its non-existence at any time since that æra, so also it is destroyed by carrying in itself this internal evidence of a much later original.

To constitute a good modus, it seems necessary that it should be such as would have been a certain, fair, and reasonable equivalent or composition for the Tithes in kind, before the year 1189; and therefore no modus for hops, turkies, or other things introduced into England, since that time, can be good. Bumb. 307. The question of rankness, or rather modus or no modus, is a question of fact which Courts of Equity will send to a jury; unless the grossness of the modus is so
obvious as to preclude the necessity of it. 2 Broc. C. R. 163; 1 Black. Ref. 420.

A custom to pay only a part of the Tithe, without substituting any thing else in lieu of the remainder, is bad: But a custom to pay less than the whole Tithe may be good, where something in lieu of, and as a compensation for, the rest is paid to the parson. 7 Term Ref. K. B. 93.

A prescription de non decimando is a claim to be entirely discharged of Tithes, and to pay no compensation in lieu of them. Thus the King by his prerogative is discharged from all Tithes. Cro. Eliz. 511. So a vicar shall pay no Tithes to the rector, nor the rector to the vicar, for ecclesia decimas non solvit ecclesia. Cro. Eliz. 479. 511; Sav. 3: Moor. 910. But these personal privileges (not arising from, or being annexed to the land) are personally confined to both the King and the clergy; for their tenant or lessee shall pay Tithes, though in their own occupation their lands are not generally tithable. And, generally speaking, it is an established rule, that in lay hands, modus de non decimando non valet. But it seems that the King's tenant at will shall not pay Tithes. 1 Woodd. 100.

Spiritual persons or corporations, as monasteries, abbeys, bishops, and the like, were always capable of having their lands totally discharged of Tithes, by various ways. Hob. 309: Cro. Jac. 308; As. 1. By real composition; 2. By the pope's bull of exemption; 3. By unity of possession; as when the rectory of a parish, and lands in the same parish, both belonged to a religious house, those lands were discharged of Tithes by this unity of possession; 4. By prescription; having never been liable to Tithes, by being always in spiritual hands; 5. By virtue of their order; as the Knights Templars, Cistercians, and others, whose lands were privileged by the pope with a discharge of Tithes. 2 Rep. 44: Seld. Tith. c. 13. § 2. Though upon the dissolution of the greater abbeys by Henry VIII., most of these exemptions from Tithes would have fallen with them, and the lands become tithable again, had they not been supported and upheld by the stat. 3 Hen. 8. c. 13. which enacts, that all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of Tithes, in as large and ample a manner as the abbeys themselves formerly held them. This provision is peculiar to this statute, and therefore all the lands belonging to the lesser monasteries, dissolved by stat. 27 H. 8. c. 28. are now liable to pay Tithe. And from this original have sprung all the lands, which, being in lay hands, do at present claim to be Tithe-free; for if a man can shew his lands to have been such abbey lands, and also immemorially discharged of Tithes by any of the means before-mentioned, this is now a good prescription de non decimando. But he must shew both these requisites; for abbey lands, without a special ground of discharge, are not discharged of course; neither will any prescription de non decimando avail in total discharge of Tithes, unless it relates to such abbey lands. 3 Comm. c. 3.

For more learning on this subject, see 5 Bac. Abr.; Vin. Abr. title Disimes; and Shaw's Laws of Tithes.

TITHING, Tithinga, from the Saxon Teothunge, Decuria.] Was, in its first appointment, the number or company of ten men with their families, held together in a society, all being bound for the peaceable behaviour of each other. And of these companies there was
one chief person, who was called Teothung-man, at this day Tithing-man; but the old discipline of Tithings is long since left off. In the Saxon times, for the better conservation of the peace, and more easy administration of justice, every hundred was divided into ten districts or Tithings; and within every Tithing, the Tithing-men were to examine and determine all lesser causes between villagers and neighbours; but to refer greater matters to the then superior courts, which had a jurisdiction over the whole hundred. Paroch. Antiq. 633. The subdivision of hundreds into Tithings, seems to be most peculiarly the invention of King Alfred. See 1 Comm. Introd.

Tithing-men, Are now a kind of petty constables, elected by parishes, and sworn in their offices in the court-leet, and sometimes by justices of peace, &c. There is frequently a Tithing-man in the same town with a constable, who is as it were a deputy to execute the office in the constable's absence; but there are some things which a constable has power to do, that Tithing-men and head-boroughs cannot intermeddle with. Dalt. 3. When there is no constable of a parish, the office and authority of a Tithing-man seems to be the same under another name. Stat. 13 & 14 Car. 2. c. 12. See title Constable.

Tithing-Penny; See Teding-penny.

TITLE, Titulus.] Is when a man hath lawful cause of entry into lands whereof another is seised; and it signifies also the means whereby a man comes to lands or tenements, as by feoffment, fine, last will and testament, &c. The word Title includeth a right, but is the more general word: Every right is a Title, though every Title, is not such a right for which an action lies; so that titulus est justa causa possidendi quod nostrum est, and is the means of holding the lands. Co. Litt. 345. Blackstone defines it to be "The means whereby the owner of lands has the just possession of his property:" 2 Comm. c. 13.

There are several stages or degrees requisite to form a complete Title to lands and tenements: As, first, The lowest and most imperfect degree of Title consists in the mere naked Possession, or actual occupation of the estate, without any apparent right, or any shadow or pretence of right to hold and continue such possession; which naked possession, by length of time, and negligence of him who hath the right, may by degrees ripen into a perfect and indefeasible Title; and at all events, without actual possession, no Title can be completely good. 2d, The next step to a good and perfect Title is a Right of Possession; which is either actual or apparent; and which may reside in one man, while the actual possession is in another. This actual possession may be recovered by him who has the right of possession, if sued for within a competent time; otherwise he will have nothing left in him; but 3dly, The mere Right of Property, without even possession, or the right of possession.

Thus, if a disseisor turns me out of possession of my lands, he thereby gains a mere naked possession, and I still retain the right of possession and the right of property. If the disseisor dies, and the lands descend to his son, the son gains an apparent right of possession, but I still retain the actual right, both of possession and property. If I acquiesce for 30 years, without bringing any action to recover the possession of the lands, the son gains the actual right of possession, and I retain nothing but the mere right of property; and even this
right of property will fail, or at least be without a remedy, unless I pursue it within the space of 60 years. So also if the father be tenant in tail, and aliens the estate-tail to a stranger in fee, the alienence thereby gains the right of possession, and the son hath only the mere right, or right of property. And hence it will follow, that one man may have the possession, another the right of possession, and a third the right of property. For if the tenant in tail encoffs A. in fee-simple, and dies; and B. disseises A.; now B. will have the possession, A. the right of possession, and the issue in tail the right of property. A. may recover the possession against B., and afterwards the issue in tail may evict A., and unite in himself the possession, the right of possession, and also the right of property; in which union consists a complete title to lands, tenements, and hereditaments; for it is an antient maxim of the law, that no title is completely good, unless the right of possession be joined with the right of property; which right is then denominated a double right, jus duplicatum, or droit droit. Mir. l. 2. c. 27: 1 Inst. 266: Bract. l. 5. tr. 3. c. 5. And when, to this double right, the actual possession is also united; when there is, according to the expression of Fleta, (l. 3. c. 15. § 5.) juris et seisinæ conjunctio, then, and then only, is the title completely legal. See 2 Comm. c. 13.

Title is generally applied to signify the right to land and real effects; as Property is to signify that to mere personal estate. See title Property; and further, this Dictionary, titles Estate; Limitation of Actions; Disseisin; Release, &c.

Title to Lands, Tenements, and Hereditaments is said to accrue either by Descent or Purchase. Purchase, in this sense, includes every mode of acquiring Lands, except by Descent. See this Dict. title Purchase.

As to Title by Descent, see this Dict. under that title.

Title by purchase may be either by Escheat; Occupancy; Prescription; Forfeiture; or Alienation; which latter may be either by Deed, Matter of Record, special Custom, or Devise.

Property in, or title to, things personal, may arise either by Occupancy; Prerogative; and Forfeiture; by Custom; by Succession; Marriage; Judgment; Gift; Grant; Contract; Bankruptcy; Will; or Administration. See the several Titles in this Dictionary; as also Title Executor, and other apposite Titles; and 2 Comm. per tot.

The law will not permit Titles and things, in entry &c. to be granted over; and the buying or selling any pretended rights, or Titles, to lands, is prohibited by statute as Maintenance. See that title.

Title of Acts of Parliament; See title Parliament VII. Statutes.

Titles, pretended, Buying or selling. See titles Champerty; Maintenance.

Title to the Crown; See title King I.

Titles of Clergymen, signify some certain place where they may exercise their functions. A Title, in this sense, is the church to which a priest was ordained, there constantly to reside: And there are many reasons why a church is called Titulus; one is because in former days the name of the Saint to whom the church is dedicated was engraved on the porch, as a sign that the Saint had a Title to that church; from whence the church itself was afterwards denominated titulus. Concil. London, Anno 1025. Antiently a title of Clergy was no more than entering their names in the bishop’s roll, and then they had not only au-
authority to assist in the ministerial function, but had a right to the share of the common stock or treasury of the church; but since, a Title is an assurance of being preferred to some ecclesiastical benefice, &c. See this Dictionary, titles Curate; Parson.

Title of Entry, is when one seised of land in fee, makes a feoffment thereof on condition, and the condition is broken; after which the feoffor hath title to enter into the land, and may do so at his pleasure, and by his entry the freehold shall be said to be in him presently. And it is called Title of Entry, because he cannot have a writ of right against his feoffee upon condition, for his right was out of him by the feoffment, which cannot be reduced into Entry; and the Entry must be for the breach of the condition. Cowell. See title Entry.


TITULARS OF ERECTION; Persons who after Popery was destroyed in Scotland got a right to the Parsonage Titles which had fallen to Monasteries, because of several parishes that had belonged to them in mortmain. Scotch Law Dict.

TOALIA; A towel. There is a tenure of Lands by the service of waiting with a towel at the King's coronation. Ing. Ann. 12, 13. King John. See title Serjeancy.

TOBACCO, is not to be planted in England, on pain of forfeiting 40s. for every rod of ground thus planted; but this shall not extend to hinder the planting of Tobacco in physic gardens. Stat. 12 Car. 2. c. 34. Justices of Peace have power to issue warrants to constables, to search after and examine whether any Tobacco be sown or planted, and to destroy the same; which they are to do under penalties, &c. Stat. 22 & 23 Car. 2. c. 26. continued by stat. 5 Geo. 1. c. 11. The importation and exportation of Tobacco is liable to the regulations of the Navigation Acts. See that title. A duty is payable thereon on importation, under the management of the commissioners of Customs and Excise; and the manufacture is subject to the control of the commissioners and officers of Excise; every manufacturer taking out a licence; the licence being charged according to the quantity manufactured, from 20,000lb. weight to 150,000, at from 2l. to 20l. Dealers also take out licences. Various provisions, by many statutes, are made to enforce the above, and other regulations, to avoid adulteration in the manufacture, by mixing walnut-tree leaves, or other leaves with Tobacco. Under stat. 1 Geo. 1. c. 46. this incurred a penalty of 5s. per lb.; but under stat. 29 Geo. 3. c. 68, § 84. the goods are forfeited, and a penalty of 200l. is also imposed. By stat. 19 Geo. 3. c. 35, so much of former acts as prohibits the growth of Tobacco in Ireland is repealed, but Tobacco raised there is to be exported thence to England only.

TOD OF WOOL, Twenty-eight pounds, or two stone; mentioned in stat. 12 Car. 2. c. 32.

TOFT, Toftum.] A messuage; or rather a place or piece of ground where an house formerly stood, but is decayed or casually burnt, and not re-edified. It is a word much used in fines, wherein we often read toftum and croftum, &c. West. Symb. par. 2.


TOILE, Fr. i. e. Tela.] A net to encompass or take deer, which
is forbid to be used unlawfully in parks, on pain of 20l. for every deer taken therewith. 3 & 4 P. & M. c. 10. But see title Deer.

TOLL, Tokens, False; See title Cheats.

TOLERATION ACT. The stat. 1 W. & M. st. 1. c. 18; as to which, see this Dict. titles Dissenters; Papists.

TOLL, or To Toll, from Lat. tollere.] To bar, defeat, or take away, as to toll the entry, i. e. to deny or take away the right of entry. Stat. 8 Hen. 6. c. 9. See title Entry.

TOLL, Tolnetum vel Theoloniwm. A Saxon word, signifying properly a payment in towns, markets, and fairs, for goods and cattle bought and sold. It is a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable within the same. 2 Inst. 220.

The word is used for a liberty as well to take, as to be free from Toll; of which freedom from Toll the city of Coventry boasts an antient charter granted by Leofrick Earl of the Mercians, in the time of King Edward the Confessor, who at the importunity of Godiva, his virtuous lady, granted this freedom to that city.

By the antient law of this land, the buyers of corn or cattle in fairs or markets ought to pay Toll to the lord of the market, in testimony of the contract there lawfully made; for Toll was first invented that contracts in markets should be openly made before witnesses; and privy contracts were held unlawful.

But the King shall pay no Toll for any of his goods; and a man may be discharged from the payment of Toll by the King’s grant.

Also tenants in antient demesne are discharged of Toll throughout the kingdom for things which arise out of their lands, or bought for manurance thereof, &c. not for merchandizes. Horn’s Mirr. lib. 1: 2 Inst. 221; 2 Roll. Abr. 198.

Toll doth not of common right belong to a fair; though it hath been held, that some Toll is due of common right; as appears from the immunities of several persons not to pay Toll; which proves that, if it was not for those privileges they ought to pay Toll of common right; therefore where the King grants a market, Toll is due, although it is not expressed in the grant, what Toll is to be paid; and this from the necessity of it, because the property of things sold in a market is not altered without paying Toll. Palm. 76; 2 Lutw. 1377. But it is said, that Toll is not incident of common right to a fair. If the King grants to a man a fair or market, and grants no Toll, the patentee shall have no Toll; for Toll being a matter of private right for the benefit of the lord, is not incident to a fair or market, as a court of Piepowder is, which is for the benefit of the public and advancement of justice, &c. Such a fair or market is free from Toll; and, after the grant made, the King cannot grant a Toll to such free fair or market, without some proportionable benefit to the subject. And if the Toll granted with the fair or market be outrageous, the grant of the Toll is void; and the same is a free market, &c. 2 Inst. 220: Cro. Eliz. 539. And see 1 Wils. 109; and this Dict. titles Fairs; Markets.

When the King grants a fair, he may likewise grant that Toll shall be paid, though it be a charge upon the subjects, but then it must be of a very small sum. Toll is to be reasonable, for the King cannot grant a burthensome Toll; and one may have Toll by prescription for some reasonable cause, but such a prescription to charge the subject
with a duty of Toll, must import a benefit or recompence for it, or some reason must be shewn why it is claimed. Cro. Eliz. 559: 3 Lev. 424: 2 Mod. 143: 4 Mod. 323. The Toll in fairs is generally taken upon the sale of cattle, as horses, &c.; but in the markets, for grain only; and the lord may seize until satisfaction is made him. It is always to be paid by the buyer, unless there be a custom to the contrary; and nothing is tollable before the sale, except it be by custom time out of mind; which custom none can challenge that claim the fair or market by grant since the reign of King Richard II.; so that it is better to have a market or fair by prescription, than grant. 2 Inst. 220, 221.

At this day there is not any one certain Toll to be taken in markets; but if that which is taken be unreasonable, it is punishable by the stat. 3 Ed. 1. c. 31. And what shall be deemed reasonable, is to be determined by the Judges of the Law, when it comes judicially before them. Toll may be said to be unreasonable and outrageous, when a reasonable Toll is due, and excessive Toll is taken; or when no Toll is due, and Toll is unjustly usurped, &c. 2 Inst. 222. If excessive Toll be taken in a market town by the lord’s consent, the franchise shall be seized; and if by other officers, they shall pay double damages, and suffer imprisonment, &c. Stat. Westm. 1. 3 Ed. 1. c. 31.

Owners of markets and fairs are to appoint Toll-takers, where Toll is to be taken, under penalties. Stat. 2 & 3 Ph. & M. c. 7. And he that hath the Toll, or profit of the market where no Toll is, ought to provide a lawful measure of brass, and chain it in the public market-place, or shall forfeit 5l. Stat. 22 Car. 2. c. 8.

The remedy for taking Toll where none is due, or for taking excessive Toll, is by action of trespass, or an action on the case; and, in some cases, by indictment. See title Extortion. Where the party is exempt from Toll, he may have his remedy on the antient writ De essendo quietum de Thelonio. It was finally determined in the house of peers, after a long contest, that this writ De essendo quietum, &c. is not merely prohibitory, but remedial; on which the parties may plead to issue on a question of right. And where it is directed to a corporation, the corporation cannot be attached for contempt, in their corporate capacity, for not returning it; but an attachment, in the nature of a Pone, is the proper remedy to compel them to appear. The great question, as to the exemption of the citizens of London from Toll, was also determined, viz. that freemen of the city of London have a right to be exempt from the payment of all Tolls and port-duties throughout England, (except the prizes of wines,) in whatever place they reside; and though they have obtained their freedom by purchase. 1 H. Blac. Refi. C. B. 206. This judgment of the court of common pleas was reversed by the court of K. B. (see 4 Term Refi. 130;) but affirmed in parliament, May 2, 1796. London (Corporation) v. King’s Lynn. (Corpl.)

Where it appeared in evidence that a corporation were entitled under a general grant, explained by usage, to Toll for all commercial goods passing in and out of the city on horses or in carts or waggons at a certain rate per horse, the court of K. B. held that any alteration of the carriage by which the goods were so conveyed, as by taking them in stage coaches instead of carts or waggons, did not vary the right of Toll in proportion to the horses employed, although
the number of horses was regulated rather by the passengers than the goods. Carlisle City v. Wilson. 5 East's Ref. 2.

Port-Toll. A prescription to have Port-Toll for all Toll coming into a man's Port, may be good. 2 Lev. 96; 2 Lut. 1519. The liberty of bringing goods into a port for safety, implying a consideration in itself. 3 Lev. 37. Prescription of Toll for goods landed in a manor, or to have Port-Toll for all goods coming into port, is a good prescription; but not to have Toll of goods brought into a river, &c. 2 Lev. 96, 97. Toll may be appurtenant to a manor. 2 Mod. 144.

Toll-Travers, or Traverse, is where one claimeth to have Toll for every beast driven across his ground; for which a man may prescribe, and distrain for it in via Regia. Cro. Eliz. 710. They who claim these Tolls by grant, ought to aver the certainty of the sum mentioned in the grant, &c. Palm. 76. Toll-travers being to pass a nearer way, he that has it is to repair the way, because he receives money for it. 2 Lil. Abr. 585.

Toll-Traverse, 'Is properly when a man pays certain Toll for passing over the soil of another man in a way not a high street. 22 Ass. 58. And for this Toll a man may prescribe. 2 Rol. Abr. 532: Cro. Eliz. 710: Moor 574.

Thorough-Toll, Is where a town prescribes to have Toll for such a number of beasts, or for every beast that goeth through their town; or over a bridge or ferry maintained at their cost; which is reasonable, though it be for passing through the King's highway, where every man may lawfully go, as it is for the ease of travellers that go that way. Terms de Ley 561, 562. Persons may have this Toll by prescription or grant; but it must be for a reasonable cause, which must be shewn, viz. that they are to repair or maintain a causeway, or a bridge, or such like. Cro. Eliz. 711. The King granted to a man, to take such Toll of persons that passed over certain bridges with their cattle, as was taken there and elsewhere in England, &c.; and it was held void for uncertainty. Bridg. 88.

The words Toll-thorough and Toll-traverse are used promiscuously. A man cannot prescribe to have Thorough-Toll of men passing though a vill in the high-street, because it is against the Common Law and common right; for the high street is common to all, without alleging of a special consideration, as the repairing the way. And the King cannot have such Toll for passing in the high street, as in the case aforesaid, for the cause aforesaid. 2 Roll. Abr. 522: 22 Ass. 58.

A man cannot prescribe to have Thorough-Toll of men for passing through a vill in a place which is not the high street; for it is more than the Law allows to go there. 2 Roll. Abr. 523: 22 Ass. 58.

'Turn-Toll, A Toll paid for beasts that are driven to market to be sold, and do return unsold. 6 Repl. 46. There is also in Toll and out Toll, mentioned in ancient Charters.

Tollage, Is the same with Tallage; signifying generally any manner of custom or imposition.

Toll-Booth, The place where goods are weighed, &c.

Toll-Corn, Corn taken for Toll ground at a mill; and an indictment lies against a miller for taking too great Toll. 5 Mod. 13: Ld. Raym. 159. See title Extortion.

Toll-Hop, A small dish or measure, by which Toll is taken in a market, &c.
TOLSESTER, Tolcestrum.] An old excise, or duty paid by the Tenants of some manors to the lord, for liberty to brew and sell ale. Cartular. Reading. 221; Chart. 51 Hen. 3.

TOLSEY, from the Sax. Tol, i. e. Tributum, and See, Sedes.] The place where merchants meet, in a city or town of trade.

TOL'T, Lat. Tollit quia tollit causam.] A writ whereby a cause depending in a Court-baron, is taken and removed into the County Court. Old Nat. Br. 4. And as this writ removes the cause to the County Court; so the writ Pone removeth a cause from thence into the Court of Common Pleas, &c.

TOLTA, Wrong, rapine, extortion, any thing exacted or imposed contrary to right and justice. Pat. 48 H. 3. in Brady Hist. Eng. APpend. i. 235.

TOMBS, Defacing of, in churches. See Monument.

TOMIN, A weight of twelve grains used by goldsmiths and jewelers.

TON, See Tun.

TONGUE, CUTTING OUT OR DISABLING; See title Maim.

TONNAGE, See Tunnage; Customs.

TOP ANNUAL, is an annual rent out of a house built in a burgh. Scotch Dict.

TORCARE, Boves striilare & torcare; To comb and cleanse his oxen. Fleta, lib. 2. c. 75.

TORRA, Sax. Tor.] A mount or hill; as Glastonbury Torre. Chart. Abbat. Glaston. MS. f. 114. So a variety of high hills in Derbyshire, are called Tor; but generally some epithet is prefixed, as Mam-tor, &c.

TORT, from the Lat. Tortus.] A French word for injury or wrong, as, de son Tort demesne, in his own wrong. Cro. Rep., fol. 20. White's case. Wrong or injury is properly called Tort, because it is wrested or crooked, and contrary to that which is right and straight. Co. Litt. fol. 158.

TORTFEASOR, Fr. Tortfaiseur.] A wrong-doer, a trespasser.

TORTITIUM, A torch. Fleta.

TORTURE. The Statute Law of England doth very seldom, and the Common Law doth never, inflict any punishment extending to life or limb, unless upon the highest necessity: And the Constitution is an utter stranger to any arbitrary power of killing or maiming the Subject without the express Warrant of Law. "Nullus liber homo, says the Great Charter, (c. 29.) aliqho modo destruatur, nisi fier le-gale judicium parium suorum aut fier legem terræ." Which words, "Aliquo modo destruatur," according to Sir Edward Coke, (2 Inst. 48.) include a prohibition not only of killing, and maiming, but also of torturing, (to which, our laws are strangers,) and of every oppression by colour of an illegal authority.

The Peine forte et dure, formerly inflicted on prisoners standing mute, and which was the only species of punishment, in the nature of Torture, allowed by the Common Law, is now repealed by stat. 12 Geo. 3. c. 20. See title Mute.

The rack, or question, to extort a confession from criminals, is a practice of a different nature; the peine forte et dure having been only used to compel a man to put himself upon his trial; that being a species of trial in itself. And the trial by rack is utterly unknown to the Law of England. See Rushw. Coll. i. 638: 4 Comm. c. 25.
The Torture was formerly applied in Scotland to discover crimes; but in the claim of right this was declared to be contrary to Law; and by 7. An. c. 21. § 5, it was expressly prohibited.

TORIES QUOTIES, As often as a thing shall happen, &c. Stat. 19 Car. 2. c. 4. &c.

TOTTED. A good debt to the King, is by the foreign apposer or officer in the Exchequer noted for such by writing the word Tot to it: And that which is paid shall be Tott. —Tot pecunia regi debitur. Stats. 42 Ed. 3. c. 9: 1 Ed. 6. c. 15.

TOURN; See Turn.

TOURNAMENTS; See Justs.

TOUT TEMPS PRIST ET UNCORE EST, i.e. Always was, and is at present ready. See title Tender.

TOWAGE, Towagium, Fr. Tavage.] The towing or drawing a ship or barge along the water by another ship or boat fastened to her; or by men or horses, &c. on land: It is also money which is given by bargemen to the owner of ground next a river where they tow a barge or other vessel. Plac. Parl. 18 Ed. 1.

TOWN, Oppidium, Villa.] A walled place or borough: The old boroughs were first of all Towns; and upland Towns, which are not ruled and governed as boroughs, are but Towns, though inclosed with walls. Finch. 80. There ought to be in every Town a Constable, or Tithing-man; and it cannot be a Town unless it hath or had a church, with celebration of sacraments and burials, &c. But if a Town is decayed so that it hath no houses left, yet it is a Town in Law. 1 Inst. 115. Under the name of a Town, or Village, boroughs, and it is said, cities are contained; for every borough or city is a Town. See City. Where a murderer escapes untaken in a Town, in the daytime, the Town shall be amerced. Stat. 3 Hen. 7. c. 1.—A Township is answerable for felons' goods to the King, which may be seized by them. But by stat. 31 Ed. 3. c. 3. if it can allege any thing in discharge of itself, and by which another doth become chargeable, it shall be heard, and right administered.

TOWN-CLERK, Coth not to be a Popish recusant convict. Stat. 3 Jac. 1. c. 5.—How to deliver a schedule of fines, &c. to the Sheriff. And a duplicate in to the Court of Exchequer. Discharging or concealing an indictment, &c. liable to a forfeiture of treble the penalty incurred by the original offence. Stat. 22 & 23 C. 2. c. 22. May be amerced by the Barons of the Exchequer; and which amercements are leviable according to the usual practice. Stat. 3 Geo. 1. c. 15. § 12.

TRABARIE, Little boats, so called from their being made out of single beams, or pieces of timber cut hollow. Florence of Worcester, page 618.

TRABES in churches, were what we now call branches, made usually with brass, but formerly with iron. Cowell.

TRACTUS, A trace by which horses in their gears draw a cart, plough, or wagggon. Paroch. Antiq. 549.

TRADE, In general signification, is traffic or merchandize: Also a private art, and way of living. Trading with enemies is generally prohibited by positive statutes in time of war. See title Treason.

It was formerly held that none of the King's subjects might trade to and with a nation of Infidels without the King's leave, because of the danger of relinquishing Christianity. And Sir Edward Coke said,
That he had seen a licence from one of our Kings, reciting, That he, having a special trust and confidence that such a one, his subject, would not decline his faith and religion, licensed him to trade with Infidels, &c. 3 Nels. Abr. 331.

As to private Trades, at Common Law, none was prohibited to exercise any particular Trade, wherein he had not any skill or knowledge; and if he used it unskilfully, the party grieved might have his remedy against him by action on the case, &c. By stat. 5 Eliz. c. 4. a man must serve seven years’ apprenticeship before he can set up any Trade; see title Apprentice. An indictment on the statute for exercising a Trade used at that time in Great Britain, quashed; it should have been England, there being then no such kingdom as Great Britain. 1 Strange 532: 2 Strange 783: 11 Rep. 53.

If a bond or promise restrains the exercise of a Trade, though it be to a particular place only, if there was no consideration for it, it is void; if there be a consideration, in such a case, it may be good: But if the restraint be general throughout England, although there be a consideration, it will be void. 2 Lill. Abr. 179: Lord Raym. 1436: 2 Strange 739: see title Bond.

Frequent acts are passed to enable soldiers and sailors, having served His Majesty for certain terms, to exercise any Trades in Great Britain, though not regularly bred to them, or free of corporations or companies. See titles Navy; Soldiers. Traders, debts from. Executors.

TRAGA, A waggon without wheels; Mon. Ang. i. 851.

TRAILBASTON; See Justices of Trailbaston.

TRAITORS; See Treason.

TRANSCRIPT, Is the copy of any original writing, or deed, &c. where it is written over again, or exemplified; stat. 34 & 35 Hen. 8. c. 14.

TRANSCRIPTO PEDIS FINIS LEVATI MITTENDO IN CANCELLARIAM, A writ for certifying the foot of a fine levied before Justices in eyre, &c. into the Chancery. Reg. Orig. 669.

TRANSCRIPTO RECOGNITIONIS FACTAE CORAM JUSTICIARIIS INERANTIBUS, &c. an old writ to certify a recognizance taken by justices in eyre. Reg. Orig. 152.

TRANSGRESSIONE, A Writ or action of trespass, according to Fitzherbert.

TRANSIRE, from Transeo.] Is used for a warrant from the custom-house to let pass. Stat. 14 Car. 2. c. 11.

TRANSITORY, Is the opposite to local. Transitory actions are those that may be laid in any county or place; such as personal action of trespass, &c. See titles Action; Venue.

TRANSLATION, Translato.] In the common sense of the word, signifies a version out of one language into another; but, in a more confined acceptation, it denotes the removing from one place to another: So the removal of a bishop to another diocese, &c. is called translating; and such a bishop writes not, anno consecrationis, but anno Translationis nostra, &c. A bishop translated is not consecrated de novo; for a consecration is like an ordination, it is an indelible character, and holds good for ever. 3 Salk. 72. But the bishop is to be a-new elected, &c. 1 Salk. 137. See title Bishop.

TRANSPORTATION, The banishing or sending away a criminal into another country.
TRANSPORTATION.

It is said, that exile was first introduced as a punishment by the Legislature in the 39th year of Queen Elizabeth, when a statute (stat. 39 Eliz. c. 4.) enacted, that such rogues as were dangerous to the inferior people, should be banished the realm. Barr. Ant. Stat. 445. (5 Edw.) And that the first statute in which the word Transportation is used, is stat. 18 Car. 2. c. 3. which gives a power to the judges, at their discretion, either to execute or transport to America for life, the moss-troopers of Cumberland and Northumberland. 2 Woodd. 498. This statute was made perpetual by stat. 31 Geo. 2. c. 42. This is, perhaps, the only instance in which the legislature has extended the term of transportation beyond fourteen years. 1 Comm. c. 1. p. 137, n.

Transportation was first brought into general use as a punishment anno 1718, by Stat. 4 Geo. 1. c. 11; continued by stat. 6 Geo. 1. c. 23. which statute allowed the court a discretionary power to order felons, who were by law entitled to their clergy, to be transported to the American plantations. See this Dict. title Clergy, Benefit of.

By these statutes the persons contracting for the transportation of convicts to the colonies, or their assigns, had an interest in the service of each, for seven or fourteen years, according to the term of transportation.

Returning from transportation, or being at large in Great Britain before the expiration of the term for which an offender is ordered to be transported, or has agreed to transport himself, is felony without benefit of clergy, in all cases; as is also the assisting a felon to escape from such as are conveying him to the port of transportation. See stats. 4 Geo. 1. c. 11; 6 Geo. 1. c. 23; 16 Geo. 2. c. 15; 8 Geo. 3. c. 15; 24 Geo. 3. st. 2. c. 56.

To persons capitally convicted the King frequently offers a pardon upon condition of their being transported for life. Many have at first rejected this gracious offer: and there were one or two instances of persons so desperate as to persist in the refusal, and who, in consequence, suffered the execution of their sentence. This evil seems to be intended to be obviated by stat. 24 Geo. 3. st. 2. c. 56. § 1. 31 Geo. 3. c. 46. § 7. under the latter of which, all convicts sentenced to transportation, may be kept to hard labour from the time of their sentence, till they are transported; and that time is to be reckoned in part discharge of their transportation. See also the stats. 24 G. 3. c. 56: 34 G. 3. c. 60. as to removing such offenders to temporary places of confinement.—These are temporary acts, continued by various acts, and now in force, till 25 March 1813.

The system of transportation to the American colonies continued for fifty-six years; during which period, and until the commencement of the American war in 1775, great numbers of felons were sent, chiefly to the province of Maryland. The rigid discipline which the colonial laws authorized the masters to exercise over the servants, joined to the prospects which agricultural pursuits, after some experience, held out to these convicts, tended to reform the chief part; who, after the expiration of their servitude, mingled in the society of the country, under circumstances highly beneficial to themselves, and even to the colony. Treatise on the Police of the Metropolis.

The convicts having accumulated greatly in the year 1776, and the intercourse with America being then shut up, it became indispensably necessary to resort to some other expedient; and in the
choice of difficulties the system of the Hulks was suggested, and first adopted under the authority of a statute, 16 Geo. 3.

The legislature, uncertain with regard to the success of this new species of punishment, and wishing to make other experiments, by an act of the same session empowered the justices of every county in England, to prepare houses of correction for the reception of convicts under sentence of death, to whom His Majesty should extend his royal mercy, to be kept at hard labour for a term not exceeding ten years. The same act, among many other excellent regulations, ordered the convicts to be kept separate, and not allowed to mix with any offenders convicted of crimes less than larceny; and that they should be fed with coarse, inferior food, water, and small beer, and clothed at the public expense; without permission to have any other food, drink, or clothing than that allowed by the act, under certain penalties. — As an encouragement to these delinquents, while such as refused to work were to receive corporal punishments, those who behaved well, had not only the prospect held out of the period of their confinement being shortened, but they were also to receive decent clothes, and a sum of money not less than 40s. nor more than 5l. when discharged. Stat. 16 Geo. 3. c. 43.

This very salutary act was followed up three years afterwards by another statute; viz. stat. 19 Geo. 3. c. 74: * Which has been continued by various subsequent acts; the last, 46 G. 3. c. 28, to 25 March 1813. This act had two very important objects in view.

The first was to erect in some convenient common or waste ground in Middlesex. Essex, Kent, or Surrey, two large Penitentiary Houses; one for 600 male, the other for 300 female convicts; with proper offices, gardens, &c. The expense to be paid by government, and His Majesty to appoint a committee of three persons to regulate the establishment, under the control of the justices of peace, and judges of assize; with power to appoint officers with salaries, to be paid out of the profits of the work to be performed by the convicts. — In these penitentiary houses, persons convicted of transportable offences were to be confined to hard labour in the proportion of five years' labour to seven years' Transportation, and not exceeding seven years' labour in lieu of fourteen years' Transportation. The number of convicts to be sent from the circuits, or the metropolis, being limited accordingly. These convicts were to be employed in works of the most servile kind, and such as were least liable to be spoiled by ignorance, neglect, or obstinacy, viz. treading in a wheel for moving machinery; drawing in a capstan for turning a mill; sawing stone; polishing marble; beating hemp; rasping logwood; making cordage; picking oakum; weaving sacks; making nets, &c. The food and drink of the offenders to be bread and coarse meat, with water or small beer; and their clothing to be uniform, with badges affixed. Other rules were also to be established under the direction of the committee, who were to attend every fortnight, and to have power to reward the diligent with a part of their earnings; and when an offender was discharged, he was to have decent clothing, and from 20s. to 3l. in money.

The second purpose of this act (and which is the only part of it that has ever been carried into effect) regards the continuation of the system of The Hulks.
It declares, that for the more effectual punishment of atrocious male offenders liable to be transported, the court may order such convicts as are of proper age, and free from bodily infirmity, to be punished by being kept on board ships or vessels, and employed in hard labour, in raising sand, soil, and gravel, and cleansing the river Thames, or any other river or port approved of by the privy council; or in any other works upon the banks or shores of the same, under the direction of superintendents approved of by the justices, for a term not less than one year, nor more than five; except any offender be liable to Transportation for fourteen years, in which case his punishment may be commuted for seven years on board the hulks; the mode of feeding, clothing, and discipline, similar to that already explained, is established, and on discharge the convicts are to receive from 20s. to 3/. according to circumstances.

The concluding part of the act obliges the governors and superintendents of the two establishments, to make annual returns to the court of king's bench; and also authorises His Majesty to appoint Inspectors of the penitentiary houses, of the hulks, and of all the other gaols and places of criminal confinement in London and Middlesex: these inspectors personally to visit every such place of confinement at least once in three months, to examine into the particulars of each, and to make a return to the court of king's bench of the state of the buildings, the conduct of the officers, treatment of the prisoners, state of their earnings and expences; and to follow up this by a report to both houses of Parliament at the beginning of each session. It is believed, that the yearly report to the court of King's Bench by the superintendent of the hulks, is the only part of the act that is in any degree punctually complied with.

It is much to be lamented, that neither of these statutes, so far as regarded Penitentiary Houses, which seemed to hold out so fair a prospect of employing convicts, in pursuits connected with productive labour, and ultimate reformation, without sending them out of the kingdom, have been carried effectively into execution; for in the year 1784, the system of Transportation was again revived; by an act which empowers the court, before whom a felon shall be convicted, to order the prisoner to be transported beyond seas, either within His Majesty's dominions, or elsewhere: and his service to be assigned to the contractor, who shall undertake such Transportation. Stat. 24 Geo. 3. st. 2. c. 56.

The same act continues the system of the hulks for a further length of time, by directing the removal of convicts under sentence of death, and reprieved by His Majesty, and also such as are under sentence of Transportation, (being free from infectious disorders,) to other places of confinement, either inland, or on board of any ship or vessel in the river Thames, or any other navigable river; and to continue them so confined, until transported according to law, or until the expiration of the term of the sentence should otherwise entitle them to their liberty.

The plan of Transportation, through the medium of the contractors, (although some felons were sent to Africa,) does not appear to have answered; from the great difficulty of finding any situation since the independence of America, where the services of convicts could
be rendered productive or profitable to merchants who would undertake to transport them. Hence arose the idea of making an establishment for these outcasts of society on the eastern coast of New South Wales, more generally known by the name of Botany Bay, from a bay on the coast so named by Captain Cook, and where the first convicts were landed; to which remote region it was at length determined to transport atrocious offenders. Accordingly, in the year 1787, an act passed authorising the establishment of a court of judicature for the trial of offenders who should be transported thither.—Stat. 27 Geo. 3. c. 2.

An act of the following year empowered His Majesty, under his sign manual, to authorise any person to make contracts for the transportation of offenders; and to direct to whom security should be given for the due performance of the contract. Stat. 28 Geo. 3. c. 24.

By a subsequent act, the governor of the settlement may remit the punishment of offenders there; and on a certificate from him, their names shall be inserted in the next general pardon. Stat. 30 Geo. 3. c. 47.

Under these various legislative regulations, the two systems of punishments, namely, the Hulks, and Transportation, are now regulated.

Transportation, Of goods and merchandise, is allowed or prohibited, in many cases by statute, for the advantage of trade. See title Navigation Acts.

Transubstantiation, Transubstantiatio. Is a converting into another substance: To transubstantiate, i.e. Quidpiam in aliam substantiam convertere. Litt. Dict. A declaration against the doctrine of Transubstantiation maintained by the church of Rome is required by the stat. 30 Car. 2. st. 2. c. 1. See title Papists.

Transumpts, is a summons, wherein the complainer demands, that his rights to such and such lands should be exhibited, and copies judicially to be taken of them, and these to be declared authentic Transumpts, and sufficient for the security of the pursuer. Scotch Dict.

Travellers; See title Inns and Innkeepers.

Traverse, from Fr. Traverser. Is used in Law for the denying of some matter of fact, alleged to be done, in a declaration or pleadings; upon which the other side comes and affirms that it was done; and this makes a single and good issue for the cause to proceed to trial. The formal words of a Traverse are in our French Sans eco, in Latin Abaque hoc, and in English without that, that such a thing was done or not, &c. Kitch. 217; West. Symb. par. 2. See title Pleading I. 2.

A Plea will be ill, which neither traverseth, nor confesseth the plaintiff's title, &c. And every matter in fact, alleged by the plaintiff, may be traversed by the defendant, but not matter of law, or where it is part matter of law and part matter of fact: nor may a record be traversed which is not to be tried by a Jury. And if a matter be expressly pleaded in the affirmative, which is expressly answered in the negative, no Traverse is necessary, there being a sufficient issue joined: also where the defendant hath given a particular answer in his plea, to all the material matters contained in the declaration,

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he need not take a Traverse; for when the thing is answered, there needs no further denial. *Cro. Eliz.* 755: *Yelt.* 173. 193. 195: 2 *Mod.* 54.

Any fact which appears to be material is traversable, though it be only on suggestion; as in prohibition, a suggestion of a refusal by the Spiritual Court, of a plea (which ought to be allowed) in a suit there for tithes, or other matter of their cognizance, is traversable; otherwise their jurisdiction might in any case be taken away by such suggestion. 2 *Co.* 45; a. So any surmise which takes away the jurisdiction of the Court is traversable. *Cro. Eliz.* 511. But Traverse of a thing, not necessary to be alleged, is bad. *Cro. Car.* 328. So of matter of mere supposal, or inducement. *Com. Dig.* title *Pleading.* (G. 13, 14.)

As one Traverse is enough to make a perfect issue, a Traverse cannot be regularly taken upon a Traverse, if it is well taken to the material point, and goes to the substance of the action; but where the first Traverse is not well taken, nor pertinent to the matter, there, to that which was sufficiently confessed and avoided before, the other party may well take a Traverse after such immaterial Traverse taken before: And if special matter alleged in a foreign county in the defendant’s plea be false, the plaintiff may maintain his action, and traverse that special matter; and in such case a Traverse on a Traverse hath been adjudged good; but a Traverse after a Traverse may be allowed; as in trespass in such a county, defendant pleads a concord for trespass in every other county, and traverses the county; the plaintiff may join issue on the county, or traverse the concord. 1 *Inst.* 282, b: *Mo.* 428: 1 *Saund.* 32: *Poph.* 101.

These rules are to be observed in Traverses: 1. The Traverse of a thing not immediately alleged, vitiates a good bar. 2. Nothing must be traversed but what is expressly alleged. 3. Surplusage in a plea doth not inform a Traverse. 4. It must be always made to the substantial part of the title. 5. Where an act may indifferently be intended to be at one day or another, there the day is not traversable. 6. In action of trespass, generally the day is not material; though, if a matter be to be done upon a particular day, there it is material and traversable. 2 *Roll. Ref.* 37: 1 *Roll. Ref.* 235: *Yelt.* 122: 2 *Litt. Abr.* 313. If the parties have agreed on the day for a thing to be done, the Traverse of the day is material; but where they are not agreed on the day it is otherwise; and though 'tis proved to be done on another day, 'tis sufficient. *Palm.* 280.

Where a traverse goes to the matter of a plea, &c. all that went before is waived by the Traverse; and if the Traverse goes to the time only, it is not waived. 2 *Salk.* 642.—In action of trespass, a particular place and time were laid in the declaration, and in the plea there was a Traverse as to the place, but not as to time: On averment that it was *eadem transgressio*, the plea was held good. 3 *Lev.* 227: 2 *Lutw.* 1452. Where a plea in justification of a thing is not local, a Traverse of the place is wrong. 2 *Mod.* 270.

The substance and body of a plea must be traversed. *Hob.* 232.—But a Traverse that a person died seised of land in fee *modo & forma* as the defendant had declared, was adjudged good. *Hutt.* 123.—A lord and tenant differ in the services, there the tenure and not the seisin shall be traversed; but if they agree in the services, the seisin...
and not the tenure is traversable; and it is a general rule, that the tenant shall never traverse the seisin of the services without admitting the tenure. March 116.—That which is not material nor traversable, is not admitted when it is alleged, and not traversed. 2 Salk. 361.—But the omitting a Traverse where it is necessary, is a matter of substance. 2 Mod. 60. And a Traverse of a debt is ill when a promise is the ground of the action; which ought to be traversed, and not the debt. Leon. 252.

A Traverse should have an inducement to make it relate to the foregoing matter. And 'tis no good plea for the plaintiff to reply, that a man is alive who is alleged to be dead, without traversing that he is not dead. 3 Salk. 357. It is said that where a Traverse abaque hoc comprizes the whole matter generally, it may conclude & de hoc fion. se sufer patriam; but when it traverses a particular matter, the conclusion ought to be with an averment, &c. 1 Salk. 4. That it ought not to conclude to the country, for it is in the negative. See 2 Mod. 203.

Traverse may be in an answer in Chancery, replication, &c. In an action upon a bail-bond the arrest is not traversable. 1 Strange 444.—Traverse of a seisin in fee is ill, where a less estate would be sufficient. 2 Strange 818. Where the party confesses and avoids, he ought not to traverse. But it may be passed over and issue taken upon the Traverse. 2 Strange 837.

Default of Traverse where the plaintiff has not fully confessed and avoided, is only form, and aided on a general demurrer: And by stat. 4 & 5 Ann. c. 16. no exception shall be for an immaterial Traverse, unless shewn for cause of demurrer. But defect of a Traverse when there are two affirmatives, is not aided on a general demurrer; for by default of an issue the right cannot appear to the Court. So if a Traverse be necessary to make a good bar, the omission will be fatal on a general demurrer. And if the replication does not traverse the matter of the bar, which is not fully confessed and avoided, the defendant shall not be aided on a general demurrer. Com. Dig. title Pleading. (G. 22.) See titles Pleading; Trespass.

Traverse of an Indictment or Presentment. The taking issue upon, and contradicting or denying some chief point of it: as in a Presentment against a person for a highway overflowed with water, for default of scouring a ditch, &c. he may traverse the matter, that there is no highway, or that the ditch is sufficiently scoured; or otherwise traverse the cause, viz. That he hath not the land, or he and they whose estate, &c. have not used to scour the ditch. Lamb. Eiren. 521: Book Entr. See title Trial.

Traverse of an Officer, is the proving that an inquisition made of lands or goods by the escheator, is defective and untruly made. See title Inquest of Office. No person shall traverse an Office, unless he can make to himself a good right and title; and if one be admitted to traverse an Office, this admission of the party to the Traverse, doth suppose the title to be in him, or else he had no cause of Traverse. Vaugh. 641: 2 Lill. Abr. 590, 591. The Traverse of an inquisition for the King is to be considered as a debt, and the prosecutor may carry down the record. 2 Strange 1208.


TRAWLERMEN, A kind of fishermen on the river Thames, who
used unlawful arts and engines to destroy fish; of these some were termed Tinckermen, others Hebbermen, and Trawlermen, &c. And hence comes to trowl or trawl for pikes. Stow's Surv. Lond. page 19.

TRAYLBASTON; See title Justices of Trailbaston. See copies of several commissions granted to them by Edward the First, in Shelman's Glossary verbo Trailbaston. Edward the First, in his thirty-second year, sends out a new writ of inquisition called Trailbaston, against intruders on other men's lands, who, to oppress their right owner, would make over their lands to great men; against batterers hired to beat men, breakers of the peace, ravishers, incendiaries, murderers, fighters, false assisors, and other such malefactors; which inquisition was so strictly executed, and such fines taken, that it brought in great treasure to the King. Chron. fol. 111. See Plac. Parliamentaria, fol. 211, & 280. 4 Inst. 186. In a Parliament, 1 Ric. II. the Commons of England petitioned the King, that no commission of Eyre or Trailbaston, might be issued during the war, or for twenty years to come. Rot. Parl. 1 R. 2.

TRAYTOR, Traditor, Proditor.] A State offender, Betrayer, &c. See Treason.

TRAYTEROUS, Perfidiousus.] Treacherous, or full of disloyalty. Lat. Law Dict.

TRAYTEROUS position, of taking arms by the King's authority against his person, and those that are commissioned by him, is condemned by the stat. 14 Car. 2. c. 3.

T. R. E. Tempore Regis Edwardi. These initial letters have this continual note of time in the Domesday Register, where the valuation of manors is recounted, what it was in the time of Edward the Confessor; and what since the Conquest. Cowell.

TREASON.

From Fr. Trahir, to betray; Trahison, betraying, contracted into treason. Lat. Proditio.] The crime of treachery and infidelity to our Lawful Sovereign.

I. Of Treason generally; and by the Common Law, previous to stat. 25 E. 3. st. 5. c. 2.

II. Who may commit High Treason.

III. Of High Treason, under stat. 25 E. 3. st. 5. c. 2.; and stat. 36 Geo. 3. c. 7. as explanatory thereof.

1. Of compassing or imagining the Death of the King, Queen, or Heir Apparent.

2. Levying War against the King in his realm.

3. Adhering to the King's Enemies, and giving them Aid, in the Realm or elsewhere.

4. The stat. 36 Geo. 3. c. 7. as applying, directly or indirectly, to the above Branches of Treason.

5. Slaying the King's Chancellor or Judges in the Execution of their offices. See also tit. Judges.

6. Violating the Queen, the King's eldest Daughter, or the Wife of the Heir Apparent, or eldest Son.

7. Counterfeiting the King's Great or Privy Seal.
8. Counterfeiting the King's Money, or bringing false Money into the Kingdom. See also title Coin.

IV. Of other Treasons, by statutes subsequent to stat. 25 E. 3.

V. Of the Proceedings and Judgment in Trials for High Treason.

1. The Indictment, and Stetis previous.

2. The Process and Regulations previous to Trial.

3. The Trial, and Judgment.

I. Treason, in its very name, imports a betraying, treachery, or breach of faith. It therefore happens only between allies, saith the Mirror; for treason is indeed a general appellation, made use of by the law, to denote not only offences against the King and Government, but also that accumulation of guilt which arises, whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, civil, or even a spiritual relation; and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such superior or lord. This is looked upon as proceeding from the same principle of treachery in private life, as would have urged him who harbours it to have conspired in public against his liege lord and sovereign; and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary; these, being breaches of the lower allegiance, of private and domestic faith, are denominated petit treasons. See title Petty Treason.—But when disloyalty so rears its crest, as to attack even Majesty itself, it is called by way of eminent distinction high treason, Alta Proditio; being equivalent to the crimen laxe Majestatis of the Romans, as Glanville denominates it also in our English law. 4 Comm. c. 6.

The greatness of this offence of Treason and severity of the punishment thereof, is upon two reasons; because the safety, peace, and tranquillity of the kingdom are highly concerned in the preservation of the person and government of the King; and therefore the laws have given all possible security thereto, under the severest penalties: And as the subjects have protection from the King and his laws; so they are bound by their allegiance to be true and faithful to him. 1 Hale's Hist. P. C. 59.

As this is the highest civil crime, which (considered as a member of the community) any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of high treason be indeterminate, this alone (says Montesquieu) is sufficient to make any government degenerate into arbitrary power. And yet, by the antient common law, there was a great latitude left in the breast of the judges, to determine what was treason, or not so; whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by forced and arbitrary constructions, offences into the crime and punishment of treason, which never were suspected to be such. Thus, in the reign of Edw. I., appealing to the French courts, in opposition to the King's, was in parliament solemnly adjudged high treason. 3 Inst. 7: 1 Hale 79; and this under the idea of subverting the realm.—Another charge, the approaching, or attempting to exercise, royal power, (a very uncertain charge,) was, in the 21 Edw. III. held to be treason in a knight of
Hertfordshire, who forcibly assaulted and detained one of the King's subjects till he paid him 90l; a crime it must be owned, well deserving of punishment; but which seems to be of a complexion very different from that of treason. 1 Hal. P. C. 80. Killing the King's father, or brother, or even his messenger, has also fallen under the same denomination. Britt. c. 22: 1 Hawk. P. C. c. 17. § 1. But however, to prevent the inconveniencies which began to arise in England from this multitude of constructive treasons, the stat. 25 Edw. 3. st. 5. c. 2. was made; which defines what offences only for the future should be held to be Treason. See post III.

Nothing can be construed to be Treason under this statute which is not literally specified therein; nor may the statute be construed by equity, because it is a declarative law, and one declaration ought not to be the declaration of another; besides, it was made to secure the subject in his life, liberty, and estate, which by admitting constructions to be made of it, might destroy all. 1 Hawk. P. C. 34: 3 Salk. 358.

This statute after reciting that divers opinions having been, what cases should amount to High Treason, enacts and declares, that if a person doth compass or imagine the death of the King, Queen, or their eldest son and heir; or if he do violate and deflower the King's wife or companion, or his eldest daughter unmarried, or the wife of the King's eldest son; or if he levy war against the King in his realm, or adhere to his enemies, give them aid and comfort in the realm, or elsewhere, and thereof be probably (or proveably) attained of open deed; and if a man counterfeit the King's great or privy seal, or his money, or bring false money into the kingdom, like to the money of England, to make payment therewith in deceit of the King and his people; or if he kill the chancellor, treasurer, or any of the King's justices in either Bench, justices of assise, &c. being in their places, doing their offices; these cases are to be adjudged Treason.

II. Every Subject of Great Britain, whether ecclesiastical or lay, man or woman, if of the age of discretion, and of sane memory, may be guilty of High Treason. 1 Hawk. P. C. c. 17. § 4. If a married woman commit High Treason, in the company of her husband, or by his command, she is punishable as if unmarried; for in a crime of such magnitude, the presumption of coercion by the husband is no excuse. 1 Hawk. P. C. c. 1. § 11: 1 Hal. P. C. 47. A Soldier cannot justify by the command of his superior officer, for, as the command is traitorous, so is the obedience. Kely. 13. Neither can a man justly, by acting as counsel. Kely. 23. Madmen were heretofore punished as Traitors, particularly by stat. 33 H. 8. c. 20: See title Idiots V.; but now they are not punishable, if the crime is committed during a total deprivation of reason. 1 Hal. P. C. 37. And this has been confirmed in modern cases; though the frequency of attempts against the person and family of King George III., by persons actually or pretendedly of that description, was extremely remarkable.

The husband of a queen regnant, as was King Philip, may commit High Treason. So may a queen consort against the King her husband. Such were the cases of queen Anne Boleyn and Catharine Howard; For the queen is considered, in the eye of the Law, as a distinct person, for many purposes. 3 Inst. 8.

Aliens may commit Treason; for as there is a local protection on the King's part, so there is a local allegiance on theirs. 7 Rep. 6.
There is no distinction, whether the alien's-sovereign is in amity or enmity with the crown of England. If during his residence here, under the protection of the crown, he does that which would constitute Treason in a natural born subject, he may be dealt with as a traitor.

1 Hal. P. C. 60. So also if he resides here, after a proclamation of war; unless he openly removes himself, by passing to his own Prince, or publicly renounces the King of England's protection, which is analogous to a diffidatio, or defiance; and then, under such circumstances, he is considered as an enemy. 1 Hal. P. C. 92. Thus the marquis De Guiscard, a French papist, residing here, during a war, under the protection of queen Anne, was charged with holding a traitorous correspondence with France. And two Portuguese were indicted and attainted of High Treason, for joining in a conspiracy with Dr. Lopez to poison queen Elizabeth. 7 Rep. 6: Dy. 144.

If an alien, during a war with his native country, leaving his family and effects here, goes home, and adheres to the King's enemies, for the purpose of hostility, he is a Traitor; for he was settled here, and his family and effects are still under the King's protection. 1 Salk. 46: 1 Id. Raym. 282: Post. 185, 186. In declarations of war, it has been frequently used to except, and take under the protection of the crown, such resident aliens as demean themselves dutifully, and neither assist or correspond with the enemy. In that case, they are upon the footing of aliens coming here by licence or safe conduct, and are considered as alien friends. Post. 185.

If an alien is charged with a breach of his natural allegiance, he may give alienage in evidence, for he is charged with a breach of that species of allegiance, which is not due from an alien. 4 St. Tr. 699, 700.

Alien merchants are protected by the statute staple, in case of a war, which provides, that they shall have convenient warning, by forty days proclamation, or eighty days in case of accident, to avoid the realm; during which time, they may be dealt with as traitors, for any treasonable act; if after that time they reside and trade here, as before, they may be either treated as alien enemies, by the law of nations, or as Traitors, by the law of the land. 1 Hal. P. C. 93, 94. See Mag. Cart. c. 30: Stat. 27 E. 3. st. 2. cc. 2. 13. 17. 19. 20.

Subjects of the King in open war or rebellion, are not the King's enemies, but Traitors; and if a subject join with a foreign enemy, and come into England with him, if he be taken prisoner, he shall not be ransomed or proceeded against as an enemy, but as a Traitor to the King; on the other hand, an enemy coming in open hostility into England, and taken, shall be either executed by martial law, or ransomed; for he cannot be indicted of Treason, because he never was within the allegiance of the King. 3 Inst. 11: 7 Rep. 6, 7: 1 Hal. P. C. 100.

A natural-born subject cannot abjure his allegiance, and transfer it to a foreign prince. Neither can any foreign prince, by naturalizing, or employing a subject of Great Britain, dissolve the bond of allegiance between that subject and the crown. 1 Comm. 369. This was determined, in the case of Æneas Macdonald, who was born in Great Britain, but educated from his early infancy in France; and being appointed commissary of the French troops intended for Scotland, was taken prisoner, tried, and found guilty of High Treason. Post. 60: 9 Stat. Tri. 585.
It is a question, whether the general exemption of ambassadors from the cognizance of the municipal tribunal, extends to Treason? On the one hand, there is a positive breach of local allegiance; on the other, an infringement of the privilege of personal inviolability, universally allowed by the law of nations. Coke maintains, that if an ambassador commits Treason, he loses the privilege and dignity of on ambassador, as unworthy of so high a place, and may be punished here, as any other private alien, and not remanded to his Sovereign, but of courtesy. 4 Inst. 153. Most writers agree that an ambassador, conspiring the death of the King, or raising a rebellion, may be punished with death. But it is doubted, whether he is obnoxious to punishment for bare conspiracies of this nature. 1 Roll. Rep. 185: 1 Hale 96, 97, 99.

The bishop of Rosse, ambassador from Mary queen of Scots, to Elizabeth, was committed to the Tower, as a confederate with the duke of Norfolk, for corresponding with the Spanish ministry, to invade the kingdom; he pleaded his privilege, and afterwards, having made a full confession, no criminal process was commenced. 1 Hal. P. C. 97: 1 St. Tri. 105. But he was afterwards banished the country. The Spanish ambassador for encouraging Treason, and the French ambassador for conspiring the same queen’s death, were only reprimanded. Doctor Story was condemned and executed, but he was an Englishman by birth, and therefore could never shake off his natural allegiance. Dyer 298. 300: 3 St. Tri. 775.

From this view we may collect, that the right of proceeding against ambassadors for Treason, in the ordinary course of justice, has been waived, from motives of policy and prudence: and that they have seldom been proceeded against further than by imprisonment, seizing their papers, and sending them home in custody. As was done in the case of count Gyllenberg the Swedish minister in George the second’s time. Post. 187. See 1 Comm. 254; Ward’s Law of Nations, where this subject is fully treated.

III. 1. The first Treason described by the stat. 25 E. 3. st. 5. c. 2, is, “When a man doth compass or imagine the death of our lord the King, of our lady his queen, or of their eldest son and heir.”—Under this description it is held that a queen regnant (such as queen Elizabeth or queen Anne) is within the words of the act, being invested with royal power, and entitled to the allegiance of her subjects. 1 Hal. P. C. 101:—But the husband of such a queen is not comprised within these words, and therefore no Treason can be committed against him. 3 Inst. 7: 1 Hal. P. C. 106.

Though the compassing the death of the queen consort be Treason, this must be intended during the marriage; for it doth not extend to a queen dowager. And the eldest son and heir of the King, that is living, is intended by the said act, though he was not the first Son; but if the heir apparent to the crown be a collateral heir, he is not within the statute; nor is a conspiracy against such collateral heir, Treason by this act. 3 Inst. 8.

At common law, compassing the death of any of the King’s children, and declaring it by overt act, was taken to be Treason; though by this statute it is restrained to the eldest son and heir. 1 Hal. P. C. 125.

The King, intended by the act, is the King in possession, without any respect to his title; for it is held, that a King de facto and not de
jure, or in other words an Usurper that hath got possession of the throne, is a King within the meaning of the statute; as there is a temporary allegiance due to him for his administration of the government, and temporary protection of the public; and therefore Treasons committed against Henry VI. were punished under Edward IV., though all the line of Lancaster had been previously declared usurpers by act of parliament. But the most rightful heir of the crown, or King de jure and not de facto, who hath never had plenary possession of the throne, as was the case of the house of York during the three reigns of the line of Lancaster, is not a King within this statute, against whom Treasons may be committed. 3 Inst. 7: 1 Hal. P. C. 104. And a very sensible writer on the Crown-Law carries the point of possession so far, that he holds, that a King out of possession is so far from having any right to our allegiance, by any other title which he may set up against the King in being, that we are bound by the duty of our allegiance to resist him. A doctrine which he grounds upon the stat. 11 Hen. 7. c. 1. which is declaratory of the common law, and pronounces all subjects excused from any penalty, or forfeiture, who do assist and obey a King de facto. 1 Hawk. P. C. c. 17. §§ 14—18. But this seems, says Blackstone, to be confounding all notions of right and wrong; and the consequence would be, that when Cromwell had murdered the elder Charles, and usurped the power, (though not the name) of King, the people were bound in duty to hinder the son's restoration: And were a foreign King to invade this kingdom, and by any means to get possession of the crown, (a term, by the way, of very loose and indistinct signification,) the subject would be bound by his allegiance to fight for his natural prince to-day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be, that the statute of Henry VII. does by no means command any opposition to a King de jure; but excuses the obedience paid to a King de facto. When, therefore, an usurper is in possession, the subject is excused and justified in obeying and giving him assistance: Otherwise, under an usurpation, no man could be safe, if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience. Nay, farther, as the mass of people are imperfect judges of title, of which in all cases possession is prima facie evidence, the law compels no man to yield obedience to that prince, whose right is by want of possession rendered uncertain and disputable, till providence shall think fit to interpose in his favour, and decide the ambiguous claim: And therefore, till he is entitled to such allegiance by possession, no Treason can be committed against him. Lastly, a King who has resigned his crown, such resignation being admitted and ratified in parliament, is, according to Hale, no longer the object of Treason. 1 Hal. P. C. 104. And the same reason holds, in case a King abdicates the government; or, by actions subversive of the constitution, virtually renounces the authority which he claims by that very constitution: Since, when the fact of abdication is once established, and determined by the proper judges, the consequence necessarily follows, that the throne is thereby vacant, and he is no longer King.

4 Comm. c. 6.

Let us next see, what is compassing or imagining the death of the King, &c. These are synonymous terms; the word compass signifying the purpose or design of the mind or will, and not, as in common

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speech, the carrying such design into effect. 1 Hal. P. C. 107. And therefore, it has been held, that an accidental stroke, which may mortally wound the sovereign, per infortunium, without any traitorous intent, is no treason; as was the case of Sir Walter Tyrrel, who, by the command of King William Rufus, shooting at a hart, the arrow glanced against a tree, and killed the King upon the spot. 3 Inst. 6. But, as this compassing or imagination is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some overt (i.e. open) act; and therefore it is necessary that there appear an open or overt act of a more full and explicit nature, to convict the Traitor upon. The statute expressly requires, that the accused "Be thereof, upon sufficient proof, attained of some open act, by men of his own condition." Thus, to provide weapons or ammunition for the purpose of killing the King, is held to be a palpable overt act of treason, in imagining his death. 3 Inst. 12. To conspire to imprison the King by force, and move towards it by assembling company, is an overt act of compassing the King's death; for all force, used to the person of the King, in its consequence may tend to his death, and is a strong presumption of something worse intended than the present force by such as have so far thrown off their bounden duty to their Sovereign; it being an old observation, that there is generally but a short interval between the prisons and the graves of Princes. 1 Hal. P. C. 109. There is no question, also, but that taking any measures to render such treasonable purposes effectual, as assembling and consulting on the means to kill the King, is a sufficient overt act of High Treason. 1 Hawk. H. C. c. 17. § 31: 1 Hal. P. C. 119.

Mr. Justice Foster lays down generally, that the care the law hath taken for the personal safety of the King, is not confined to actions or attempts of the more flagitious kind, to assassination or poison, or other attempts immediately and directly aimed at his life: It is extended to every thing wilfully and deliberately done or attempted, whereby his life may be endangered. Post. 195.

It hath been adjudged, that he who intended by force to prescribe laws to the King, and to restrain him of his power, doth intend to deprive him of his Crown and life; that if a man be ignorant of the intention of those who take up arms against the King, if he join in any action with them, he is guilty of treason; and that the law construeth every rebellion to be a plot against the King's life, and a deposing him, because a rebel would not suffer that King to reign and live, who will punish him for rebellion. Moor 62: 2 Salk. 63.

How far mere words, spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, has been formerly matter of doubt. Two instances occurred in the reign of Edward IV. of persons executed for treasonable words: The one a citizen of London, who said he would make his Son Heir of the Crown, being the sign of the house in which he lived; the other a gentleman, whose favourite Buck the King killed in hunting, whereupon, he wished it, horns and all, in the King's belly. These were esteemed hard cases; and the Chief Justice Markham rather chose to leave his place than assent to the latter judgment. 1 Hal. P. C. 115.

It was resolved in the trial of the Regicides, that though a man cannot be indicted of High Treason for words only, yet if he be indicted
for compassing the King's death, these words may be laid as an overt act, to prove that he compassed the death of the King; and to support this opinion, the case of a person was cited who was indicted of Treason, anno 9 Car. I., for that he, being the King's Subject at Lisbon, used these words: "I will kill the King, (innuendo King Charles,) if I may come to him;" and afterwards he came into England for that purpose; and two merchants proving that he spoke the words, for that his traiterous intent, and the wicked imagination of his heart was declared by these words, it was held to be High Treason by the Common Law, and within the statute of the 25 Ed. 3. c. 2: Cro. Car. 242: 1 Lev. 57.

But now it seems clearly to be agreed, that, by the Common Law, and the statute of Edward III., words spoken amount only to a High Misdemeanor, and no Treason: For they may be spoken in heat, without any intention; or be mistaken, perverted, or misremembered by the hearers; their meaning depends always on their connexion with other words, and things; they may signify differently even according to the tone of voice with which they are delivered; and sometimes silence itself is more expressive than any discourse. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to High Treason. And accordingly, in 4 Car. I. on a reference to all the Judges, concerning some very atrocious words spoken by one Pyne, they certified to the King, "That though the words were as wicked as might be, yet they were no Treason; for, unless it be by some particular statute, no words will be Treason." Cro. Car. 125. See 1 Hol. P. C. 111—120; 312—322: Foot. 196—207. From which authorities it may be concluded, that bare words are not overt acts of Treason, unless uttered in contemplation of some traiterous purpose actually on foot or intended; and in prosecution of it: As if they are attended or followed by a consultation, meeting, or any act, then they will be evidence, or a confession of the intent of such meeting, consultation, or act.

Ever since the Revolution, it has been the constant practice, where a person, by treasonable discourses, has manifested a design to murder or depose the King, to convict him upon such evidence. And Chief Justice Holt was of opinion, that express words were not necessary to convict a man of High Treason; but if, from the tenor of his discourse, the Jury were satisfied he was engaged in a design against the King's life, this was sufficient to convict the prisoner. 4 State Trials 172.

If the words be set down in writing, it argues more deliberate intention; and it has been held that writing is an overt act of Treason; for scribere est agere. But even in this case the bare words are not the Treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted its author of Treason; particularly in the cases of one Peacham, a clergyman, for treasonable passages in a sermon never preached; and of Algernon Sydney, for some papers found in his closet; which, had they been plainly relative to any previous formed design for dethroning or murdering the King, might doubtless have been properly read in evidence as overt acts of that Treason, which was specially laid in the indictment. Foster 198. But being merely speculative, without any intention (so far as appeared) of making any public use of them, the convicting the authors of Treason upon such an insufficient founda-
tion has been universally disapproved. Peacham was therefore pardoned; and though Sydney indeed was executed, yet it was to the general discontent of the Nation; and his attainder was afterwards reversed by Parliament. There was then no manner of doubt, but that the publication of such a treasonable writing was a sufficient overt act of Treason at the Common Law; though, of late, even that has been questioned. 1 Hal. P. C. 118: 1 Hawk. P. C. c. 17. § 32. 45. But see post III. 4.

2. The next species of Treason to be considered is, "If a man do levy war against our Lord the King in his realm." And this may be done by taking arms, not only to dethrone the King, but under pretence to reform Religion or the Laws, or to remove evil counselors, or other grievances, whether real or pretended. 1 Hawk. P. C. c. 17. § 25. So it was held, in the case of Lord G. Gordon, that an attempt, by intimidation and violence, to force the repeal of a Law, is a levying war against the King, and High Treason. Doug1. 570. For the Law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power for these purposes, in the High Court of Parliament. Neither does the Constitution justify any private or particular resistance, for private or particular grievances; though, in cases of national oppression, the Nation has very justifiably risen as one man, to vindicate the original contract subsisting between the King and his People. To resist the King's forces, by defending a castle against them, is a levying of war; and so (it has been held) is an insurrection, with an avowed design to pull down all inclosures, all brothels, and the like; the universality of the design making it a rebellion against the state, and usurpation of the powers of government, and an insolent invasion of the King's authority. 1 Hal. P. C. 132. But a tumult, with a view to pull down a particular house, or lay open a particular inclosure, amounts at most to a Riot; this being no general defiance of public government. So, if two Subjects quarrel and levy war against each other, it is only a great Riot and Contempt, and no Treason. Thus it happened between the Earls of Hereford and Gloucester, in 20 Edward 1., who raised each a little army, and committed outrages upon each other's lands, burning houses, attended with the loss of many lives; yet this was held to be no High Treason, but only a great misdemesnor. 1 Hal. P. C. 136.

But in the case of a great riot in London by the Apprentices there, some whereof being imprisoned, the rest conspired to kill the Lord Mayor, and release their comrades; and, in order to it, to provide themselves with armour, by breaking open two houses near the Tower: They marched with a cloak on a pole, instead of an ensign, towards the Lord Mayor's house; and in the way, meeting with opposition from the Sheriffs, resisted them: This was held levying of war, and Treason. Sid. 358.

Those who make an insurrection in order to redress a public grievance, whether it be a real or pretended one, are said to levy war against the King, although they have no direct design against his person; as they are for doing that by private authority, which he by public justice ought to do, which manifestly tends to a rebellion. For example; where great numbers by force endeavour to remove certain persons from the King; or to lay violent hands on a Privy Counsellor, or revenge themselves against a Magistrate for executing his office,
or to deliver men out of prison, expel foreigners, or to reform the Law of Religion, see *post Div. 4. But where a number of men rise to remove a grievance to their private interest, as to pull down a particular inclosure, they are only Rioters; for there is a difference between a pretence that is public and general, and one that is private and particular. 3 Inst. 9: H. P. C. 14: Kel. 75: 1 Hawk. P. C. c. 17. § 25.

It was resolved by all the Judges of *England, in the reign of King *Henry VIII., that an insurrection against the statute of Labourers, for raising their wages, was a levying of war against the King; because it was generally against the King's Law, and the offenders took upon them the reformation thereof. *Read. Statutes, vol. 5. p. 150. It is to be observed however that many of the foregoing constructions of Treason, in cases where the object, though extensive, was private and not connected with the government of the country, are to be considered with great caution, and are not likely to be adopted as precedents; particularly since the *Stat. 36 G. 3. c. 7. *post. 4. of this division; and see to this point, *Luders's Considerations on the Law of Treason.

Not only such as directly rebel and take up arms against the King, but also those who, in a violent manner withstand his lawful authority, or attempt to reform his government, do levy war against him; and therefore, to hold a Fort or Castle against the King's forces, or keep together armed men in great numbers against the King's express command, have been adjudged a levying of war, and Treason. But those who join themselves to rebels, &c. for fear of death, and return the first opportunity, are not guilty of this offence. 3 Inst. 10: Kel. 76.

A person in arms was sent for by some of the Council from the King, and to give in the names of those that were armed with him; but he refused, and continued in arms in his house; and it was held Treason. Also, where one went with a troop of captains and others into *London, to pray help of the city to save his life, and bring him to court to the Queen, though there was no intent of hurt to her, was adjudged Treason; and in them who joined with him, though they knew nothing but only a difference between him and some courtiers. So if any man shall attempt to strengthen himself so far, that the Prince cannot resist him. *E. of Essex's Case, Moor 620.

A bare conspiracy to levy war does not amount to this species of Treason; but, if particularly pointed at the person of the King or his government, it falls within the first, of compassing or imagining the King's death. 3 Inst. 9: Foster 211. 213.

By the Common Law, levying war against the King was Treason: But as, in cases of High Treason, there must be an overt act, therefore it is that a conspiracy, or compassing to levy war, is no overt act unless a war is actually levied; though if a war is actually levied, then the conspirators are all Traitors, although they are not in arms. And a conspiracy to levy war will be evidence of an overt act to maintain an indictment for compassing the King's death; but if the indictment be for levying war only, proof must be made that a war was levied, to bring the offender under this clause of the statute. 3 Inst. 8, 9; *H. P. C. 14. If two or more conspire to levy war, and one of them alone raises forces, this shall be adjudged Treason in all. *Dyer, 98.

3. "If a man be inherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere," he is also
declared guilty of High Treason. This must likewise be proved by some overt act, as by giving them intelligence, by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the like. 3 Inst. 10. Sending intelligence to the enemy of the destinations and designs of this kingdom, in order to assist them in their operations against us, or in defence of themselves, is High Treason, although such correspondence should be intercepted. 1 Burr. 650. So sending any intelligence to the enemy, in order to serve them in shaping their attack or defence, though its object be to dissuade them from an invasion, is High Treason. 6 Term Rep. 529.

Officers or Soldiers of this realm, holding correspondence with any rebel, or enemy to the King, or giving them any advice, information by letter, message, &c. are declared guilty of Treason by stat. 2 & 3 Ann. c. 20.

By Enemies are here understood the Subjects of foreign Powers with whom we are at open war. As to foreign pirates or robbers who may happen to invade our coasts, without any open hostilities between their nation and our own, and without any commission from any Prince or State at enmity with the crown of Great Britain, the giving them any assistance is clearly Treason; either in the light of adhering to the public enemies of the King and kingdom, or else in that of levying war against His Majesty. Foster 219. And, most indisputably, the same acts of adherence or aid, which, when applied to foreign enemies, will constitute Treason under this branch of the statute, will, when afforded to our own fellow-subjects in actual rebellion at home, amount to High Treason, under the description of levying war against the King. Foster 216. But to relieve a rebel, fled out of the kingdom, is no Treason; for the statute is taken strictly, and a rebel is not an enemy; an enemy being always the Subject of some foreign Prince, and one who owes no allegiance to the crown of England. 1 Harek. P. C. c. 17. § 28 And if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or enemies in the kingdom, provided he leaves them whenever he hath a safe opportunity. Foster 216, See ante I.

The delivery or surrender of the King's castles or forts, by the captains thereof, to the King's enemy, within the realm or without, for reward, &c. is an adhering to the King's enemies. A Lieutenant of Ireland let several rebels out of Dublin Castle, and discharged some Irish hostages which had been given for securing the peace; and for this he was attainted of High Treason in adhering to the King's enemies. 33 H. 8. Adhering to the King's enemies out of the realm is Treason; but such adherence out of the realm must be alleged in some place in England. 3 Inst. 10: H. P. C. 14: Dyer, 298. 310. If there be war between the King of England and France, those Englishmen that live in France before the war, and continue there after, are not merely upon that account adherents to the King enemies, to be guilty of Treason, unless they actually assist in such war; or at least refuse to return into England upon a Privy Seal, or on proclamation and notice thereof; and this refusal is but evidence of an adherence, and not so in itself. 1 Hale's Hist. P. C. 165. Adhering to the King's enemies is an adhering against him; and English subjects
joining with rebel subjects of the King's allies, and fighting with them under the command of an alien enemy prince, are guilty of treason in adhering to the King's enemies: So cruising in a ship with intent to destroy the King's ships, without doing any act of hostility, is an overt act of adhering, comforting, and aiding; for where an Englishman lists himself and marches, this is treason without coming to battle or actual fighting. 2 Salk. 634.

By a temporary act, 33 Geo. 3. c. 27. (now expired,) it was enacted, that if any person residing, or being in Great Britain should, during the war with France, either on his own account or on account of any other person whatsoever, buy, sell, procure, or send, or assist in so doing, for the use of the French armies, or of any person resident within the dominions of France, any ordnance, stores, iron, lead, or copper, except cutlery ware, not being arms, and except buttons, buckles, japanned wares, toys, and trinkets; or any bank notes, gold, or silver; or any provisions whatever, or any clothing for the armies or fleets; or any leather wrought or unwrought, without licence from the King or Privy Council, he shall be guilty of high treason. And that every British subject, who should purchase, or enter into any agreement for any land or real property in France, should also be guilty of high treason. Temporary provisions were also made by various acts to prevent the intercourse and correspondence with France and other hostile countries during the war, viz. 38 Geo. 3. c. 28. 45. 79, the restraints imposed by which were removed by 42 Geo. 3. c. 11. and not renewed during the subsequent war.

4. The legislature, in the reign of Edward III., was not only careful to specify and reduce to a certainty the vague notions of treason that had formerly prevailed; but the statute goes on to state, that, "Because other like cases of treason may happen in time to come, which cannot be thought of nor declared at present, it is accorded that if any other case, supposed to be treason, which is not above specified, doth happen before any Judge: the Judge shall try without going to judgment of the treason, till the cause be shewn and declared before the King and his Parliament, whether it ought to be judged treason, or other felony." Sir Matthew Hale is very high in his encomiums on the great wisdom and care of the Parliament, in thus keeping Judges within the proper bounds and limits of this act; by not suffering them to run out (upon their own opinions) into constructive treasons, though in cases that seem to them to have a like parity of reason; but reserving them to the decision of Parliament. This is a great security to the public, the Judges, and even this sacred act itself; and leaves a weighty memento to Judges to be careful and not over-hasty in letting in treasons by construction or interpretation, especially in new cases that have not been resolved and settled. 2. He observes, that as the authoritative decision of these casus omissi is reserved to the King and Parliament, the most regular way to do it is by a new declarative act; and therefore the opinion of any one or of both Houses, though of very respectable weight, is not that solemn declaration referred to by this act, as the only criterion for judging of future treasons. 1 Hal. P. C. 259; 4 Comm. c. 6.

Doubts having been entertained, how far the words of Stat. 25 Edw. 3. were applicable, with sufficient explicitness, to modern treasonable attempts to overturn the constitution, by means of tumultuous assemblies of the people; the publication and dispersion of in-
flammatory works and speeches, against all the branches of the legislature having increased to an enormous and very alarming degree, "with unremitting industry, and with a transcendant boldness:"

The project of overawing Parliament, by means of mobs and their leaders having been repeatedly avowed; the legislature thought the following act necessary to explain and enlarge the clauses of the statute 25 E. 3. relative to the Treasons enumerated in the three preceding divisions.

The stat. 36 Geo. 3. c. 7. (the recital of which alludes to the transactions just mentioned,) enacts, "That if any person, (during the life of His present Majesty, and until the end of the next session of Parliament, after a demise of the Crown,) shall, within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of the King, his heirs and successors: Or to deprive or depose him or them from the style, honour, or kingly name of the Imperial Crown of this realm, or of any other of his dominions: Or to levy war against His Majesty, his heirs, and successors within this realm, in order, by force or constraint, to compel him or them to change his or their measures or councils, or in order to put any force or constraint upon, or to intimidate or overawe, both houses, or either house of Parliament: Or to move or stir any foreigner with force to invade this realm, or any other of His Majesty's dominions; and such compassings, &c. shall express, utter or declare, by publishing any printing or writing, or by any overt act, or deed," the offender shall be deemed a Traitor, and punished accordingly. The benefits of stats. 7 W. 3. c. 3: 7 Ann. c. 11. (see post. V. 2.) are reserved to the offenders; and the act does not extend to prevent any prosecutions at Common Law.

5. The killing of the King's Chancellor, Treasurer, justices of either bench; &c. declared to be Treason, relates to no other officers of state besides those expressly named; and to them only when they are in actual execution of their offices, representing the person of the King, and it doth not extend to any attempt to kill, or wounding them, &c. 3 Inst. 18. 38: H. P. C. 17. The places for the justices to do their offices, are the courts themselves, where they usually, or by adjournment, sit for despatch of the business of their courts. 1 Hale's Hist. P. C. 232. See titles Judges; Privy Council.

By stat. 7 Ann. c. 21. it is made High Treason to slay any of the Lords of Session in Scotland, or Lords of Justiciary, sitting in judgment; or to counterfeit the King's Seals appointed by the Act of Union. See post. 7.

6. It is also a species of Treason, under this statute 25 Edw. 3: "if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir." By the King's companion is meant his wife; and by violation is understood carnal knowledge, as well without force as with it; and this is High Treason in both parties, if both be consenting, as some of the wives of Henry VIII. by fatal experience evinced. The plain intention of this law is to guard the Blood Royal from any suspicion of bastardy, whereby the succession to the Crown might be rendered dubious; and therefore, when this reason ceases, the Law (generally speaking) ceases with it; for to violate a Queen or Princess dowager is held to be no Treason. 3 Inst. 9. But it has been remarked, that the in-
stances specified in the statute do not prove much consistency in the application of this Treason; for there is no protection given to the wives of the younger sons of the King, though their issue must inherit the Crown before the issue of the King's eldest daughter; and her chastity is only inviolable before marriage, whilst her children would be clearly illegitimate. 4 Comm. c. 6. n.

The eldest daughter of the King is such a daughter as is eldest not married at the time of the violation, which will be Treason, although there was an elder daughter than her, who died without issue; for now the elder alive has a right to the inheritance of the Crown upon failure of issue male. Violating the Queen's person, &c. was High Treason at Common Law, by reason it destroyed the certainty of the King's issue, and consequently raised contention about the succession. H. P. C. 16.

As a Queen dowager after the death of her husband, is not a Queen within the statute; for though she bears the title, and hath many prerogatives answering the dignity of her person, yet she is not the King's wife or companion: So a Queen divorced from the King à vinculo matrimonii, is no Queen within this act, although the King be living; which was the case of Queen Katharine, who, after twenty years' marriage with King Henry VIII. was divorced causâ affinitatis. 1 Hale's Hist. P. C. 124.

7. “If a man counterfeit the King's Great or Privy Seal,” this is also High Treason. But if a man takes wax bearing the impression of the Great Seal off from one patent, and fixes it to another, this is held to be only an abuse of the Seal, and not a counterfeiting of it: as was the case of a certain chaplain, who in such manner framed a dispensation for non-residence. But the knavish artifice of a lawyer much exceeded this of the divine. One of the clerks in Chancery gewed together two pieces of parchment; on the uppermost of which he wrote a patent, to which he regularly obtained the Great Seal, the label going through both the skins. He then dissolved the cement; and taking off the written patent on the blank skin wrote a fresh patent, of a different import from the former, and published it as true. This was held no counterfeiting of the Great Seal, but only a great misprision; and Coke mentions it with some indignation, that the party was living at that day. 3 Inst. 16; 4 Comm. c. 6.

Counterfeiting the King's Seal was Treason by the Common Law; and the stat. 25 Ed. 3. st. 5. c. 2. mentions only the Great Seal and Privy Seal; for the counterfeiting of the Sign Manual, or Privy Signet, is not Treason within that act, but by stat. 1 Mary, st. 2. c. 6, those who aid and consent to the counterfeiting of the King's Seal are equally guilty with the actors: But an intent or compassing to counterfeit the Great Seal, if it be not actually done, is not Treason; there must be an actual counterfeiting, and it is to be generally like the King's Great Seal. 3 Inst. 15; S. P. C. 3: H. P. C. 18. This branch of the statute does not extend to the affixing the Great Seal to a patent; without a warrant for so doing; nor to the raising any thing out of a patent, and adding new matter therein; yet this, like the taking off the wax impressed by the Great Seal, from one patent, and fixing it to another, though it be not a counterfeiting, has been adjudged a misprision of the highest degree: And a person guilty of an act of this nature, with relation to a commission for levying money, &c. had judgment to be drawn and hanged. 2 H. 4; 3 Inst. 16; Kel. 80. Till a
new Great Seal is made, the old one of a late King, being used and employed as such, is the King's Seal within the statute; notwithstanding its variance in the inscription, portraiture, and other substantialia: When an old Great Seal is broken, the counterfeiting of that Seal, and applying it to an instrument of that date wherein it stood, or to any patent; &c. without date, is Treason. 1 Hale's Hist. P. C. 177. The adding a crown in a counterfeit Privy Signet, which was not in the true; and omitting some words of the inscription, and inserting others, done purposely to make a little difference, alters not the case, but it is High Treason; being published on a feigned patent to be true, &c. 1 Hal. P. C. 184.

8. The last species of Treason under this statute, according to our present division, is, "If a man counterfeit the King's money; and if a man bring false money into the realm counterfeit to the money of England, knowing the money to be false, to merchandize and make payment withal." As to the first branch, counterfeiting the King's money; this is Treason, whether the false money be uttered in payment or not. Also if the King's own minters alter the standard or alloy established by Law, it is Treason. But gold and silver money only are held to be within the statute. With regard likewise to the second branch, importing foreign counterfeit money, in order to utter it here; it is held that uttering it, without importing it, is not within the statute. 1 Hawk. P. C. c. 17. § 55. See this Dictionary, title Coin.

If a counterfeit money, and another vent the same for his own benefit, he is not guilty of Treason; for it is only a cheat and misdemeanor in him, punishable by fine and imprisonment: But if one counterfeit the King's money, though he never vents it, this is a counterfeiting, and Treason within the statute. And if any man doth counterfeit the lawful coin of this kingdom in a great measure, but with some variation in the impression, &c. yet it is counterfeiting of the King's money; and shall not evade the statute. 1 Hale's Hist. P. C. 214, 215.

False money brought into this kingdom, counterfeit like the money of England, must be knowingly brought over from some foreign nation, not from any place subject to the crown of England; and must be uttered in payment. 3 Inst. 18. See title Coin.

IV. IN CONSEQUENCE of the power, not indeed originally granted by the statute of Edward III., but constitutionally inherent in every subsequent Parliament, (which cannot be abridged of any rights by the act of a precedent one,) the legislature was extremely liberal in declaring new Treasons in the unfortunate reign of King Richard II; as, particularly, the killing of an Ambassador was made so; which seems to be founded upon better reason than the multitude of other points, that were then strained up to this high offence: The most arbitrary and absurd of all which was by the stat. 21 Ric. 2. c. 3. which made the bare purpose and intent of killing or deposing the King, without any overt act to demonstrate it, High Treason. And yet so little effect have over violent laws to prevent any crime, that within two years afterwards this very Prince was both deposed and murdered. And in the first year of his successor's reign, an act was passed, reciting, "That no man knew how he ought to behave himself; to do, speak, or say, for doubt of such pains of Treason: And therefore it was accorded, that in no time to come any Treason be judged, otherwise than
was ordained by the statute of King Edward the Third." This at once swept away the whole load of extravagant Treasons introduced in the time of Richard the Second. Stat. 1 Hen. 4. c. 10.

But afterwards, between the reign of Henry IV. and Queen Mary, and particularly in the bloody reign of Henry VIII., the spirit of inventing new and strange Treasons was revived; among which we may reckon the offences of clipping money; breaking prison or rescue, when the prisoner is committed for Treason; burning houses to extort money, stealing cattle by Welchmen; counterfeiting foreign coin; wilful poisoning; executions against the King; calling him opprobrious names by public writing; counterfeiting the Sign Manual or Signet; refusing to abjure the pope; deflowering or marrying without the Royal Licence, any of the King's children, sisters, aunts, nephews or nieces; bare solicitation of the chastity of the Queen or Princess, or advances made by themselves; marrying with the King, by a woman not a virgin, without previously discovering to him such her unchaste life; judging or believing (manifested by any overt act) the King to have been lawfully married to Anne of Cleve; derogating from the King's royal style and title; impugning his supremacy: assembling riotously to the number of twelve, and not dispersing upon proclamation: All which new-fangled Treasons were totally abrogated by the stat. 1 Mar. st. 1. c. 1. which once more reduced all Treasons to the standard of the statute 25 Edw. III. Since which time, though the legislature has been more cautious in creating new offences of this kind, yet the number has been very considerably increased; these new Treasons may be comprised under three heads. 1. Such as relate to Papists. See that title.—2. Such as relate to falsifying the Coin or other Royal Signatures. See title Coin, and ante, Div. 7, 8.—3. Such as are created for the security of the Protestant succession to the throne in the House of Hanover.—With respect to this latter, it may be necessary to state something in this place, in addition to what is said under title King I.

After the act of Settlement (stat. 12 & 13 W. 3. c. 2.) was made, for transferring the crown to the illustrious house of Hanover, it was enacted by stat. 13 & 14 W. 3. c. 3.) that the pretended Prince of Wales, who was then thirteen years of age, and had assumed the title of King James III., should be attainted of High Treason; and it was made High Treason for any of the King's subjects, by letters, messages, or otherwise, to hold correspondence with him, or any person employed by him, or to remit any money for his use, knowing the same to be for his service.—And by stat. 17 Geo. 2. c. 39. it was enacted, that if any of the sons of the Pretender should land or attempt to land in this kingdom, or be found in Great Britain or Ireland, or any of the dominions belonging to the same, he should be judged attainted of High Treason, and suffer the pains thereof. And to correspond with them, or to remit money for their use, was made High Treason in the same manner as it was to correspond with the father. By stat. 1 Ann. st. 2. c. 17, if any person shall endeavour to deprive or hinder any person, being the next in succession to the Crown according to the limitations of the Act of Settlement, from succeeding to the Crown, and shall maliciously and directly attempt the same by any overt act, such offence shall be High Treason.—And by stat. 6 Ann. c. 7. if any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm, that any
other person hath any right or title to the Crown of this realm, other-
wise than according to the Act of Settlement; or that the Kings of
this realm, with authority of Parliament, are not able to make laws
and statutes to bind the Crown, and the descent thereof; such person
shall be guilty of High Treason. This offence (or indeed maintain-
ing this doctrine in any wise, that the King and Parliament cannot
limit the Crown) was once before made High Treason, by stat. 13
Eliz. c. 1., during the life of that Princess. And after her decease it
continued a high misdemeanour, punishable with forfeiture of goods
and chattels, even in the most flourishing era of indefeasible heredi-
tary right and jure divino succession. But it was again raised into High
Treason, by the statute of Anne before-mentioned, at the time of a pro-
jected invasion in favour of the then Pretender; and upon this statute
one Matthews, a printer, was convicted and executed in 1719, for
printing a treasonable pamphlet intitled vox populi vox dei. 4 Comm.
c. 6. See ante III. 4. as to the statute 56 Geo. 3. c. 7.

V. 1. Though the offence of Treason is not within the letter of the
commission of Justices of the Peace, yet because it is against the
peace of the King and of the Realm, any Justice may upon his own
knowledge, or the complaint of others, cause any person to be appre-
hended, and commit him to prison. And the Justice may take the
examination of the person apprehended, and the information of those
who can give material evidence against him, and put the same in
writing, and also bind over those who can give any material evidence
to the Justices of Oyer and Terminer, or Gaol-delivery; and certify the
proceedings to that court where he binds over the informers. 2 Hawk.
P. C. c. 8. See title Justices of the Peace.

A Justice having no power to bail the offender, must commit him:
and it may be advisable to send an account immediately to one of the
Secretaries of State. The Court of King's Bench, having power to
bail in all cases whatsoever, may admit a person to bail for Treason
done upon the High Seas: or a person committed for High Treason
generally, if four terms have elapsed, and no prosecution commenced. Holt 83: 1 Stra. 2. The commitment may be for High Treason
generally; and it is not necessary to express the overt act in the war-
rant.

The regular and legal way of proceeding in cases of Treason, and
misprision of Treason, is by indictment. An information cannot be
brought in capital cases, nor for misprision of Treason. Antiently an
appeal of High Treason, by one Subject against another, was permit-
ted in the Courts of Common Law, and in Parliament; and if commit-
ted beyond the Seas, in the Court of the High Constable and Mar-
shal. See title Appeal.—And as to proceedings by Impeachment, see
that title.

By the common Law, no Grand Jurors can indict any offence what-
soever, which does not arise within the limits of the precincts for
which they are returned; therefore they are enabled, by several sta-
tutes, to inquire of Treasons committed out of the county. See title
Indictment II.

Offenders guilty of High Treason by being concerned in the re-
bellion of the first year of King Geo. I. were to be tried before such
Commissioners of Oyer and Terminer and Gaol-delivery, and in such
county, as His Majesty by any commission under the Great Seal
should appoint, by lawful men of the same county, as if the fact had been there committed: This extended only to persons actually in arms. Stat. 1 Geo. 1. c. 33.

The venue or place laid in the indictment where the offence was committed, must generally be laid in that county where the offence was actually committed, unless a statute gives a power to the contrary. If Treason is committed in several counties, the venue may be laid in any one of them. 4 Sta. Tri. 640. If Treason is committed out of the realm, the venue may be laid in any county within the realm, where the treason is appointed to be inquired into. See title Indictment.

Wales is within the kingdom of England. But if any Treason respecting the coin is committed in Wales, the venue may be changed to the next adjoining county in England, where the King's writs run. 2 Hawk. P. C. c. 25. § 41. See stat. 26 H. 8. c. 6. In Chedley's case, who was indicted for Petig Treason, it was doubted whether a certiorari lay to remove the indictment from the Grand Sessions at Anglesea into an adjoining county. Cro. Car. 331. But it seems a certiorari may issue for a special purpose, as to quash the indictment for insufficiency; or to plead a pardon; but not as to trial of the fact, but it must be sent down by mittimus. 1 Hale P. C. 158.

By stat. 7 Ann. c. 21. If Treason is committed by any native of Scotland, upon the High Seas, or in any place out of the realm of Great Britain, it may be inquired of in any shire or county, that is assigned by the commission. Therefore the venue may be laid in such county, as if the Treason was actually committed there.

This stat. 7 Ann. c. 21. also enacted, that the crimes of High Treason, and Misprision of Treason, shall be exactly the same in England and Scotland; and that no acts in Scotland (except slaying the Lords of Session, &c. see ante Div. 5.) shall be construed High Treason in Scotland, which are not High Treason in England.—And all persons prosecuted in Scotland for High Treason, or Misprision of Treason, shall be tried by a jury, and in the same manner as if they had been prosecuted for the same crime in England.

It has been resolved, that if Treason is committed in Ireland, it may be laid and tried in England, in pursuance of stat. 35 Hen. 8. c. 2: 1 Sta. Tri. 189. In the case of Lord Macquire the venue was laid in Middlesex, though the war was levied against the King in Ireland. 1 St. Tr. 930. But see title Ireland.

The indictment must be drawn with great form and accuracy: For there can be no conviction of Treason, where the crime is not formally laid, even though the facts charged amount to Treason. 2 Sta. Tri. 808, 809. The day laid in the indictment is circumstance and form only, and not material in point of proof. Therefore the jury are not bound to find the defendant guilty on that particular day; but may find the Treason to be committed either before or after the time laid.

3 Inst. 250; Kely. 16.

There must be a specific charge of Treason. And since the traiterous intent is the gist of the indictment, the Treason must be laid to have been committed traiterously; this word being indispensably requisite. If the charge is for compassing the King's death, the words of the stat. 25 Ed. 3. (or stat. 36 Geo. 3. as the case may be) must be strictly pursued. The indictment must charge, that the defendant did traiterously compass and imagine, &c. And then proceed to lay the
several overt acts, as the means employed for executing his traitorous purposes. Levying war may be charged as a distinct species of Treason, according to the statute; or it may be laid as an overt act of compassing.

There must be an overt act laid. It is not necessary that the overt act be laid to have been committed traiterously because that is not the offence; but if the Treason consists not in the intention, but in the act, as levying war, then it must be laid to have been done traiterously. *Cranburn’s case*, 2 Salk. 633. It has been doubted, whether an overt act is required for any other species, except that of compassing or imagining the King’s death; but since the words of *stat. 25 Edw. 3.* “and thereof be proveably attainted by overt act,” relate to all the Treasons, an overt act is required for each. 5 Sta. Tri. 21; 2 Salk. 634.

Though a specific overt act must be alleged, yet it is not necessary that the whole detail of evidence intended to be given should be set forth; it is sufficient that the charge be reduced to a reasonable certainty, so that the defendant be apprised of its nature. Neither is it necessary to prove the overt act committed on the particular day laid. *Foster* 194: 9 Sta. Tri. 607.

As there must be an overt act laid, so that which is laid must be proved; for if another act than what was laid was sufficient, the prisoner would never be provided to make his defence. But if more than one are laid, the proof of any one will maintain the indictment. Also if one overt act is proved, others may be given in evidence, to aggravate the crime, and render it more probable. 1 Hale P. C. 121, 122.

It has been said that since every overt act of compassing is transitory, it may be proved in a different county from where the Treason is laid. Kel. 15. But in *Layer’s case*, Chief Justice Pratt laid it down as clear Law, that there must be an overt act proved in the county where the indictment is laid; and that then the defendant may be charged with any overt act of the same species of Treason, in any county whatsoever. 6 State Trials 319.

The compassing is considered as the Treason, and the overt act as the method of effecting it.—As to what shall be considered as an overt act, see generally ante III. 1.

In Indictments upon the clause of the statute for levying war, which Sir Matthew Hale calls an obscure clause, it is not necessary to lay the day with precision. 9 Sta. Tri. 350. But there must be an overt act shewn in the indictment, upon which the Court may judge upon the question of fact, whether war is levied or conspired. And this is usually done by setting forth, that the insurgents were arrayed in a warlike manner, were armed, or were conspiring to procure arms for the purpose of arming themselves. 2 Vent. 316, *Harding’s Case*.

2. If the Defendant is in custody before the finding of the Indictment, the next step is the arraignment. But if he absconds or secretes himself, still an indictment may be preferred against him in his absence; and if it is found, process issues to bring him into Court.

The first process is a *Capias*. At Common Law, in cases of Treason, there was but one capias; and as this has not been altered by statute, upon a *non est inventus* returned, an *exigent* is awarded, in order to proceed to outlawry. 2 Hale P. C. 194.

But if the indictment is originally taken in the King’s Bench, the
stat. 6 Hen. 6. c. 1. specially provides, that before any exigent award-
ed, the Court shall issue a capias to the sheriff of the county where
the indictment is taken, and another to the sheriff of that county
where the defendant is named in the indictment, having six weeks’
time or more before the return; and after these writs returned, the
exigent to issue as before. 2 Hale P. C. 195.
A capias and exigent may issue against a Lord of Parliament; al-
though, in civil cases, they cannot. 2 Hale P. C. 199.
If the offender is out of the realm, the process is of the same ef-
fect as if he was resident in the realm. Com. Dig. title Indictment, p.
513.

The punishment for Outlawries, upon indictments for misdemes-
nors, is the same as for Outlawries in civil actions. But an Outlawry in
Treason amounts to a conviction and attainder of the offence charged
in the indictment, as much as if the offender was found guilty by his
country. See title Outlawry.

By stat. 5 & 6 E. 6. c. 11. a party within one year after the out-
lawy for Treason, may surrender himself to the Chief Justice of
England, and traverse the indictment, and being found thereon not
guilty, shall be acquitted.

By the word provably (or probably) attainted, in the stat. 25 E. 3.
a person ought to be convicted of the Treason on direct and manifest
proofs, and not upon presumptions or inferences; and the word at-
tainted necessarily implies, that the prisoner be proceeded against
and attainted according to due course of Law; wherefore, if a man
be killed in open war against the King, or be put to death arbitra-
rily, or by Martial Law, and be not attainted of Treason, accord-
ging to the Common Law, he forfeits nothing; for which cause some
persons, killed in open rebellion against the King, have been attainted
by Act of Parliament. 3 Inst. 12.
The next proceeding is the arraignment, but previous to this, and
the trial, the prisoner is entitled to many important privileges, con-
ferred upon him by the stats. 7 Will. 3. c. 3: 7 Ann. c. 21. which are
the standard for regulating trials, in cases of Treason and Mispris-
sion.

By the stat. 7 W. 3. c. 3, which extends to all cases of High Treas-
on, whereby corruption of blood may ensue, (except Treason in coun-
terfeiting the King’s Coin or Seals,) or Misprision of such Treason,
it is enacted, First, that no person shall be tried for any such treason,
except an attempt to assassinate the King, unless the indictment be
found within three years after the offence committed: Next, that the
prisoner shall have a copy of the indictment, (which includes the
caption,) but not the names of the witnesses, five days at least before
the trial; that is, upon the true construction of the act, before his ar-
raignment; for then is his time to take any exception thereto, by
way of plea or demurrer. See Fost. 229, 230: Doug. 590. Thirdly,
That he shall also have a copy of the panel or jurors two days before
his trial: And, lastly, that he shall have the same compulsive process
to bring in his witnesses for him, as was usual to compel their ap-
pearance against him. And, by stat. 7 Ann. c. 21. (which did not take
place till after the decease of the late Pretender,) all persons, indi-
ced for High Treason or Misprision thereof, shall have, not only a
copy of the indictment, but a list of all the Witnesses to be produced,
and of the Jurors impanelled, with their professions and places of
abode, delivered to him ten days before the trial, and in the presence of two witnesses; the better to prepare him to make his challenges and defence. But this last act, so far as it affected indictments for the inferior species of High Treason, respecting the Coin and the Royal Seals, is repealed by stat. 6 Geo. 3. c. 53; else it had been impossible to have tried those offences in the same circuit in which they are indicted: For ten clear days, between the finding and the trial of the indictment will exceed the time usually allotted for any Session of Oyer and Terminer. 

It is the practice to deliver the copy of the indictment, and the list of witnesses and jurors, ten clear days, exclusive of the day of delivery and the day of trial; and of intervening Sundays previous to the trial. 

We cannot help inserting in this place the opinion of the just and venerable Judge Foster, on the subject of the indulgence given to prisoners accused of High Treason, by the above statutes. No one will dare to suggest that that eminent writer on Crown Law, was in the least degree an advocate for oppression or arbitrary power. 

The furnishing the prisoner with the names, professions, and places of abode of the witnesses and jury, so long before the trial, may serve many bad purposes, which are too obvious to be mentioned; one good purpose, and but one, it may serve. It giveth the prisoner an opportunity of informing himself of the character of the witnesses and jury. But this single advantage will weigh very little in the scale of justice or sound policy, against the many bad ends that may be answered by it. However, if it weigheth anything in the scale of justice, the Crown is entitled to the same opportunity of sifting the character of the prisoner’s witnesses. 

Equal justice is certainly due to the Crown and the public. For, let it be remembered, that the public is deeply interested in every prosecution of this kind, that is well founded. Or shall we presume that all the management, all the practising upon the hopes or fears of witnesses, lieth on one side? It is true, power is on the side of the Crown: May it, for the sake of the constitutional rights of the subject, always remain where the wisdom of the Law hath placed it! But in a government like ours, and in a most changeable climate, power, if, in criminal prosecutions it is but suspected to aim at oppression, generally disarmeth itself. It raiseth and giveth countenance to a spirit of opposition, which falling in with the pride or weakness of some, the false patriotism of others, and the sympathy of all, not to mention private attachments and party connections, generally turns the scale to the favourable side; and frequently against the justice of the case. 

If there is any objection to the copy, as if it does not appear before whom the indictment was taken, or that it was taken at all, or in what place, this must be objected to before the plea. For the copy is given the prisoner to enable him to plead; therefore, by pleading, he admits that he has had a copy, sufficient for the purpose intended by the act. 4 Sta. Tri. 668.

The reason of giving the prisoner a copy of the panel is, that he may inquire into the characters and qualifications of the jury, and make what challenges he thinks fit. But the copy may be delivered antecedent to the panel returned by the sheriff. For if he has a copy of the panel arrayed by the sheriff, which is afterwards returned into
Court, and there is no variation from it, the end and intent of the act is entirely pursued. 4 Sta. Tri. 649. 663, 664: 2 Doug. 590.

By the same stat. 7 W. 3. c. 3. the prisoner is allowed to make his defence by counsel. And the Court is authorised to assign him counsel, not more than two in number, who shall have free access to him at all seasonable hours. The counsel are to assist him throughout the trial, to examine his witnesses, and to conduct his whole defence, as well in points of fact, as upon questions of law. And this indulgence is extended to cases of impeachment in Parliament, by stat. 20 Geo. 2. c. 30.

3. The Arraignment is the calling the prisoner to the bar of the Court, to answer to the matter charged in the indictment. Upon this, the indictment being read, it is demanded of the prisoner what he saith to the indictment; who either confesses, stands mute, pleads, or demurs.

A plea to the jurisdiction is where the indictment is taken before a Court that has no cognizance of the offence. Fitzharris, in the Court of King's Bench, pleaded to the jurisdiction of the Court, that he was impeached of High Treason, by the Commons of England in Parliament, before the Lords, and that the impeachment was still in force. But the Court, after taking time to consider, held that the plea was insufficient to bar the Court of its jurisdiction. 3 Sta. Tri. 259, 260: 4 Sta. Tri. 167.

Lord Macquaire, an Irish Peer, pleaded his privilege of peerage, but the Court resolved he might be tried here. 1 Sta. Tri. 950: 4 Sta. Tri. 415.

Lord Delamere was indicted for High Treason, before the Lord High Steward, during a prorogation of Parliament, and pleaded to the jurisdiction of the Court, that, as the Parliament was not dissolved, he ought to be tried by the whole body of the Peers; the plea was over-ruled. 4 Sta. Tri. 212. 215.

The stat. 7 W. 3. c. 3. § 9. provides, that the indictment shall not be quashed for mis-writing, mis-spelling, or false or improper Latin, unless the exception is taken before any evidence is given.

Pleas in bar are general or special. The General Issue is Not Guilty. Upon which the defendant is not merely confined to evidence in negation of the charge, but may offer any matter in justification or excuse. In short the general issue goes to say, that the prisoner, under the circumstances, has not been guilty of the crime imputed to him.

Special pleas in bar are such as preclude the Court from discussing the merits of the indictment; either on account of a former acquittal, or of some subsequent matter operating in discharge of the defendant.

A pardon may be pleaded in bar, either on the arraignment, or in arrest of judgment, or in bar of execution. By stat. 13 R. 2. c. 1. no pardon of High Treason is good, unless the crime is expressly specified. See title Pardon.

Sir H. Vane justified that what he did was by authority of Parliament; that the King was out of possession of the kingdom; and that the Parliament was the only governing power. But this was over-ruled by the Court. Kelynge 14. Neither can a man plead, by way of justification, that what he did was se defendendo. 2 Hale P. C. 258.

A man may plead specially the limitation of the stat. 7 W. 3. c. 3. § 5. that no man shall be indicted, tried, or prosecuted for certain Treas-
sons unless within three years after they are committed. See ante V. 2.

A Demurrer admits the facts stated in the indictment, but refers the law arising upon them to the determination of the Court. As if the prisoner insists that the fact as stated is no Treason.

After plea, the jurors are sworn, unless challenged by the party.

A peremptory challenge of thirty-five jurors, is at this day allowable in cases of High Treason. For though the stat. 33 Hen. 8. c. 23. enacted, that in cases of High Treason or Misprision of Treason, a peremptory challenge should not be allowed: Yet the stat. 1 & 2 P. & M. c. 10. enacts, that all trials for any Treason shall be according to the order and course of the Common Law, which allowed this privilege. 3 Inst. 27: 2 Hale P. C. 269; and see stat. 7 & 8 W. 3. c. 3. § 2.

But by stat. 33 Hen. 8. c. 12. which seems to be still in force, for Treasons committed in the King’s household, and tried before the Lord Steward, all challenge, except for malice is taken away. See 2 Hal. P. C. 272.; and further this Dictionary, title Jury.

After the jury are sworn, and the indictment opened, the next step is proceeding to evidence of the charge.

The stat. 7 W. 3. c. 3. § 2. enacts, that no person shall be indicted, tried, or attainted for High Treason or misprision, except upon the oaths of two lawful witnesses; either both of them to the same overt act, or one of them to one, and the other to another overt act of the same Treason: unless the prisoner willingly without violence, in open Court, confesses the same: or stands mute; or refuses to plead; or, in cases of High Treason, peremptorily challenges more than thirty-five of the jury.

At Common Law, one positive witness was sufficient. But several statutes previous to the act of William required two; but a collateral fact, not tending to the proof of the overt acts, may be proved by one. 5 St. Tr. 29.

If two distinct heads of Treason are alleged in one bill of indictment, one witness produced to prove one of the Treasons, and another witness to prove another of the Treasons, are not two witnesses to the same Treason, according to the intent of the act.

In an indictment for compassing the King’s death, the being armed with a dagger, for the purpose of killing the King, was laid as an overt act; and being armed with a pistol for the same purpose, as another overt act; it was held, that proving one overt act by one witness, and the other by a different witness, was good proof by two witnesses within the meaning of the act.

An overt act not laid may be given in evidence, if it be a direct proof of any of the overt acts that are laid. Foster 9. And after the overt act has been proved in the proper county, evidence of overt acts, though done in foreign counties, is admissible; and such evidence was given upon most of the trials after the rebellions of 1715 and 1745. Foster. 10.

On an indictment for High Treason in sending intelligence to the enemy, a letter sent by one of the conspirators in pursuance of the common design, with a view of reaching the enemy, is evidence against all engaged in the same conspiracy. 6 Term Rep. K. B. 527.

The same rules of evidence are observable in cases of parliamentary impeachments, as in the ordinary courts of judicature.
As to the confession, there have been doubts whether the statute requires a confession upon the arraignment of the party; or a confession taken out of court by a person authorised to take such examination. Evidence of a confession proved upon the trial by two witnesses has been held sufficient to convict, without farther proof of the overt acts. Foster 241. This point however is not clearly settled. But such evidence out of court is evidence admissible, proper to be left to a jury, and will go in corroboration of other evidence to the overt acts.

We have seen that the prisoner is entitled by the act 7 W. 3. c. 3. to have a similar process of the court to compel witnesses to appear for him, to that which is usually granted to compel witnesses to appear against him; and by stat. 1 Ann. st. 2. c. 9. § 3. the witnesses on the behalf of prisoners, before they give evidence, are to take an oath to depose the whole truth, &c. as the witnesses for the Crown are obliged to do. And if convicted of wilful perjury in their evidence, they shall suffer the usual punishment.

The jury must be unanimous, and give their verdict in open court. No privy verdict can be given. 2 H. P. C. 300.

Upon the trial of peers in the court of the Lord High Steward, a major vote is sufficient either to acquit or condemn; provided that vote amount to twelve or more. Kelynge 56, 57. Therefore it has been usual to summon not less than twenty-three Peers. See title Peers.

After the trial and conviction, unless the prisoner has any thing to offer in arrest of judgment, the judgment of the Court is awarded.

The punishment of High Treason, in general, is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried, or walk; though usually (by connivance, at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement. 2. That he be hanged by the neck, and then cut down alive. 3. That his entrails be taken out and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the King's disposal. 4 Comm. c. 6.

The King may, and often doth discharge all the punishment, except beheading, especially where any of noble blood are attainted. For beheading being part of the judgment, that may be executed, though all the rest be omitted by the King's command. But where beheading is no part of the judgment, as in murder or other felonies, it hath been said that the King cannot change the judgment, although at the request of the party, from one species of death to another. See title Execution of Criminals.

In the case of coining, which is a Treason of a different complexion from the rest, the punishment is milder for male offenders; being only to be drawn, and hanged by the neck till dead. But in Treasons of every kind, the punishment of women is the same, and different from that of men. For as the decency due to the sex forbids the exposing and publicly mangling their bodies, their sentence is now to be drawn to the gallows, and there to be hanged. See stat. 30 Geo. 3. c. 48; and title Judgment, Criminal.

Upon a writ of error to reverse an attainder in Treason, because the party convicted was not asked what he had to say why judgment
should not be given against him, the attainder was reversed; for he might have a pardon, or some matter to move in arrest of judgment. 2 Salk. 630; 3 Mod. 265. And the omission of any necessary part of the judgment for Treason, is error sufficient to reverse an attainder, as it is more severe and formidable in Treason than for any other crime. 2 Salk. 632.

The consequences of this judgment are, attainder, forfeiture of all lands and tenements, and corruption of blood. Corruption of blood annihilates the powers of inheritance, both as to the offender and as to others. But stat. 17 Geo. 2. c. 39. § 3. enacts, that after the death of the sons of the late Pretender, no attainder of Treason shall extend to the disinheriting any heir, nor to the prejudice of any other person, except the offender himself. See titles Attainder; Forfeiture.

Petit Treason, is where one, out of malice, takes away the life of a subject, to whom he owes special obedience. And it is called Petit Treason in respect to High Treason, which is against the King. 3 Inst. 20. See title Homicide III. 4. Aiders, abettors, and procurers are within the stat. 25 E. 2.; but if the killing is upon a sudden falling out, or se defendendo, &c. it is not Petit Treason; for persons accused of Petit Treason shall be adjudged not guilty, or principal and accessory according to the rules of Law in other cases. H. P. C. 24.

If a servant kills his mistress, or the wife of his master, she is master within the letter of the statute, and it is Petit Treason. But this statute is so strictly construed, that no case, which cannot be brought within the meaning of the words of it, shall be punished by it; and therefore, if a son kills his father, he shall not be tried for Petit Treason, except he served his father for wages, &c., in which case he shall be indicted by the name of a servant; and yet the offence is more heinous by far in a child than a servant. 3 Inst. 20: H. P. C. 23: 11 Ref. 34. A servant procured another to kill his master, who killed him in the servant’s presence; this was Petit Treason in the servant, and murder in the other. If the servant had been absent, the crime would not have been Petit Treason, but murder; to which he would have been accessory. 3 Inst. 20: Moor. 91. A maid servant and a stranger conspired to rob the mistress; and in the night the servant opened the door and let the stranger into the house, who killed her mistress, she lighting him to her bed, but neither saying nor doing anything, only holding the candle; and this was held murder in the stranger, and Petit Treason in the servant. Dyer 128.

If a wife and a stranger kill the husband, it is Petit Treason in the wife, and murder in the stranger. And so it is of an ecclesiastical person killing his prelate, &c. Dalt. 337. If a wife and her servant conspire to kill the husband, and appoint time and place for it, but the servant alone in the absence of the wife killeth him; it shall be Petit Treason in both: And if the wife procure a servant to kill the husband, both are guilty of Petit Treason; also, if a stranger procures a wife or servant to kill the husband or master, he may be indicted as accessory to Petit Treason. Dyer 128. 332: Crompt. 41.

Where the wife, and another who was not her servant, conspired the death of the husband, the indictment was, that the wife fraudulenter, and the other person felonice, gave him poison, &c. whereof he died; and the wife being acquitted on the indictment, she brought an action against her son-in-law for a malicious prosecution, and recover-
ed damages; but afterwards he brought an appeal of murder against her, upon which she was convicted in B. R., and carried down into the county where the fact was done, and there executed. Cro. Car. 331. 382: Mod. Ca. 217: 3 Nels. Abr. 372. On a divorce from the husband for adultery, a woman is a wife within the statute to be guilty of Petit Treason against her husband; for they may cohabit again. But where a man marries a second wife, the former being alive, she is not within this Law. 1 Hale's Hist. P. C. 381.

If a clergyman be ordained by the bishop of A. and he kills that bishop, it is Petit Treason, for he hath professed canonical obedience to him. And where a parson hath benefice in two dioceses, if he kill the bishop of either, it is Petit Treason; but in case he kill a bishop out of the diocese where he is benefited, it is only murder. A parson kills the metropolitan of his province, this will be Petit Treason, though he be not his immediate superior. 1 Hal. P. C. 381.

TREASURE-TROVE, Thesaurus inventus; French, trouvé, found.] Money or coin, gold, silver, plate, or bullion, found hidden in the earth or other private place, the owner thereof being unknown. In such case, the treasure belongs to the King, and is part of his ordinary revenue; but if he that hid it be known, or afterwards found out, the owner and not the King, is entitled to it. 3 Inst. 132: Dalt. of Sheriffs, c. 16. Also, if it be found in the sea, or upon the earth, it doth not belong to the King, but to the finder, if no owner appears. Brit. c. 17: Finch. L. 177. So that it seems it is the hiding; and not the abandoning of it, that gives the King a property: Bracton defining it, in the words of the civilians to be vetus depositio pecunie; l. 3. c. 3. § 4. This difference clearly arises from the different intentions which the Law implies in the owner. A man that hides his Treasure in a secret place, evidently does not mean to relinquish his property; but reserves a right of claiming it again when he sees occasion: And if he dies, and the secret also dies with him, the Law gives it to the King in part of his royal revenue. But a man that scatters his Treasure into the sea, or upon the public surface of the earth, is construed to have absolutely abandoned his property, and returned it into the common stock, without any intention of reclaiming it; and therefore it belongs, as in a state of nature, to the first occupant or finder; unless the owner appear and assert his right, which then proves that the loss was by accident, and not with an intent to renounce his property. 1 Comm. c. 8.

Formerly, all Treasure-trove belonged to the finder. Bract. l. 3. c. 3: 3 Inst. 133: Kitch. 80. Afterwards it was judged expedient for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the King; which part was assigned to be all hidden Treasure; such as is casually lost and unclaimed, and also such as is designedly abandoned, still remaining the right of the fortunate finder. And that the prince shall be entitled to this hidden Treasure is now grown to be, according to Grotius, "jus commune, et quasi gentium," for it is not only observed he adds, in England, but in Germany, France, Spain, and Denmark. The finding of deposited Treasure was much more frequent, and the Treasures themselves more considerable, in the infancy of our constitution, than at present; and therefore the punishment of such as concealed from the King the finding of such hidden Treasure was formerly no less than
Nothing is said to be Treasure-trove but gold and silver. It is every subject's part, as soon as he has found any Treasurer in the earth, to make it known to the coroners of the county, &c. Britton, cap. 17: S. P. C. 25. Coroners ought to inquire of Treasure-trove, being certified thereof by the King's bailiffs, or others, and of who were the finders, &c. 4 Edw. 1. st. 2.—And seizures of Treasure-trove may be inquired of in the sheriff's torn. 2 Hawk. P. C. c. 10. § 57.

TREASURER, Thesaurarius.] An officer to whom the Treasure of another is committed to be kept, and truly disposed of. The chief of these with us is the Lord Treasurer of England, who is a Lord by his office, and one of the greatest men of the kingdom. This great officer holds his place durante bene placito, and is instituted by the delivery of a white staff to him by the King; and in former times he received his office by delivery of the golden keys of the Treasury: He is also Treasurer of the Exchequer, by letters patent. By stat. 31 Edw. 3. stat. 1. c. 12. in writs of error the Lord Chancellor and Lord Treasurer shall cause the record and process of the Exchequer to be brought before them, who are judges; but the writ is to be directed to the Treasurer and Barons, who have the keeping of the records. See title Error. Under the charge and government of the Lord Treasurer is all the King's wealth contained in the Exchequer; he has the check of all the officers employed in collecting the customs and royal revenues; all the offices of the customs in all ports of England are in his gift and disposition; escheators in every county are nominated by him; and he makes leases of all the lands belonging to the Crown, &c.

But the high and important post of Lord Treasurer has of late years, like some other great offices, been esteemed too great a task for one person, and been generally executed by commissioners. See more belonging to this office, stat. 20 Ed. 3. c. 6: 31 H. 6. c. 5: 4 Ed. 4. c. 1: 4 Inst. 104. If any one kill the Treasurer, being in his place, doing his office, it is High Treason by stat. 25 Ed. 3. c. 2. See titles Treason; Judges.

Besides the Lord Treasurer, there is a Treasurer of the King's household, who is of the Privy Council, and with the comptroller, &c. has great power. A Treasurer of the Navy or War, see stat. 35 Eliz. c. 4. Treasurer of the King's Chamber, stat. 33 H. 8. c. 39. A Treasurer of the Wardrobe, stat. 25 Ed. 3. c. 21. There are also Treasurers of Corporations, &c.

TREASURER, in CATHEDRAL CHURCHES, An officer whose charge was to take care of the vestments, plate, jewels, relics, and other Treasure belonging to the said churches. At the time of the Reformation, the office was extinguished as needless in most Cathedral Churches; but it is still remaining in those of Salisbury, London, &c.

TREASURER OF THE COUNTY. He that keeps the county stock. There are two of them in each county, chosen by the major part of the justices of the peace, &c. at Easter sessions; they must have 10l. a year in land, or 150l. in personal estate; and shall not continue in their office above a year; and they are to account yearly at Easter sessions, or within ten days after, to their successors, under penalties. The county stock, of which this officer hath the keeping, is raised by
rating every parish yearly; and is disposed to charitable uses, for the relief of maimed soldiers and mariners, prisoners in the county gaols, paying the salaries of governors of houses of correction, and relieving poor alms-houses, &c. The duty of these Treasurers, with the manner of raising the stock, &c. is particularly specified in the statutes, 43 Eliz. c. 2: 7 Jac. 1. c. 4: 11 & 12 W. 3. c. 18: 5 Ann. c. 32: 6 Geo. 1. c. 23, &c. See further, titles Poor; Vagrants.

Treasurer's Remembrancer, is he whose charge it is to put the Lord Treasurer and the rest of the Judges of Exchequer in Remembranc of such things as are called on, and dealt in for the King's behoof: He makes process against all sheriffs, escheators, receivers, and bailiffs for their accounts. Scotch Dict. There is a like officer in the Exchequer of England.

TREASURE, Signifies sometimes the place where the King's Treasure is deposited; and, at other times, the office of Treasurer. Cowell.

TREATIES, LEAGUES, AND ALLIANCES; See. title King V. 3.


TREES. The proprietors of trees cut down or taken away how re-compensed, and the offenders punished, Stats. 43 Eliz. c. 7: 15 Car. 2. c. 2. § 2. The houses of persons suspected to have cut or taken them away, to be searched, stat. 15 Car. 2. c. 2. § 3. Persons destroying plantations, punished as trespassers, stats. 22 & 23 Car. 2. c. 7. § 5: 1 Geo. 1. st. 2. c. 48: 29 Geo. 2. c. 36. § 6. As felons, stats. 9 Geo. 1. c. 22. § 1: 13 Geo. 3. c. 33. (third offence.) See Larceny I. 1. The neighbouring inhabitants, stat. 1 Geo. 1. st. 2. c. 48. and the hundred answerable for damages, stats. 9 Geo. 1. c. 22. § 7: 29 Geo. 2. c. 36. § 9. See titles Timber; Mischief, Malicious.

TREET, Triticum.] Fine wheat; mentioned in the stat. 51 H. 3. See Bread.

TREMAGIUM, TREMESIUM, TERMISIUM. The season or time of sowing summer corn, being about March, the third month, to which the word may allude; and corn sowed in March is by the French called Tremes and Tremois. Tremesium was the season for summer corn, barley, oats, beans, &c. opposed to the season for winter corn, wheat and rye, called Hibernagium; and is thus distinguished in old charters. Cartular. Glaston. MS. 91.

TREMELLUM, A granary. Mon. Ang. i. 470.

TRENCHEAtor, From Fr. Trancher, to cut.] A carver of meat at a table. In the patent rolls, mention is made of a pension granted by the King to A. B. uni Trenchiatorum nostrorum, &c.

TRENCHIA, A trench, or dike newly cut. Peramb. 33 Hen. 3.

TRENTAL, Triennale; Fr. Tren tale.] An office for the dead, that continued thirty days, or consisting of thirty masses; from the Ital. Trenta, i. e. Triginta. Stat. 1 Edw. 6. c. 14.

TREPGET; See Trebuchet.

TRESAYLE, The name of a writ, to be sued on ouster by abatement, on the death of the grandfather's grandfather; now obsolete. See title Assise of Mort d'ancestor.
TRESPASS.

**Transgressio.** Any transgression of the Law less than treason, felony, or misprision of either: But it is most constantly used for that wrong, or damage, which is done by one private man to another; or to the King in his forest, &c. In which signification it is of two sorts: Trespass general, otherwise called Trespass *vi et armis*; and Trespass special, or upon the case. *Bro. Trespass:* Bract. *lib.* 4.

Trespass, in its largest and most extensive sense, signifies any transgression or offence against the Law of Nature, of Society, or of the Country in which we live; whether it relates to a man's person or his property. Therefore beating another is a Trespass; for which an action of Trespass *vi et armis* in assault and battery will lie: Taking or detaining a man's goods are respectively trespasses; for which an action of trespass *vi et armis*, or on the case in trover and conversion, is given by the Law: So, also, non-performance of promises or undertakings is a trespass, upon which an action of trespass on the case in *assumpsit* is grounded: And, in general, any misfeasance, or act of one man whereby another is injuriously treated or damned, is a transgression, or Trespass in its largest sense; for which an action will lie. 3 *Comm.* c. 12. See titles *Action; Assault; Mayhem,* &c.

Trespass supposes a wrong to be done with force; and Trespasses against the person of a man are of several kinds, *viz.* By menacing or threatening to hurt him; assaulting or setting upon one, to beat him; battery being the actual beating of another; maiming of a person so that he loses the use of his limbs; by imprisonment, or restraining him of his lawful liberty, &c. Trespasses against a man's property may be committed in divers cases; as against his wife, children, or servants, or his house and goods, &c. and against his land, by carrying away deeds and evidences concerning it, cutting the trees, or spoiling the grass therein, &c. *F. N.* B. 86, 87: *Finch* 198. 201: 2 *Roll. Abr.* 545.

Trespass *vi et armis* may be brought by him that hath the possession of goods, or of a house, or land, if he be disturbed in his possession; for the disturbance, besides the private damage, is also a breach of the public peace. 1 *Inst.* 57: 6 *East's Rep.* 602.

It is a settled distinction, that where an act is done which is in itself an *immediate injury* to another's person or property, there the remedy is usually by an action of Trespass *vi et armis*: But where there is no act done, but there is only a culpable omission, or where the act is not *immediately* injurious, but only by consequence and collaterally, there no action of Trespass *vi et armis* will lie, but an action on the special case for the damages consequent on such omission or act. 11 *Mod.* 180: *Ld. Raym.* 1402: *Stra.* 635: 3 *Comm.* c. 8. *p.* 123; c. 12. *f.* 208. The distinctions in these cases are frequently very delicate. See the subject much considered in 2 *Black. Rep.* 892.

Thus it is lawful for a man to make a dam on his own ground; but if, by making it, the water overflows his neighbour's land, an action on the case lies against him. *Mod. Cas. in L.* & *F.* 275: 1 *Strange* 634. Trespass lies generally for breaking a man's close; for chasing cattle, whereby they die or are injured; taking away pales, and breaking of fences, or of doors or windows of a house; for driving a cart and horses over the ground of another, where there is no way for it: Fishing in another person's pond, and for breaking the pond; for eating
the corn of another with cattle, and digging in any man's coal mines, and carrying away coals; for taking away so much of the plaintiff's money; tearing a bond, &c. 1 Bro. Ab. 338: 1 Saund. 220: 2 Cro. 463: Latch. 144.

Trespass lies for setting the end of a bridge on another man's soil, though it be a highway, 2 Strange 1004; and for erecting a stall in a market, without agreeing for stallage. Ibid. 1238.

In Trespass for taking goods, the plaintiff must allege a property in himself; because in such case there may be two intendments, one that they were the defendant's own goods, and then the taking is lawful; and the other that they were the goods of the plaintiff, when the taking will be wrongful; but wherever the construction is indifferent, it shall always be most strong against the plaintiff. 2 Lev. 20: Yetv. 36.

In all Trespasses there ought to be a voluntary act, and also a damage; and in detinue and trover, where the thing itself is in demand, it should be particularly named; if Trespass be laid in a declaration for the taking of goods, without expressing the quantity and quality of them, or the value, &c. it is bad upon a general demurrer; though, as to the omission of the value, it hath been held to be good after verdict. Latch. 13: Styl. 170. 230: Lutw. 1384: Sid. 39.

Trespass quod cepit & abduxit lies not for the father for taking and carrying away any of his children, except for taking of a son or daughter who is heir. Cro. Eliz. 769. A man committed adultery with a woman in Southwark, where they both dwelt, and the woman went to Ratcliff in Middlesex, from whence the man brought her to Richmond in Surrey; the husband brought an action of Trespass de uxore rapta & abducta cum bonis viri; and it was a doubt whether, upon the matter given in evidence, the defendant could be found guilty in London; but the jury found him guilty generally, and gave the plaintiff 300l. damages. Dyer 256.

Executors may bring Trespass for goods taken out of their possession, or for goods and chattels taken in the life of the testator: Also administrators shall have it for goods of intestates; and an Ordinary may bring action of Trespass for goods in his own possession to administrator as Ordinary, &c. If a man voluntarily take away my goods or cattle, and keep them till I pay him money, on pretence that they are his heirit, &c. when they are not so, I may have action of Trespass. Bro. Tres. 354. And if the sheriff have a writ against the lands and goods of one man, and he by mistake execute it upon my lands or goods; this action lies against him, and it will be no excuse that the plaintiff or any other informed him they were the goods, &c. of the defendant. Dyer 295: Keitv. 119. 129.

If a man hurt my beasts, in ground belonging to me, or some other person; he is liable to action of Trespass. Though the owner of the land wherein the cattle are doing this Trespass, may gently by himself, or his dogs, chase them out, and justify the same. Bro. Tresfl. 421: 8 Rep. 67.

Trespass will not lie against a Ministerial Officer, for any thing done merely in pursuance of his duty; though it is somewhat in support of a wrong, but a wrong to which he is no way accessory or assisting: As, where a distress is tortiously taken and impounded, an action will not lie against the pound-keeper. Comp. 476.
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Trespass does not lie against Magistrates acting upon a complaint made to them on oath, by the terms of which it appeared that they had jurisdiction; though the real facts of the case might not have supported such complaint; if such facts were not laid before them, at the time, by the party complained against, having notice of such complaint, and being properly summoned to attend. 8 East's Rep. 113.

Trespass will not lie against the Master or Seamen of a King's ship or privateer, for taking a vessel as prize on the Seas; though the capture is afterwards determined to be illegal in the Court of Admiralty; for questions of prize, or not prize, belong exclusively to that Court, which gives damages for the detention. Roux v. Hassard, Doug. 580: See 1 Lev. 243; Sid. 267; Lindo v. Rodney, Doug. 501.

With respect to Officers in the Excise and Customs various acts of Parliament have been made to protect them in the exercise of their duty; that they might not be harassed with actions of Trespass, where they have acted bona fide. See particularly, stats. 6 Geo. 1. c. 21: 19 Geo. 2. c. 34: and Esp. Ni. Pri. Ch. 8.

A Court, which is not a Court of Record, cannot hold plea of Trespass vi et armis. F. N. B. 85. Writs of Trespass lie either to the Sheriff to determine the matter in the County Court, or returnable in B. R. or C. B. F. N. B. 86. 190. Trespass quare vi et armis clausum fregit was brought, wherein the plaintiff laid damage to the value of 20s. and the defendant demurred for that cause, alleging that B. R. could have no cognizance at Common Law, or by the statute of Gloucester, to hold plea in action where the damages are under 40s. But it was adjudged, that Trespass quare vi et armis will lie in this Court, be the damages what they will. 3 Mod. 275.

At Common Law, in Trespass vi et armis, if the defendant was convicted, he was to be fined and imprisoned; but in other Trespasses only amerced. Jenk. Cent. 185. In action of Trespass against two persons for carrying away goods, &c. one lets judgment go by default, and the other justifies under a licence from the plaintiff, and has a verdict; this goes to the whole, and judgment shall be arrested as to the other defendant. 2 Ld. Raym. 1372. 1374.

Trespass in a limited and confined sense, as relates to land, signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of meum and tuum, or property in lands being once established, it follows as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil: every entry, therefore, thereon, without the owner's leave, and especially if contrary to his express order, is a Trespass or transgression; for satisfaction of which an action of Trespass will lie; but the quantum of that satisfaction is to be determined by considering how far the offence was wilful or inadvertent, and by estimating the value of the actual damage sustained. 3 Comm. c. 12.

Every unwarrantable entry on another's soil, the Law entitles a Trespass by breaking his close; the words of the writ of Trespass commanding the defendant to shew cause quare clausum querentis fregit. For every man's land is in the eye of the Law inclosed and set apart from his neighbour's; and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal, invisible boundary, existing only in the contemplation of Law,
as when one man’s land adjoins to another’s in the same field. And every such entry or breach of a man’s close carries necessarily along with it some damage or other: for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, viz. the treading down and bruising his herbage. F. N. B. 87, 88.

One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of Trespass: or, at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land. Dyer 285: Mo. 456. 6 East’s Refi. 602. Thus, if a meadow be divided annually among the parishioners by lot, then, after each person’s several portion is allotted, they may be respectively capable of maintaining an action for the breach of their several closes: for they have an exclusive interest and freehold therein for the time. Cro. Eliz. 421. But, before entry and actual possession, one cannot maintain an action of Trespass, though he hath the freehold in Law, 2 Roll. Abr. 553. And therefore an heir before entry cannot have this action against an abator: though a disseisee might have it against the disseisor, for the injury done by the disseisin itself, at which time the plaintiff was seised of the land: but he cannot have it for any act done after the disseisin, until he have gained possession by re-entry, and then he may well maintain it for the intermediate damage done; for, after his re-entry, the Law, by a kind of jus postlimini, supposes the freehold to have all along continued in him. 11 Refi. 5. Neither, by the Common Law, in case of an intrusion or deforcement, could the party kept out of possession sue the wrong-doer, by a mode of redress which was calculated merely for injuries committed against the land while in the possession of the owner. But now, by the stat. 6 Ann. c. 18: if a guardian or trustee for any infant, a husband seised jure uxoris, or a person having any estate or interest determinable upon a life or lives, shall, after the determination of their respective interests, hold over and continue in possession of the lands or tenements, without the consent of the person entitled thereto, they are adjudged to be Trespassers. See also the stat. 4 Geo. 2. c. 28: 11 Geo. 2. c. 19. as to tenants for years; &c. holding over, and this Dictionary, titles Sufferance; Rent; Distress, &c.

If A. is bound to fence his close against B., and he against C. a neighbour; and neither of them inclose against one another, so that the beasts of C. for want of inclosure go out of the ground to that of B. and thence to A.’s ground: In this case A. shall have Trespass against C., for he is bound only to fence against B., and every one ought to keep his cattle as well in open grounds, not inclosed, as in several grounds where there is inclosure. Dyer 366: Jenk. Cent. 161.

A man is answerable for not only his own Trespass, but that of his cattle also; for, if by his negligent keeping they stray upon the land of another, (and much more if he permits, or drives them on,) and they there tread down his neighbour’s herbage, and spoil his corn or his trees, this is a Trespass for which the owner must answer in damages. And the Law gives the party injured a double remedy in this case; by permitting him to distrain the cattle thus damage feasant, or doing damage till the owner shall make him satisfaction: or else by leaving him to the common remedy by action. And the action that lies in either of these cases of Trespass committed upon another’s land, either by a man himself or his cattle, is the action of Trespass vi et
armis; whereby a man is called upon to answer, quare vi et armis clausum ipsius A. afront B. fregit, et blada ipsius A. ad valentiam centum solidorum ibidem nuper crescentia, cum quibusdam averis depastus fuit, conculcavit, et consumpsit, &c. Registr. 94. For the Law always couples the idea of force with that of intrusion upon the property of another. And herein, if any unwarrantable act of the defendant or his beasts, in coming upon the land, be proved, it is an act of Trespass for which the plaintiff must recover some damages; such however as the Jury shall think proper to assess. 3 Comm. c. 12.

In Trespasses of a permanent nature, where the injury is continually renewed, (as by spoiling or consuming the herbage with the defendant’s cattle,) the declaration may allege the injury to have been committed by continuacion from one given day to another; (which is called laying the action with a continuando;) and the plaintiff shall not be compelled to bring separate actions for every day’s separate offence. 2 Roll. Abr. 545: Lord Raym. 240. But where the Trespass is by one or several acts, each of which terminates in itself, and being once done cannot be done again, it cannot be laid with a continuando; yet if there be repeated acts of Trespass committed, (as cutting down a certain number of trees,) they may be laid to be done, not continually, but at divers days and times within a given period. Salk. 638, 639: Ld. Raym. 823: 7 Mod. 152.

Things must lie in continuance, and not terminate in themselves, or a continuando will not be good: And where a Trespass is alleged with a continuance, that cannot be continued, the evidence ought only to be the first act. 2 Salk. 638, 639.

The best way to declare for such Trespasses which lie in continuance, is for the plaintiff to set forth in his declaration that the defendant, between such a day and such a day, cut several trees, &c. and not to lay a continuando transgressionis from such a day to such a day; and upon such declaration, the plaintiff may give in evidence a cutting on any day within those days. 3 Salk. 360.

If the defendant makes the place where the Trespass was done material by his plea, he must shew it with great certainty; but if it be a Trespass quare clausam fregit in B. and the defendant pleads that the place where is his freehold, which is the common bar in this case, so justifies as in his freehold, &c. if issue be taken thereon, the defendant may give in evidence any close in which he hath a freehold; though if the plaintiff had replied and given the close a name, defendant must have a freehold in that very close. 2 Salk. 453: Cartwright’s Ref. 176.

A plaintiff may make a new assignment of the place where, &c. and then the defendant may vary from his first justification: As for instance; an action of Trespass assigned to be done generally in D., the defendant justified the taking damage feasant; and the plaintiff in his replication made a new assignment, upon which the defendant justified for a heriot; and it was adjudged good. Moor 540. The defendant in his plea may put the plaintiff to the new assignment; and every new assignment is a new declaration, to which the defendant is to give a new answer, and he may not traverse it, but must either plead or demur; yet where Trespasses are alleged to be done in several places, and the defendant pleads to some, and agrees to the places wherein the plaintiff alleged the Trespasses to be done, there the plaintiff may answer that part of the plea by a traverse, and shew a
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new assignment as to the rest. Cro. Eliz. 492. 812. See titles New Assignment; Pleading.

One action of Trespass may be brought for a Trespass committed in lands which lie in several towns or vills, if they are in one and the same county; for else they cannot receive one trial, as they are local causes of action triable in the county where done. 2 Lill. Abr. 595. As Trespass quoare clausum fregit is a local action, Trespass for breaking and entering a house in Canada in America, will not lie in this country. 4 Term Rep. 503.

In some cases Trespass is justifiable; or, rather, entry on another's land or house shall not in those cases be accounted Trespass: as if a man comes thither to demand or pay money, there payable; or to execute, in a legal manner, the process of the Law. Also a man may justify entering into an inn or public house, without the leave of the owner first specially asked; because, when a man professes the keeping of such inn or public house, he thereby gives a general licence to any person to enter his doors. See title Inns. So a landlord may justify entering to distrain for rent; a commoner to attend his cattle, commoning on another's land; and a reversioner, to see if any waste be committed on the estate; for the apparent necessity of the thing. 8 Rep. 146. Also it hath been said, that, by the Common Law and custom of England, the poor are allowed to enter and glean upon another's ground after the harvest, without being guilty of Trespass; but modern determinations have denied this right. See this Dictionary, title Gleaning.—The Common Law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land; because the destroying such creatures is said to be profitable to the Public. Cro. Jac. 321. See title Game Laws. But in cases where a man misdemeaned himself, or makes an ill use of the authority with which the Law entrusts him, he shall be accounted a Trespasser ab initio: as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night, contrary to the inclinations of the owner; this wrongful act shall affect and have relation back even to his first entry, and make the whole a Trespass. Finch. L. 47: Cro. Jac. 148: 2 Roll. Abr. 561. But a bare non-feasance, as not paying for the wine he calls for, will not make him a Trespasser; for this is only a breach of contract for which the taverner shall have an action of debt or assumptio against him. 8 Rep. 147. So, if a landlord distrained for rent, and willfully killed the distress, this, by the Common Law, made him a Trespasser ab initio: and so indeed would any other irregularity have done, till the statute 11 Geo. 2. c. 19. See Finch. L. 47; and this Dictionary, title Distress. But still, if a Reversioner, who enters on pretence of seeing waste, breaks the house, or stays there all night; or if the commoner, who comes to tend his cattle, cuts down a tree: in these and similar cases the Law judges that he entered for this unlawful purpose; and therefore, as the act which demonstrates such his purpose is a Trespass, he shall be esteemed a Trespasser ab initio. 8 Rep. 146. So also, in the case of hunting the fox or the badger, a man cannot justify breaking the soil, and digging him out of his earth: for though the Law warrants the hunting of such noxious animals for the public good, yet it is held that such things must be done in an ordinary and usual manner; therefore as there is an ordinary course to kill them,
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viz. by hunting, the Court held that the digging for them was unlawful. Cro. Jac. 321. See title Game Laws.

A man may also justify in an action of Trespass, on account of the freehold and right of entry being in himself; and this defence brings the title of the estate in question. This is therefore one of the ways devised, since the disuse of real actions, to try the property of estates; though it is not so usual as that by Ejectment, because that, being now a mixed action, not only gives damages for the ejection, but also possession of the land: whereas in Trespass, which is merely a personal suit, the right can be only ascertained, but no possession delivered; nothing being recovered, but damages for the wrong committed. 3 Comm. c. 12. See title Ejectment.

In Trespass the defendant may in all cases give evidence of title under the general issue. 7 Term Rep. K. B. 354: 8 T. R. 403.

One justification in Trespass also arises from the leave or licence of the party complaining; and as to this the following has been stated as the difference:

There is difference between a positive abuse of an authority or licence in fact, and of an authority or licence in Law: The reason of this difference is in one book said to be, that the abuse in the latter case is deemed a Trespass with force ab initio; because the Law intends from the subsequent tortious act, that there was from the beginning a design to be guilty thereof. 8 Rep. 146. The Six Carpenters' case.

But this reason, which equally applies to both cases, is by no means conclusive; for it may be as well intended in the former case, from the subsequent tortious act, that there was from the beginning a design of being guilty thereof. Perhaps the difference between the two cases may be better accounted for in the following manner: In the one, where the law has given an authority or licence, it seems reasonable, that the same law should, in order to secure the persons, who are without their direct assent made the objects thereof, from all positive abuses of such authority or licence, whenever either of these is positively abused, make the same void from the beginning; and leave the abuser thereof in the same situation, as if he had acted without any authority or licence. And this agrees perfectly with the maxim, No respect for any man's person, a man, who was under no necessity of giving an authority or licence to any person, has thought proper to give one of these to a certain person, who is afterwards guilty of a positive abuse thereof, there is no reason that the Law should interpose, and make all that has been done under the authority or licence by him so voluntarily given, void from the beginning; because it was his own folly to place a confidence in a man who was not fit to be trusted. 5 New Arb. 156.

A private person may justify breaking and entering the house of another and imprisoning his person in order to prevent him from committing murder on his wife. 2 Bos. & Pull. 260.

To Trespass for assault and battery the defendant may plead that the plaintiff with force and arms, and with a strong hand endeavoured forcibly to break and enter the plaintiff's close; whereupon the defendant "did then and there resist and oppose such entrance, and did then and there defend his possession, as it was lawful for him to do," and if any damage happened to the plaintiff, it was in the defence of the possession of the said close. 8 Term Rep. K. B. 78.
In order to prevent trifling and vexatious actions of Trespass, as well as other personal actions, it is (inter alia) enacted, by stat. 43 Eliz. c. 6: 22 & 25 C. 2. c. 9. § 136. that where the Jury, who try an action of Trespass, give less damages than 40s., the plaintiff shall be allowed no more costs than damages; unless the Judge shall certify under his hand, that the freehold or title of the land came chiefly in question. But this rule now admits of two exceptions more, which have been made by subsequent statutes: One is by stat. 8 & 9 W. 3. c. 11. which enacts, that in all actions of Trespass, wherein it shall appear that the Trespass was wilful and malicious, and it be so certified by the Judge, the plaintiff shall recover full costs. Every Trespass is wilful, where the defendant has notice, and is especially forewarned not to come on the land; as every Trespass is malicious, though the damage may not amount to forty shillings, where the intent of the defendant plainly appears to be, to harass and distress the plaintiff; as in cases of sportsmen warned to go off, or not to come again on another's land. Estp. N. P. 425. The other exception is by stat. 4 & 5 W. & M. c. 23, which gives full costs against any inferior tradesman, apprentice, or other dissolve person, who is convicted of a Trespass in hawking, hunting, fishing, or fowling, on another's land; and these costs such inferior tradesman is liable to in case of such Trespass, whatever qualification he may have in point of estate. Ld. Raym. 149: 3 Comm. c. 12. See this Dict. titles Costs; Game Laws.

If the defendant, in Trespass quare clausum fregit, disclaim any title to the land, and the Trespass is involuntary, or by negligence, he may be admitted to plead a disclaimer and tender of amends before the action brought, &c. And if it be found for the defendant, the plaintiff shall be barred. Stat. 21 Jac. c. 16. See title Tender.

Under peculiar circumstances, the Court of K. B. staid the proceedings in an action of Trespass for seizing goods on the defendant's restoring the goods, or paying the full value of them, with the costs of the action. 7 Term Refl. K. B. 53.

See further on this subject Estinasse's Nisi Prius, ch. 8. TRESPASSANTS, Fr.] Is used by Britton, c. 29. for passengers.

TRESPASSER, One who commits a Trespass. See title Trespass.

TRESTORNARE, To turn or divert another way; Trestornare viam, to turn the road. Cowell.

TREYTS, Fr.] Taken out or withdrawn, applied to a Juror removed or discharged. F. N. B. 159.

TRIAL.

Triatio.] The examination of a cause, civil or criminal, before a judge who has jurisdiction of it, according to the laws of the land. Inst. 124: Finch. L. 36.

I. Of the Course of Trial, in Civil Cases.

II. in Criminal Cases.

III. Of New Trials.

I. Trial is the examination of the matter of fact in issue: of which there are many different species, according to the difference of the subject to be tried: As for example, Trial by Record; by Inspection,
TRIAL, I.

or Examination; by Certificate; by Witnesses; by Wager of Battel; by Wager of Law; and by Jury.

The first six of these species of Trial are only had in certain special and eccentricial cases, where the Trial by the county, per juries, or by Jury, would not be so proper or effectual. See this Dictionary, titles Record; Inspection; Certificate; Battel; Wager of Law; as to those Trials.

Trial by witnesses, per testes, without the intervention of a Jury, is the only method of trial known to the Civil Law, in which the Judge is left to form in his own breast, his sentence upon the credit of the witnesses examined: But it is very rarely used in our Law, which prefers the Trial by Jury before it, in almost every instance: Save only, that when a Widow brings a Writ of Dower, and the Tenant pleads that the Husband is not dead; this being looked upon as a dilatory plea, is, in favour of the Widow, and for greater expedition, allowed to be tried by Witnesses examined before the Judges: and so, saith Finch, shall no other case in our Law. But Coke mentions some others; as, to try whether the Tenant in a real action was duly summoned, or the validity of a challenge to a juror; so that Finch’s observation must be confined to the Trial of direct, and not collateral, issues. And in every case Coke lays it down, that the affirmative must be proved by two witnesses at the least. 1 Inst. 6: 3 Comm. c. 22.

For the proceedings on the Trial in civil cases by Jury, as relate to the summoning and appearance of the jury, see this Dict. title Jury I: As also titles Assises; Justices of Assise.

Trials by the country, are at Bar, or Nisi Prius.

Trials at Bar are those which take place before all the judges, at the bar of the court in which the action is brought. Before the stat. Westm. 2. 13 Ed. 1. c. 30. civil causes were tried either at the bar of the court, or, when of no great moment, before the justices in Eyre; a practice having very early obtained, of continuing the cause from Term to Term, in the court above, provided the justices in Eyre did not previously come into the county where the cause of action arose; and if it happened that they arrived there within that interval, then the cause was removed from the jurisdiction of the justices at Westminster, to that of the justices in Eyre. See title Jury I. Afterwards, when the justices in Eyre were superseded by the modern justices of assise, it was enacted by the above statute, “that inquisitions to be taken of trespasses pleaded before the justices of either Bench, shall be determined before the justices of assise, unless the trespass be so heinous that it requires great examination; and that inquisitions of other pleas pleaded in either Bench, wherein the examination is easy, shall be also determined before them: But inquisitions of many and weighty matters, which require great examination, shall be taken before the justices of the Benches, &c.; and when such inquests are taken, they shall be returned into the Benches, and there judgment shall be given, and they shall be inrolled.” Since the making of this statute, causes in general are tried at Nisi Prius; Trials at Bar being only allowed in Ejectment, and other causes which require great examination. This statute, extending only to the courts of King’s Bench and Common Pleas, whenever an issue is joined in the Exchequer, to be tried in the country, there is a particular commission, authorising the judges of assise to try it. Bull. N. P. 304.
When the crown is immediately concerned, the attorney-general has a right to demand a Trial at Bar. In all other cases, it is entirely in the discretion of the court, governed by the circumstances of the case; even if the parties consent, such a mode of Trial cannot be had without leave of the court. The grounds on which this Trial ought to be granted are, the great value of the subject-matter in question, the probable length of the inquiry, and the likelihood that difficulties may arise in the course of it. In Ejectment, it is said, the rule has been not to allow a Trial at Bar, except where the yearly value of the land is 100L.; and, value alone, or the probable length of the inquiry, is not a sufficient ground for it; but difficulty must concur; and in order to obtain it upon that ground, it is not sufficient to say generally in an affidavit, that the cause is expected to be difficult; but the particular difficulty which is expected to arise, ought to be pointed out, that the court may judge whether it be sufficient. Tidd's Pract. K. B., and the authorities there cited.

If one of the justices of either Bench, or a Master in Chancery, be concerned, it is a good cause for a Trial at Bar, be the value what it may; and, it is said, that such Trial was never denied to any officer of the court, nor hardly to any gentleman at the Bar. The plaintiff may have a Trial of this nature, by the favour of the court, though he sue in formâ pauperis: But, where the plaintiff is poor, the court will not grant it to the defendant, unless he will agree to take Nisi-Prius costs if he succeed, and if he fail, to pay Bar costs. In London, it is said, a cause cannot be tried at Bar, by reason of their charter, which exempts them from serving upon juries out of the city. But the great cause of Lockyer against the East India Company, was tried at Bar (M. 2 Geo. 3.) by a special jury of merchants of London, 2 Salk. 644: 1 Term Refi. 366. In that case, however, the jury consented to be sworn, and waived their privilege. 2 Wils. 156. And where the cause of action arises in a county palatine, it has been doubted whether the court of K. B. can compel the inhabitants of the palatinate to attend as jurors. Tidd's Pract.

A Trial at Bar is never granted before issue joined, except in Ejectment; in which, as issue is very seldom joined till the Term is over, it would afterwards be too late to make the application. This sort of Trial should regularly be moved for in the Term preceding that in which it is intended to be had; as in Hilary for Easter, and in Trinity for Michaelmas Term, except where lands lie in Middlesex; and it is never allowed in an issuable Term, unless the crown be concerned in interest, or under very particular and pressing circumstances. In Easter Term, they did not formerly allow more than ten Trials at Bar; and they must have been brought on a fortnight at least before the end of it, to allow sufficient time for the other business of the court. Tidd's Pract.

Antiently, there was no other notice given of such Trial, than the rule in the office; but now there must be 15 days' notice. The plaintiff, however, as in other cases, may countermand his notice, and prevent the cause from being tried at the day appointed; after which, it cannot be brought to Trial again, unless some new day be appointed by the court. And it is said, that a second rule cannot be made for a Trial at Bar, between the same parties, in the same Term. Previous to giving notice, the day appointed for the Trial must be entered with the clerk of the papers; and it could not formerly have been on Vol. VI.
a **Saturday**, or the last paper day in Term, except in the King's case. *Tidd's Pract.*

A Trial at Bar is had upon the *Venire Facias* or *Distringas*, &c., as at common law, without any clause of *Nisi Prius*; and it is mostly by a special jury of the county where the action is laid. But it may be had, by consent, by a jury of a different county; and in Wales or Berwick-upon-Tweed, &c. or where an impartial Trial cannot be had, the jury must come from the next English or adjoining county, where the King's writ of *Venire* runs. Six days' notice at least ought to be given to the jurors before the Trial; and if a sufficient number do not attend to make a jury, the Trial must be adjourned, and a *deemor octo Tales* awarded, as at common law; for the parties in this case cannot pray a *Tales* upon the statutes. See title *Jury*. And no writ of *alias* or *pluries Distingas*, with a *Tales*, for the Trial of Issues at the Bar shall be sued out, before the precedent writ of *Distringas*, with a panel of the names of the jury annexed, shall be delivered to the secondary of the court, to the intent that the issues, forfeited by the jury for not appearing upon the precedent writ, may be duly treated. After a Trial at Bar, if the parties be dissatisfied with the verdict, they may move for a new Trial, as in other cases. *Tidd's Pract.* and authorities there cited.

**Trials at Nisi Prius** are always had in the county where the venue is laid, and where the fact was or is supposed to have been committed; except where the venue is laid in *Wales* or *Berwick-upon-Tweed*, &c., or in a county where an impartial Trial cannot be had; in which cases the cause shall be tried in the next English or adjoining county, where the King's writ of *Venire* runs. *Tidd's Pract.* By Stat. 38 G. 3. c. 52. where the venue is laid in the county of any city or town corporate, the Trial may be had by a jury of the county next adjoining, &c. See title *Venue*.

When the day of Trial is fixed, the plaintiff or his attorney must bring down the record to the assises, and enter it with the proper officer, (the clerk of the papers,) in order to its being called on in course. If it be not so entered it cannot be tried; therefore it is in the plaintiff's breast to delay any Trial by not carrying down the record; unless the defendant, being fearful of such neglect in the plaintiff, and willing to discharge himself from the action, will himself undertake to bring on the Trial, giving proper notice to the plaintiff. Which proceeding is called the Trial by *Proviso*; by reason of the clause then inserted in the sheriff's *Venire*, viz. "*Proviso*, provided that if two writs come to your hands, (that is, one from the plaintiff and another from the defendant,) you shall execute only one of them." But this practice hath begun to be disused, since the stat. 14 Geo. 2. c. 17. which enacts, that if, after issue joined, the cause is not carried down to be tried according to the course of the court, the plaintiff shall be esteemed to be nonsuited, and judgment shall be given for the defendant as in case of a nonsuit. See title *Nonsuit*.

A defendant in a case where the King is party cannot carry down the *Nisi-prius* record to Trial by proviso; 7 Term Rep. K. B. 661; and see 2 East's Rep. 202. 206. n.

In case the plaintiff intends to try the cause, he is bound to give the defendant (if he lives within forty miles of London) eight days' notice of Trial; and, if he lives at a greater distance, then fourteen days' notice, in order to prevent surprise: And if the plaintiff then changes his mind, and does not countermand the notice, six days be-
fore the Trial, he shall be liable to pay costs to the defendant for not proceeding to Trial, by the same last-mentioned statute. The defendant, however, or plaintiff, may, upon good cause shewn to the court above, as upon absence or sickness of a material witness, obtain leave upon motion to defer the Trial of the cause till the next assizes. 3 Comm. c. 23.

The stat. 14 Geo. 2. c. 17, only requires ten days' notice of Trial; but at the sittings in London and Westminster, the former practice of fourteen days' notice was still continued. But in all country causes, ten days' notice is sufficient: As where the commission-day is on the fifteenth of any month, notice of trial must be given on or before the fifth. Impey's Pract. If the defendant resides within forty miles of London, and if the cause is to be tried at the sittings in London or Westminster, then two days' notice of countermand, before it is to be tried, is sufficient. Sellon's Pract.

Where a defendant residing in town at the issuing of the writ, changed his residence permanently into the country, at the distance of above forty miles from town, before the delivery of the issue, the court of K. B. allowed him to be entitled to 14 days' notice of Trial. 1 East's Rep. 688.

If a cause be made a remanet, no new notice of Trial need be given: but where the Trial of a cause is put off to the ensuing sittings or assises by rule of court; and even when a plaintiff gives a peremptory undertaking to try, a new notice of Trial must be given. 8 Term Rep. K. B. 245: 1 H. Black. Rep. C. P. 222.

Where there have been no proceedings within four Terms, a full Term's notice must be given previous to the assises or sittings; unless the cause has been delayed by the defendant himself, by an injunction or other means. Sellon's Pract.: 2 Black. Rep. 784: 3 Term Rep. 530, and see 3 East's Rep. 1.—If the defendant proceed to Trial by Proviso, he must give the same notice as would have been required from the plaintiff. Sellon's Pract.—Sometimes the courts impose it as a condition upon the defendant, that he shall accept short notice of Trial; which, in country causes, shall be given at least four days before the commission-day, one day being exclusive, and the other inclusive. 3 Term Rep. 660.—But in town causes, two days' notice seems sufficient in such a case. Tidd's Pract.

The old rule for entering causes in London and Middlesex was, that unless they were entered with the chief justice, two days before the sittings upon which they were to be tried, the marshal might enter a ne recipiatur, at the request of the defendant or his attorney. And this rule still holds, with regard to Trials at the sittings in term. But if a cause was to be tried at the sittings after Term, no ne recipiatur could be entered, until after proclamation made, by order of the chief justice, for bringing in the record; and then, if the record was not brought in, the defendant's attorney might enter a ne recipiatur. Tidd's Pract.

At present, the practice with regard to entering causes for Trial, at the sittings after term or assises, stands thus: In Middlesex, no record or writ of Nisi-Prius will be received, at any sitting after term, unless the same shall be delivered to and entered with the marshal, within two days after the last day of every term; and in London no record of Nisi Prius will be received, at any sitting after term, unless the same shall be delivered to, and entered with the marshal,
the day before the day to which the sittings in London shall be adjourned, by nine in the evening. At the assises, the writ and record are entered together; and no writ and record of Nisi Prius shall be received, in any county in England, unless they shall be delivered to and entered with the marshal, before the first sitting of the court, after the commission-day, except in the counties of York, and Norfolk, and there the writs and records shall be delivered to and entered with the marshal, before the first sitting of the court, on the second day after the commission-day, otherwise they shall not be received. And both in London and Middlesex, as well as at the assises, every cause shall be tried in the order in which it is entered, beginning with remainders, (those which have stood over from former sittings,) unless it shall be made out to the satisfaction of the judge, in open court, that there is reasonable cause to the contrary; who thereupon may make such order for the Trial of the cause, so to be put off, as to him shall seem just. Rule Hil. 14 Geo. 2. Special-jury causes are appointed for particular days; and in London and Middlesex no cause can be tried by a special jury, unless the rule for such jury be drawn up, and the cause marked as a special jury, in the marshal’s book of causes, before the adjournment day after each term. Rule Trin. 30 Geo. 3.

The cause being entered, stands ready for Trial, at the Bar of the Court, or before the Judge at Nisi Prius; and previous to its coming on, a Brief should be prepared for each party, and delivered to Counsel; containing a short abstract of the pleadings, a clear statement of the case, and a proper arrangement of the proofs, with the names of the witnesses. The grand rule to be observed in drawing Briefs, consists in conciseness with perspicuity. Tidd's Pract. K. B. Sellon’s Pract.

When the cause is called on in Court, in its turn, according to a list or paper, made out from the order in which the several causes are entered for hearing, by the Attornies in each cause, the Record is handed to the Judge to peruse and observe the pleadings, and what issues the parties are to maintain and prove. If no plea juis darren continuance (see title Pleading I. 3.) intervenes, the Jury being completed, sworn, and ready to hear the merits, in order to fix their attention the closer to the facts which they are impanelled and sworn to try, the pleadings are opened to them by Counsel on that side which holds the affirmative of the question in issue. For the issue is said to lie, and proof is always first required, upon that side which affirms the matter in question. The opening Counsel briefly informs them what has been transacted in the court above; the parties, the nature of the action, the declaration, the plea, replication, and other proceedings; and lastly, upon what point the issue is joined, which is there sent down to be determined. Instead of which formerly, the whole record and process of the pleadings was read to them in English by the Court, and the matter in issue clearly explained to their capacities. The nature of the case, and the evidence intended to be produced, are next laid before them by Counsel also on the same side; and, when their evidence is gone through, the Advocate on the other side opens the adverse case, and supports it by evidence; and then the party which began is heard by way of reply. 3 Comm. c. 23.

As to the nature of the Evidence at the Trial, see this Dictionary, titles Evidence; Jury III.

When the Evidence is gone through on both sides, the Judge, in the presence of the parties, the Counsel, and all others, sums up the whole to the Jury; omitting all superfluous circumstances, observing
wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction and giving them his opinion in matters of Law arising upon that evidence: The Jury then (unless the case be very clear) withdraw from the Bar to consider of their verdict; and when they are unanimously agreed, return, and before they deliver their verdict, the plaintiff is bound to appear in Court, by himself, Attorney, or Counsel, in order to answer the amercement to which by the old Law he is liable, in case he fails in his suit, as a punishment for his false claim. To be amerced, or à mercie, is to be at the King's mercy with regard to the fine to be imposed; in misericordiâ Domini Regis pro falso clamore suo. The amercement is disused, but the form still continues; and if the plaintiff does not appear, no verdict can be given, but the plaintiff is said to be nonsuit, non sequitur clamorem suam. Therefore it is usual for a plaintiff, when he or his Counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself; whereupon the Crier is ordered to call the plaintiff, and if neither he, nor any body for him, appears, he is nonsuited, the Jurors are discharged, the action is at an end, and the defendant shall recover his costs. The reason of this practice is, that a nonsuit is more eligible for the plaintiff, than a verdict against him. See title Nonsuit; and further, title Jury III.

When a verdict will carry all the costs, and it is doubtful, from the evidence, for which party it will be given, and the action is trivial, though founded in strict Law, it is a common practice for the Judge to recommend, and the parties to consent that a Juror shall be withdrawn: And thus no verdict is given, and each party pays his own costs.

If the plaintiff appears, the Clerk asks the Jury who they find for? and if for the plaintiff, what damages? The Jury naming the sum, and what costs, or pronouncing for the defendant, the Associate enters the verdict on the back of the panel of the Jurors' names, and repeats it to the Jury, which finishes the Trial.—The Verdict, Nonsuit, or whatever else passes at the Trial, is entered on the back of the Record of Nisi Prius; which entry, from the Latin word it began with, is called the Postea; the substance of which is, that, postea, Afterwards, the said plaintiff and defendant appeared by their Attornies at the place of Trial, and a jury being sworn, found such a Verdict; or as the case may happen. This, being added to the roll, is returned to the Court from which it was sent, and the history of the cause is thus continued. See titles Pleading; Practice; Record.

When the cause is tried at the Sittings in London or Middlesex, the Associate in the court of K. B. delivers the record to the party for whom the verdict is given; and he afterwards indorses the Postea, from the Associate's Minutes, on the Panel: But when the cause is tried at the Assises, the Associate keeps the record till the next Term, and then delivers it, with the Postea indorsed thereon, to the party obtaining the verdict. On a motion for a new Trial, the Postea was brought into court, and after the new Trial had been denied, the Postea could not be found; the Court, on debate, ordered a new one to be made out, from the record above, and the Associate's notes. If the Postea be wrong, it may be amended by the Plea-roll, by the memory or notes of the Judge, or by the notes of the Associate or Clerk of Assise. Tidd's Pract. K. B.; and see Selton's Pract.
After these proceedings, the party entitled proceeds to enter up his Judgment; for which a certain ... and the Crier, or Clerk of the Arraigns, says to him, "A. B. hold up thy hand: Thou standest indicted by the name of A."

Many deserved eulogies are bestowed on this mode of Trial by Jury, in the Commentaries; where also some defects in it are suggested; as, the want of a complete discovery by the oath of the parties: the want of power to examine witnesses abroad; or to compel the production of books and papers belonging to the parties; and the prejudices or inconveniences arising from the locality of Trial and jurisdiction.—All, or most of these defects are, however, generally remedied in practice: And, on the whole, this mode of decision will be found (with all its unavoidable imperfections) the best criterion for investigating the truth of facts ever established in any country. See 3 Comm. c. 23.

Seisin of a house in the East Indies is not tithable here. 1 Strange 646. In covenant, the action was laid in London, and issue joined upon a feoffment in Oxfordshire, of lands in that county, and the cause was tried in London; after verdict it was objected that the Trial ought to have been in Oxfordshire; but resolved, that by the stat. 17 Car. 2, it was well tried in the county where the action was brought: But though the words of that statute are, that it shall be good, if tried by the county where the action is laid, it hath been adjudged, that must be understood of a Trial by the county where the matter in issue doth arise; for otherwise it would destroy the whole Law concerning Trials by Juries, 3 Salk. 364. See this Dict. titles Action; Venue; Indictment, &c.

II. The several methods of Trial and Conviction of Offenders, established by the Laws of England, were formerly more numerous than at present; and among them were reckoned the Trial by Ordeal; by Corned; and by Battel. See this Dictionary, under those titles.

The Trial of Peers, in cases of Treason and Felony, or Misprision of either, is by the Peers of Great Britain in the Court of Parliament, or the Court of the Lord High Steward, when a Peer is indicted: For in case of Appeal, and all other criminal prosecutions therein, for the offences above mentioned, they are tried like commoners by a Jury. 9 Rep. 30: 3 Inst. 50: 2 Inst. 49. See this Dictionary, titles Appeal; Peers IV.

The Trial by Jury, or the Country, per patriam, is also that Trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the Great Charter.

As to the mode of proceeding and giving the verdict, in the Trial of Criminal cases, see in general, titles Jury IV. 1. Evidence (Introd.); Treason V.

The following summary will give a general idea of the nature of Trials in criminal Cases:

The Bill of indictment against an offender having been prepared; the party prosecutor and others being bound over to give evidence, the Grand Jury having found the Bill; the prisoner is brought to the bar of the Court; and the Crier, or Clerk of the Arraigns, says to him, "A. B. hold up thy hand: Thou standest indicted by the name of A.
B. for such a felony, &c. (reciting the crime laid in the indictment): How sayest thou, art thou guilty of this felony, &c. whereof thou standest indicted, or not Guilty?" To which the prisoner answers, "Not Guilty:" Whereupon the Clerk of the Peace says, "Culprit (see title Pleading II.) How wilt thou be tried?" And the offender answers, "By God and my Country."

This was formerly a very significant question and answer, when there were Trials by Battel, and by Ordeal, as well as by Jury; and when the Offender answered the question, "By God and his Country," it shewed that he made choice to be tried by a Jury: But now there is no other way of Trial of Criminals. Blount's Dict.

When the prisoner has pleaded Not Guilty, (which is the common plea), it is to be recorded; and then the Petit Jury are called upon the panel, and a full Jury appearing, the prisoner is told they are to pass upon his life and death, and that he may challenge any of them as they come to the book to be sworn, and before they are sworn; for not being indifferent, but partial, or other defect, &c. Then the jury are sworn, well and truly to try the prisoner, and to bring in a true verdict. This being done, the indictment is recited, and the Jury are acquainted with the particular crimes of which the prisoner stands indicted; and the Clerk of the Peace, addressing the Jury, states the crime laid in the indictment; and adds, "To which indictment he hath pleaded Not Guilty, and for his Trial hath put himself upon God and his Country, which Country you are: So that you (the Jury) are to inquire whether he be guilty of the felony, &c. whereof he stands indicted, or not? If you find him Guilty, you are to make inquiry into what goods and chattels he had at the time that the said felony, &c. was committed, or at any time since: And if you find him Not Guilty, you shall inquire whether he did fly for i; and if he fled for it, what goods, &c. he had at the time of his flight; but if you find him Not Guilty, and that he did not fly, you shall then say no more." Then the Clerk of the Peace swears the witnesses to give true evidence; to speak the whole truth, and nothing but the truth; and when the evidence is given to the Jury concerning the prisoner, the Jury (if they go out of the Court to consider of their verdict) are to be kept in a room, by a sworn Bailiff appointed, without meat, drink, fire or candle, and without any persons speaking to them, till they bring in their verdict. See title Jury IV. All things being given in charge, the Jury go to their room, and consider of the matter; when they are all agreed, and returned within or near the bar, the prisoner is brought forth, and the Jury are called over; who all appearing, and the prisoner being set to the bar, the Clerk of the peace says to them, "Look upon the prisoner, you Gentlemen of the Jury; How say you, is A. B. Guilty of the felony, &c. of which he stands indicted, or Not Guilty?" If the Jury say Not Guilty, it is recorded, and the prisoner taken away; if they say Guilty, the Clerk of the peace says, "Gentlemen of the Jury, hearken to your verdict as the Court hath recorded it; You say A. B. is Guilty of the felony, &c. whereof he stands indicted:" To which they answer "yes:" Then proclamation is made for all persons to keep silence, on which the prisoner is set to the bar, and sentence passed upon him; after which an order or warrant is made for his execution.—Though this part of passing sentence only takes place immediately, in cases of Murder; the felons being all brought up together, at the end of the Sessions, to receive their several sentences.
It is not customary nor agreeable to the general course of proceedings, (unless by consent of parties, or where the defendant is actually in gaol,) to try persons indicted for misdemeanors, at the same Court in which they have pleaded Not Guilty, or traversed the indictment. But they usually give security to the Court to appear at the next Assises or Sessions, and then and there to try the traverse, giving notice to the Prosecutor of the same. 4 Comm. c. 27. p. 351.

Every defendant indicted for a misdemeanor, should give full eight days' notice of Trial to the prosecutor, before the Assises, if the Trial is to be there; if at the Sessions, it is usual to give two or three days' notice: Or the Justices at Sessions fix, as a general rule, what time they think a reasonable notice in such cases. Cro. Circ. Comp. 17. 48.

When the Jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshalled, examined, and enforced by the Counsel for the Crown or Prosecution. But it is a settled rule at Common Law, that no Counsel shall be allowed a prisoner upon his Trial, upon the General Issue in any capital crime, unless some point of Law shall arise proper to be debated.—This has been considered as so great a hardship, and so very inconsistent with the general principles of the English Laws, that the Judges never scruple to allow a prisoner Counsel, to instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact: But the Counsel are not allowed to address the Jury; except in cases of Treason, under stat. 7 W. 3. c. 3. See title Treason V. But in matters of Law; or in the Trial of Issues, or collateral facts, prisoners are entitled to the full assistance of Counsel. See 4 Comm. c. 27: Fost. 232. 242.

If the Jury find the prisoner Not Guilty, he is then for ever quit and discharged of the accusation, except he be appealed of Felony, within the time limited by Law. See title Appeal. And upon such his acquittal or discharge, for want of prosecution, he shall be immediately set at large, without payment of any fee to the gaoler. Stat. 14 Geo. 3. c. 20. But if the offender is convicted, two collateral circumstances immediately arise. 1. On a conviction, (or even upon an acquittal where there was a reasonable ground to prosecute, and in fact a bona fide prosecution,) for any Grand or Petit Larceny, or other Felony, the reasonable expences of prosecution, and also, if the prosecutor be poor, a compensation for his trouble and loss of time, are by stats. 25 Geo. 2. c. 35: 18 Geo. 3. c. 19. to be allowed him out of the County stock, if he petitions the Judge for that purpose; and by stat. 27 Geo. 2. c. 3. explained by the same statute 18 Geo. 3. c. 19. all persons appearing upon recognizance or subpœna to give evidence, whether any indictment be preferred or not, and as well without conviction as with it, are entitled to be paid their charges with a farther allowance (if poor) for their trouble and loss of time. 2. On a conviction of Larceny, in particular, the prosecutor shall have restitution of his goods; as to which, see this Dictionary, title Restitution.

III. CAUSES of suspending the judgment, by granting A New Trial, are at present wholly extrinsic; that is, arising from matters foreign to, or dehors the record.—Of this sort are want of Notice of Trial; or any flagrant misbehaviour of the party prevailing towards the Jury; which may have influenced their verdict; or any gross misbehaviour of the Jury among themselves; also, if it appears by the
Judge's report, certified to the Court, that the Jury have brought in a verdict without, or contrary to evidence, so that he is reasonably dissatisfied therewith, or if they have given exorbitant damages; or if the Judge himself has misdirected the Jury, so that they found an unjustifiable verdict; for these, and other reasons of the like kind, it is the practice of the Court to award a New, or Second Trial. But if two Juries agree in the same or a similar verdict, a third Trial is seldom awarded; for the Law will not readily suppose, that the verdict of any one subsequent Jury can countervail the oaths of the two preceding ones. 3 Comm. c. 24. Though the Court will grant any number of new Trials in the same Action, if the Jury find verdicts contrary to the established Law. Tindal and Brown, 1 Term Rep.

The exertion of these superintendent powers of the King's Courts, in setting aside the verdict of a Jury, and granting a New Trial, on account of misbehaviour in the Jurors, is of a date extremely antient. There are instances, in the Year-books of the reigns of Edward III, Henry IV., and Henry VII. of Judgments being staid, (even after Trial at Bar,) and new Venire's awarded, because the Jury had eat and drank without consent of the Judge, and because the plaintiff had privately given a paper to a Juryman before he was sworn. And upon these the Chief Justice Glynn, in 1655, grounded the first precedent that is reported in our books, for granting a New Trial upon account of excessive damages given by the Jury; apprehending, with reason, that notorious partiality in the Jurors was a principal species of misbehaviour. Sty. 466. A few years before, a practice took rise in the Common Pleas, of granting New Trials upon the mere Certificate of the Judge, (unfortified by any report of the evidence,) that the verdict had passed against his opinion, though Chief Justice Rolle (who allowed of New Trials in case of misbehaviour, surprise, or fraud, or if the verdict was notoriously contrary to evidence) refused to adopt that practice in the Court of King's Bench. And at that time it was clearly held for Law, that whatever matter was of force to avoid a verdict, ought to be returned upon the Postea, and not merely surmised by the Court; lest Posterity should wonder why a new Venire was awarded, without any sufficient reason appearing upon the record. But very early in the reign of Charles II. New Trials were granted upon Affidavit; and the former strictness of the Courts of Law, in respect of New Trials, having driven many parties into Courts of Equity, to be relieved from oppressive verdicts, they are now more liberal in granting them; the maxim at present adopted being this, that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another. 3 Comm. c. 24.

Formerly, the principal remedy for reversal of a verdict unduly given, was by writ of Attaint; which is at least as old as the institution of the Grand Assise by Henry II. in lieu of the Norman Trial by Battel; and as to which, see this Dictionary, title Attaint.

Next to doing right, the great object in the administration of public justice, should be to give public satisfaction. If the verdict be liable to many objections and doubts, in the opinion of his Counsel, or even in the opinion of By-standers, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive; he would arraign the determination as manifestly unjust; and abhor a Tribunal which he imagined had done him an injury without a possibility of redress. 3 Comm. c. 24.
Granting a new Trial, under proper regulations, cures all these, and many other, inconveniences; and at the same time preserves entire, and renders perfect, that most excellent method of decision, which is the glory of the English Law. A new Trial is a rehearing of the cause before another Jury; but with as little prejudice to either party, as if it had never been heard before. No advantage is taken of the former Verdict on the one side, or the Rule of Court for awarding such second Trial on the other; and the subsequent verdict, though contrary to the first, imports no title of blame upon the former Jury; who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the Counsel better prepared, the Law is more fully understood, the Judge is more master of the subject, and nothing is now tried but the real merits of the case. 3 Comm. c. 24.

A sufficient ground must however be laid before the Court, to satisfy them that it is necessary to justice that the cause should be farther considered. If the matter be such, as did not, or could not, appear to the Judge who presided at Nisi Prius, it is disclosed to the Court by Affidavit; if it arises from what passed at the Trial, it is taken from the Judge’s information, who usually makes a special and minute report of the evidence. Counsel are heard on both sides, to impeach or establish the verdict, and the Court give their reasons at large, why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of Law which arose at the Trial are, upon full deliberation, clearly explained and settled. 3 Comm. c. 24.

Nor do the Courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case. A new Trial is not granted, where the value is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections, which do not go to the real merits. It is not granted in cases of strict right, or summum jus, where the rigorous exaction of extreme legal justice is hardly reconcilable to conscience. Nor is it granted where the scales of evidence hang nearly equal; that which leans against the former verdict, ought always very strongly to preponderate. 3 Comm. c. 24.

In granting such farther Trial, (which is matter of sound discretion,) the Court has also an opportunity, which it seldom fails to improve, of supplying the defects in this mode of Trial, before shortly alluded to, by laying the party applying under all such equitable terms as his antagonist shall desire, and mutually offer to comply with; such as, the discovery of some facts upon oath; the admission of others not intended to be litigated; the production of deeds, books, and papers; the examination of witnesses. infirm or going beyond sea; and the like. And the delay and expence of this proceeding are so small and trifling, that it seldom can be moved for to gain time, or to gratify humour. The motion must be made within the first four days of the succeeding Term after the Verdict, within which Term it is usually heard and decided. And it is worthy observation, how infinitely superior to all others the Trial by Jury approves itself, even in the very mode of its revision. In every other country of Europe, and in those of our own Tribunals which conform themselves to the process of the
Civil Law, (the Scotch Courts, for example,) the parties are at liberty, whenever they please, to appeal from day to day, and from Court to Court, upon questions merely of fact; which is a perpetual source of obstinate chicane, delay, and expensive litigation. With us, no new Trial is allowed, unless there be a manifest mistake, and the subject-matter be worthy of interposition. The party who thinks himself aggrieved, may still, if he pleases, have recourse to his writ of *Attaint after judgment; in the course of the Trial he may demur to the Evidence; or tender a Bill of Exceptions. And if the first is totally laid aside, and the other two very seldom put in practice, it is because long experience has shewn, that a motion for a second Trial is the shortest, cheapest, and most effectual cure for all imperfections in the verdict; whether they arise from the mistakes of the parties themselves, of their Counsel or Attornies, or even of the Judge or Jury. 3 Comm. c. 24.

If the verdict of the Jury be agreeable to Equity and Justice, the Court will not grant a new Trial, though there may have been an error in the admission of evidence, or in the direction of the Judge. 4 Term Ref. 468: 1 Bos. & Pull. 338.

It will not be granted merely because it has been discovered, after Trial, that a witness examined was incompetent. 1 Term Ref. 717: 3 East's Ref. 471.—But where the testimony of Witnesses, on which a Verdict was given, derived credit from particular circumstances, which were afterwards clearly falsified, a new Trial was granted. 1 Bos. & Pull. 427: Excessive damages in all cases, except in actions for Adultery, are a sufficient ground to grant a new Trial. 5 Term Ref. 257: In aggravated cases however the Court will direct that the Verdict shall stand as a security for the damages which may be given on the second Trial. 7 Term Ref. 529.

A new Trial may be granted on account of the misconduct of the Jury, as if they have referred to chance to determine the party for whom the verdict was given: But the Courts have frequently refused to hear any affidavit of such conduct from the Jury themselves. 1 Term Ref. 11.

It is generally said, that there cannot be a new Trial, in penal actions and criminal prosecutions, when there is a verdict for the defendant; the principle of this being the great favour which the Law shews to the liberty of the Subject. But the rule does not extend to informations in the nature of *Quo Warranto. See that title, and 2 Term Ref. 484.—Nor does it extend to an action on a penal statute in which a verdict is given for the defendant, in consequence of the misdirection of the Judge. 4 Term Ref. 753.

But the Court of King's Bench refused to grant a rule nisi for a new Trial, after verdict for the defendant upon an indictment for non-repair of a church-yard fence, which was moved on the ground of the verdict being against evidence. 6 East's Ref. 315.

See further, *Tidd's Practice; and on this subject of Trial in general, and as connected therewith, see this Dictionary, titles Jury; Pleading; Practice; Assises; and other applicable titles.

If the issue tried in any cause is not joined, it is not a good Trial; except it be an issue in Chancery in the petit bag side, which is to be sent from thence to be tried in *B. R. Hil. 22 Car. It is a Miss-Trial for a thing to be tried before a Judge, who hath interest in the thing in question; and if a cause is tried by a jury out of a wrong county,
or there be any error in the process against the jurors, or it is directed to a wrong officer, &c. it is a Miss-Trial; likewise, where matter of record is tried by a jury, it will be a Miss-Trial; but if the matter of record be mixed with matter of fact, Trial by jury is good. Hob. 124 A Miss-Trial is helped by the statute of jeofails. See titles Amendment; Pleading.

TRIBUCH; See Castigatory.
TRICENNAL; See Trental.
TRICESIMA, An antient custom in a borough in the county of Hereford, so called, because thirty burgesses paid 1d. rent for their houses to the bishop, who is lord of the manor. Lib. Niger Heref.
TRIDINGMOTE, The court held for a triding or trithing. See Trithing.
TRIGINTALS; See Trental.
TRIHING; See Trithing.
TRILLION, A word used by merchants in accounts, to shew that the word million is thrice mentioned. Merch. Dict. It signifies millions of millions.
TRIMILCHI, The English Saxons denominated the month of May Trimitlchi; because they milked their cattle three times every day in that month. Beda.
TRINITY, Trinitas.] The number of three persons in the Godhead, or Deity; denying any one of the persons in the Trinity to be God, is subject to divers penalties and incapacities by stat. 9 & 10 W. 3. c. 32. See title Blasphemy.
TRINITY-HOUSE, A kind of college at Deptford, belonging to a company or corporation of seamen, who have authority by the King's charter to take knowledge of those that destroy sea marks; also to redress the faults of sailors, and divers other things belonging to navigation. See stat. 8 Eliz. c. 13; and title Pilots.
TRINK, A fishing net or engine to catch fish. Stat. 2 Hen. 6. c. 15
TRINOBANTES, The antient inhabitants of Middlesex, Essex, Hertfordshire, &c.
TRINODA NECESSITAS, Signified a threefold necessary tax, to which all lands were liable, in the Saxon times, i. e. for repairing of bridges; the maintaining of castles or garrisons; and for expeditions to repel invasions: And in the King's grants, and conveyances of lands, these three things were excepted in the immunities from other services, &c. Paroch. Antiq. 46; Cowell: Selden, in rot. Eadm.
TRIORS, TRIOURS, or TRIERS. Such as are chosen by the court to examine whether a challenge made to the panel of Jurors, or any of them, be just or not. Broke 122. See title Jury II.
TRIORS, LORDS; See title Peers IV.
TRIORS of JURORS; See title Jury II.
TRIPODIUM, Leg. Hen. 1. c. 64. In quibus vero causis tripli dignum ladam haberat, ferat judicium tripodii, i. e. 60 solid. The meaning is, that as for a small offence, or for a trivial cause, the composition was twenty shillings; so for a great offence, which was to be purged tripli lada, the composition was to be three times twenty shillings, viz. tripodio. Cowell.
TRIRODA TERRÆ, A quantity of land containing three rods or perches. MS. El. Ashmole Mus.
TRISTEGA, The uppermost room in the house, a garret or room three stories high. Matt. Parisian. 1247.

TRISTIS, said to be from Fr. Traist, i.e. Trust.] An immunity, whereby a man is freed from attendance on the lord of a forest when he is disposed to chase within the forest; and by this privilege, he shall not be compelled to hold a dog, to follow the chase, or stand at any place appointed, which otherwise he is obliged to, on pain of amerciament. Manwood, par. 1. page 86.

TRISTA, A post or station, in hunting. Cowell.

TRITHING; TRITHING-REEVE; The third part of a county, or three or more hundreds orwapentakes, were called a Triding; or Trithing; such sort of portions are the Laths in Kent, the Rapes in Sussex, and the Ridings, (corrupted from the word Trithing) in Yorkshire; and those who governed these Trithings were thereupon called Trithing-Reeves, before whom were brought all causes that could not be determined in the wapentakes or hundreds. See Spelman of the ancient Government of England, p. 52.

The term Trithing is also used for the court held within the circuit of a Trithing, of the nature of a Court-leet, but inferior to the County-court, to which causes might be removed from them. Magna Carta, c. 56.


TRONAGE, Tronagium.] A customary duty or toll for weighing of wool: According to Fleta, trona is a beam to weigh with, mentioned in stat. Westm. 2. c. 25. Tronage being used for the weighing of wool in a staple or public mart, by a common trona or beam; which, for the Tronage of wool in London, was fixed at Leaden-Hall. Fleta, lib. 2. c. 12. The mayor and commonality of London are ordained keepers of the beams and weights for weighing merchants' commodities, with power to assign clerks and porters, &c. of the great beam and balance; which weighing of goods and wares is called Tronage: And no stranger shall buy any goods in London, before they are weighed at the King's beam, on pain of forfeiture. Chart. King Hen. VIII.

TRONATOR, from Trona, i.e. Statera.] An officer in the city of London, who weighs the wool brought thither.


TROPHY-MONEY, Money formerly raised and collected in the several counties of England, towards providing harness and maintenance for the militia, &c. See Militia.

TROVER, From the Fr. Trouver, i.e. invenire.] An action which lies where one man gets possession of the goods of another, by delivery, finding, or otherwise, and refuses to deliver them to the owner, or sells or converts them to his own use, without the consent of the owner, for which the owner, by this action, recovers the value of his goods. Esp. Nis. Pr. cap. 12: 2 Litt. Abr. 618.

The action of Trover and Conversion was in its original an action of trespass on the case for recovery of damages against such person as had actually found another's goods, and refused to deliver them on demand, but converted them to his own use: from which finding and converting, it is called an action of Trovers and Conversion. The freedom of this action from wager of law, and the less degree of certainty
requisite in describing the goods, gave it so considerable an advantage over the action of detinue, that, by a fiction of Law, actions of Trover were at length permitted to be brought against any man who had in his possession, by any means whatsoever, the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded. The injury lies in the conversion: for any man may take the goods of another into possession, if he finds them; but no finder is allowed to acquire a property therein, unless the owner be for ever unknown: and therefore he must not convert them to his own use, which the Law presumes him to do, if he refuses to restore them to the owner: for which reason, such refusal alone is, prima facie, sufficient evidence of a conversion. The fact of the finding or Trover, is therefore now totally immaterial: for the plaintiff needs only to suggest (as words of form) that he lost such goods, and that the defendant found them; and, if he proves that the goods are his property, and that the defendant had them in his possession, it is sufficient. But a conversion must be fully proved: and then in this action the plaintiff shall recover damages, equal to the value of the thing converted, but not the thing itself; which nothing will recover but an action of Detinue or Replevin. (See those titles.) 3 Comm. c. 9.

In Trover, the Conversion is the Gist of the Action; and the manner in which the goods come to the defendant’s hands is but inducement; the plaintiff may therefore declare upon a devenerunt ad manus generally, or specially by finding; (though in fact the defendant came to them by delivery;) or that the defendant fraudulently obtained them; as by winning them at cards from the plaintiff’s wife: And this being inducement, need not be proved: but it is sufficient to prove property in the plaintiff, the possession of, and conversion by, the defendant. Bull. N. P. 33: Esp. N. P. c. 12.

If in Trover, an actual conversion cannot be proved, then proof is to be had of a demand made before the action brought, of the thing for which the action is commenced, and that the thing demanded was not delivered: In this case, though an actual conversion may not be proved, a demand, and refusing to deliver the things demanded, is a sufficient evidence to the jury that he converted the same, till it appears to the contrary. 10 Refl. 56. 491: 2 Litl. 619.

Where a defendant really comes to the possession by finding, denial is a conversion: but if he had the goods, &c. by delivery, there denial is no conversion, but evidence of a conversion: And in both cases, the defendant hath a lawful possession, either by finding or by delivery; and where the possession is lawful, the plaintiff must shew a demand and a refusal to make a conversion: Though if the possession was tortious, as if the defendant takes away the plaintiff’s hat, the very taking is a sufficient proof of the conversion, without proving a demand and refusal. Sid. 264: 3 Salk. 365.

By Holt, Chief Justice, the denial of goods to him who hath a right to demand them, is a conversion; and after a demand and refusal, if the defendant tender the goods, and the plaintiff refuse to receive them, that will go only in mitigation of damages; not to the right of the action of Trover, for the plaintiff may have that still. Mod. Cas. 212. An action of Trover and Conversion may be brought for goods, although the goods come into possession of the plaintiff before the action is brought; which doth not purge the wrong, or make satisfac-
tion for that which was done to the plaintiff by detaining the goods:
If a man takes my horse and rides him, and afterwards delivers him to me, Trover lies against him; for this is a conversion, and the re-
delivery is no bar to the action. 1 Danv. Abr. 21: 2 Litt. 618.

If goods are delivered to one to deliver over to another, and he to whom they were first delivered do afterwards refuse to deliver them over, and converts them to his own use, he is liable to action of Tro-
ver, not only by him who first delivered them, but also by him to whom they were to be delivered: And a plaintiff may choose to have his action of Trover against the first finder of goods: or any other who gets them afterwards by sale, &c. 1 Bulst. 68: 1 Leon. 183.

If a common carrier has goods delivered to him to carry to a cer-
tain place, and a stranger takes them out of his possession, and con-
verts the goods to his own use; action of Trover and Conversion lies for the carrier, against him. 1 Mod. 31. Trover doth lie against a common carrier for negligence in losing goods; though it doth not for an actual wrong: And if goods are stolen from a carrier, he may not be charged in Trover and Conversion; but by action upon the case on the custom of the realm, &c. 2 Salk. 655. See title Carrier.

A. entrusted B. with goods to sell in India, agreeing to take back from B. what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get, if he could not obtain that price. B. not being able to sell the goods in India himself, left them with an agent to be dis-
posed of, directing the agent to remit the money to B. himself in England: The Court of C. P. held that A. could not maintain Trover against B. for the goods. 2 Bos. & Pul. 438.

Where goods are stolen, and before prosecution of the offender by indictment, the party robbed brings action of Trover, it lies not; for so felonies might be compounded: But where A. steals the goods or money of B. and is convicted, and hath his clergy, upon the prose-
cution of B., if B. brings Trover and conversion for the money, and on Not Guilty pleaded this special matter is found, the plaintiff shall recover. 1 Hale's Hist. P. C. 546. See title Restitution.

If, upon a Fieri Facias, the sheriff takes goods in execution, and before the sale of them, a stranger takes them away and converts them to his own use; the sheriff may have an action of Trover and Conver-
sion, as he had a lawful possession, and is answerable for them. 2 Saund. 47. An executor may have Trover for the goods of the testa-
tor; the Law gives him a property, which draweth the possession to it, though there be not an actual possession. Latch 214.

There must be a right of property in the goods and lawful posses-
sion &c. which is to be proved by the plaintiff in Trover, before the goods came to the defendant’s hands: and such owner may maintain Trover against any person into whose hands the goods have fallen though the person in whose possession they are found may, (as far as relates to himself,) have honestly obtained it: provided it was not by sale in market overt, or by other fair transfer. Espin. N. P. c. 12. 1 Term Rep. K. B. 56: 7 T. R. 9.

An uncertificated bankrupt may maintain Trover for goods acquir-
ed by him after his bankruptcy, against all the world, except his as-
signees. 7 Term Rep. K. B. 391.

One tenant in common may maintain Trover against his co-tenant,
in case where the subject matter of tenancy (e. g. a ship) is actually destroyed mediately or immediately. 4 East’s Rep. 110. 121.

Where certain lands, together with woods, were conveyed under a marriage settlement to trustees, during the life of a married woman, in trust for her and her issue, and in default thereof to the use of her right heirs, the court of C. P. held that the trustees could not maintain Trover against a stranger for trees cut down by order of the woman’s husband, and carried away by the defendant. 1 New Rep. 25.

Trover lies for the finder of a jewel, against a goldsmith who defrauded him of it; 1 Stra. 503; for possession alone gives a sufficient title to maintain this action against all persons, except against the actual owner. Drawing out part of a vessel, and filling it up with water, is conversion of all the liquor. 1 Stra. 576.

Trover may be maintained for Deeds. Thus, where one agreed to purchase the remainder of a term, and received the lease to get an assignment made out, but afterwards refused to accept such assignment, or to deliver up the lease, on demand made, action of Trover was held maintainable against him for the lease. 2 Bos. & Pul. 451.

In Trover for a bond, the plaintiff need not shew the date; for the bond being lost or converted, he may not know the date: and if he should set out the date, and mistake it, he would fail in his action. Cro. Car. 262. If the defendant find the bond, and receive the money, action of account lieth against the receiver, and not Trover. Cro. Eliz. 723.

The place of conversion must be generally mentioned in Trover, or it will be naught. Cro. Eliz. 78. 79. And yet where the Trover of goods is in one county, and the conversion in another county, the action brought for these goods may be laid in the county where the conversion was, or in any other county, as it is only a transitory action; and neither the place of Trover, nor conversion, are traversable. Pasch. 23 Car. B. R.

Action of Trover or Detinue, at the plaintiff’s election, may be brought for goods detainted; for it is but justice that the party should have his goods detained if they may be had, or else damages to the value for the detaining and conversion of them. 2 Litt. Abr. 618. Action of Trespass, or Trover, lies for the same thing; though they cannot be brought in one declaration: And the allegation of the conversion of the goods in trespass, is for aggravation of the damages, &c. Cro. Jac. 50; Lutw. 1526. See titles Detinue; Trespass.

Detinue doth not lie for money numbered; but Trover and conversion lies for it: For though, in the finding and converting generally, the money of one person cannot be distinguished from that of another, all money being alike; yet the proof that the plaintiff lost, and the defendant converted so much, maintains the action, if the verdict finds it. Jenk. Cent. 208. Where money is given to a person to keep, though it be not in bags. action of Trover will lie; because this action is not to recover the money, but damages. Poth. 91; 3 Salk. 365. In case a master delivers corn to his servant to sell, who does so, and converts the money, the master may bring Trover against the servant. 2 Bulst. 307; 1 Roll. Rep. 59. Trover lieth not for any part of a freehold; but if doors fixed are removed and converted, it will lie. Wood’s Inst. 540.

There is no proper plea in action of Trover, where it lies, but the general issue Not Guilty; on which the special matter may be given
in evidence, to prove the plaintiff hath no cause of action; or to entitle the defendant to the thing in controversy. 2 Bulst. 313. Vide also, 2 Salk. 654: Yelv. 198: Cro. Car. 27: 2 Lill. 622. But there are several instances of special pleas in justification, in the books, though the purpose of many of them might have been answered by evidence under the general issue: Such plea in justification should always shew a complete title in the defendant; and such plea should either traverse the conversion, or confess and avoid it: So the statute of limitations may be pleaded in Trover: and it begins to run from the time of the conversion. See Esp. N. P. c. 12; and which see on the whole of the subject.

TROY-WEIGHT, Pondus Troy. A weight of twelve ounces to the pound, having its name from Troyes, a city in Champagne, whence it first came to be used here. But see title Pondus Regis, for a different etymology; and this Dict. tit. Weights.

TRUCE, Treuga.] A league or cessation of arms; antiently there were keepers of Truces appointed; as king Edw. III. constituted, by commission, two keepers of the Truce between him and the king of Scots, with this clause, Aos volentes treugam prae dictam quantum ad nos pertinent observari, &c. Rot. Scot. 10 Edw. 3. See titles Conservators of the Truce; Safe Conduct.

TRUG-CORN, Truga frumenti.] A measure of corn. At Lecomminster, at this day, the vicar hath Trug-Corn allowed him for officiating at some chapels of ease within that parish. Liber Niger Heref.

TRUNCUS, A trunk set in churches to receive the oblations of pious people; of which, in the times of popery, there were many at several altars and images, like boxes; which, since the reformation, have been placed near the doors of churches, for receiving all voluntary contributions for the poor: The customary free-will offerings that were dropt into those Trunks, made up a good part of the endowment of vicars, and thereby oftentimes rendered their condition better than in latter times. See Ordin. Vic. Lancast. anno 1430.

TRUSSA, A Truss, or bundle of corn; mentioned among the customary services done by tenants. Cartular S. Edmund. MS.

TRUST.

FIDUCIA, CONFIDENTIA.] A confidence which one man reposes in another;—but, as generally used in law, it is a right to receive the profits of land, and to dispose of the land itself (in many cases) for particular purposes, as directed by the lawful owner, or pointed out by settlement, &c. or by that deed of conveyance which created the Trust. A Trust is but a new name given to an use.—For the origin of Trusts, and their former and present connexion with Uses, see this Dictionary under title Uses. What follows here is chiefly miscellaneous information on the nature and property of Trusts, and Trust-Terms; and the duty of Trustees: as to which, see more at large Fonblanque’s Treatise of Equity, in the notes passim; and particularly, as to Trusts Executory and Executed, and the existing distinctions between them, lib. 1. c. 6. § 8.—As to who may be seised to Use, or may be a Trustee, lib. ii. c. 6. § 1, in n.—What acts may or ought to be done by a Trustee, to alter or perfect the intent of his Trust, lib. ii. c. 7. § 2, in n.—And on the whole of the subject, Vin. Ab. tit.
Trust.—And Mr. Butler's disquisition on this subject, in his note on 1 Inst. 290, b.

Trusts and legal estates are to be governed by the same rules; and this is a maxim which has universally prevailed. It is so in the rules of Descent, as in gavelkind, and borough-English lands; there is a possessio fratris of a Trust, as well as of a legal estate. The like rules in limitations, and also of barring entails of Trusts, as of legal estates; per the master of the Rolls, who said he thought there was no exception out of this general rule, nor is there any reason that there should; and that it would be impossible to fix boundaries, and shew how far, and no farther, it ought to go; and that perhaps in early times the necessity of keeping thereto was not seen, or thoroughly considered. 2 P. Wms. 645.

Declarations and creations of Trust, of lands, tenements or hereditaments, are to be in writing, signed by the party empowered to declare such Trust, &c. Stat. 29 Car. 2. c. 3. But it is provided, that this shall not extend to resulting Trusts, or Trusts arising by implication or construction of Law; which shall be of like force as before that act. See post, as to Resulting Trusts. Infants, seised of estates in fee in Trust, may make conveyances of such estates, by order of the Chancery. Stat. 7 Ann. c. 19. If a man buys land in another person's name, and pays the money for the land, this will be a Trust for him that paid the money, though there be no deed declaring the Trust; because the statute of frauds extends not to Trusts raised by the implication of Law: And a bare declaration by parol, on a deed assigned, may prevent any resulting Trust to the assignor. 2 Vent. Rep. 361: 2 Vern. 294. Where there has been fraud in gaining a conveyance from another, that is a reason of making the grantee considered as a Trustee: But the stat. 29 Car. 2. c. 3. relates only to equitable Trusts and Interests, and not to an use, which is a legal estate. 1 P. Wms. 115.

There are only two kinds of Trusts by operation of Law; either where the deed or conveyance has been taken in the name of one man, and the purchase-money paid by another; or where the owner of an estate has made a voluntary conveyance of it, and declared the Trust with regard to one part to be for another person, but hath been silent as to the other part: In which case he himself ought to have the benefit of that, it being plainly his intent. Barnardist. 388.

A Fine and Recovery of Cestui-que-Trust shall bar and transfer a Trust, as it should an estate at law, if it were upon a consideration. Chanc. Rep. 49. See titles Fine of Lands; Recovery; and Treat. Eq. Lib. i. c. 3. § 1, in n. And a Cestui que Trust may bar an entail of a Trust without fine or recovery, particularly by Devise. See Treat. Eq. l. i. c. 4. § 20, in n.

By stat. 39 & 40 G. 3. c. 51. for relief of persons entitled to entailed estates to be purchased with Trust-monies, reciting that by the practice of courts of Equity in cases where money is to be laid out in the purchase of lands to be limited to uses capable of being barred by fine, such courts direct the money to be paid to the party who could by fine bar the uses, without requiring the actual investment of the money in land; but nevertheless in cases where a Recovery is requisite to bar such uses, the said courts refuse to direct the money to be paid to the party who might suffer such Recovery; It is enacted that in future in all cases where money under the control of
a court of Equity, or which any Trustees shall be possessed of or entitled to, shall be subject to be invested in the purchase of freehold or copyhold premises to be settled in such manner that it would be competent to the first tenant in tail to bar estates tail and remainders, it shall not be necessary to have such money actually invested; but the court, on the petition of the first tenant in tail, and the parties having any antecedent estates (being adults, or if femes covert, separately examined,) may order such money to be paid to them, or applied as they shall appoint.—Funds or other securities in which such money is vested may be transferred under orders of the court.

In Equity, Trusts are so regarded, that no act of a Trustee will prejudice the Cestui-que-Trust; for though a purchaser for valuable consideration, without notice, shall not have his title any ways impeached, yet the Trustee must make good the Trust: But if he purchases, having notice, then he is the Trustee himself, and shall be accountable. Abr. Cas. Eq. 384. Where Trustees in a settlement join with tenant for life in any conveyance, to defeat a remainder, before it comes in esse, this is a plain breach of Trust; and those who claim under such deed, having notice of the Trust, will be liable to make good the estates. 2 Sail. 680. Yet in case a Trustee joins with Cestui-que-Trust in tail, in a deed to bar the entail, as it is no more than what he may be compelled to, it is no breach of his Trust. 1 Chan. Cas. 49. 213. See further, as to the several modes by which prejudice may be induced by acts of the Trustee, and of the interposition of courts of Equity in favour of the Trustee and Cestui-que-Trust, Trat. Eq. l. ii. c. 7. § 1.

For much useful information, as to the manner in which the courts have remedied the mischiefs arising from the secret nature of Trusts, both with respect to the Cestui-que-Trust, and the Public at large, see 1 Inst. 290, b. &c. and the long and learned note there.

This, with respect to the Cestui-que-Trust has been effected, in some degree, by Courts of Equity having held that persons paying money to Trustees, with notice of the Trust, are, generally speaking, obliged to see it properly applied.—It is perhaps to be wished that the operations and consequences of Trusts had been confined to the Trustee and Cestui-que-Trust: There is no doubt but the doctrine is, in many instances, of great service to the Cestui-que-Trust, as it preserves his property from the peculations, and other disasters, to which, if it were left solely to the discretion of the Trustee, it would necessarily be subject. Yet it may be questioned, whether the admission of it is not in general productive of more inconvenience than real good; for if the Cestui-que-Trust is a married woman, an infant, or otherwise incapable of giving assent to the payment of the money to the Trustee, the persons paying it cannot be indemnified against the Trustee's misapplication of it, but by paying it under the sanction of a court of Equity. This retards and often absolutely impedes the progress of the business, involves the parties in an expensive and intricate litigation, and puts them to very great and, in other respects, useless expense. To avoid this, it is become usual to insert a clause in deeds or wills, that the receipts of the Trustees shall, of themselves, discharge the persons, to whom they are given, from the obligation of seeing to the application of money paid by them as purchasers, &c. See this Dict. tit. Purchase; and further, 1 Inst. 290, b. in n.
The prevention of the mischief arising from Trusts, with respect to the Public, has been effected, in some measure, by the rule laid down in courts of Equity, that in any competition of claims, where the Equity of the parties is equal, he who has the law shall prevail. If a person has the legal estate or interest of the subject-matter in contest, he must necessarily prevail at law over him whose right is only equitable, and therefore not even noticed by the courts of law: This advantage he carries with him even into a court of Equity, so far, that if the equitable claims of the parties are of equal force, Equity will leave him who has the legal right in full possession of it; and not do any thing to reduce him to an equality with the other, who has the equitable right only. This very important rule of Equity is most fully illustrated, by an inquiry into the doctrine of Courts of Equity respecting Trust-Terms of Years attendant upon the Inheritance: In this inquiry, the origin and effect of these terms, and the general rules as to the cases in which it is necessary that they should be from time to time assigned to Trustees to attend the inheritance, and protect a purchaser from all mesne incumbrances, are very clearly and explicitly stated; though these rules, must from their nature, be subject to an endless variety of modifications. It is concluded by the learned writer, that, in all cases of this description, it is infinitely better to err by an excess of care, than to trust any thing to hazard. There is no doubt that the precautions used for the security of purchasers appear sometimes to be excessive; and satisfactory reasons cannot always be given for requiring some of them: Yet the more a person’s experience increases, the more he finds the reason and real utility of them: and the more he will be convinced that very few of the precautions required, by the general practice of the Profession, are without their use, or can be safely dispensed with. 1 Inst. 290, b. 292, b. 294, b. in notis: And see Treat. Eq. lib. ii. c. 4. § 3. in n.; and also this Dict. title Mortgage.

By the operation of these long terms, the legal estate being separated from the beneficial interest, many inconveniences would have resulted from them, had not Courts of Equity interposed, and laid down certain rules, restrictive of the legal rights of the Trustee. Hence it became a rule in Equity, that where the tenant for years is but a Trustee for the Owner of the inheritance, he shall not keep out his Cestui-que-Trust; nor, pari ratione, obstruct him in doing any act of Ownership, or in making any assurances of his estates; and therefore, in Equity, such a term for years shall yield and be moulded according to the uses, estates, or charges which the Owner of the inheritance declares or carves out of the Fee. See 1 Term Rep. 765. Courts of Law, feeling the reasonableness of this rule, allow it to prevail as an exception to the general rule, which requires a plaintiff in Ejectment to recover by the strength of a legal title; so that it is now established by many decisions, that, even at Law, an estate in Trust, merely for the benefit of the Cestui-que-Trust, shall not be set up against him; any thing shall rather be presumed. See Cowp. 46: Doe v. Pott, Doug. 721: Bull. N. P. h. 110; Lade v. Hofford, 1 T. Rep. 758: 2 T. Rep. 698.

It has been decreed, that a Trust for a son, &c. shall pass with the lands into whose hands soever they come, and cannot be defeated by any act of the father or Trustees. And though a husband and wife have no children in many years, and they and the Trustees agree to
sell the land settled, &c. it will not be permitted in Chancery. Abr. Cas. Eq. 391: 1 Vern. 181. A Termor grants his lands in Trust for himself for life, and to his wife for life, and after to his children for their lives, and then to A. B. This Trust to A. B. is good; though, if it had been to the heirs of their bodies, it would be otherwise. Chanc. Rep. 230. 239.

A Trust to pay portions, legacies, &c. out of the rents and profits of the lands, at the day prefixed, gives the Trustees power to sell; if the annual profits will not do it within that time, then they may sell the land, being within the intention of the Trust; And they cannot sell to raise the money, except it be to be paid at a certain time. Ref. Chanc. 176. A Trustee for sale of lands for payment of debts, paying debts to the value of the land, thereby becomes a purchaser himself. Ibid. 199. Where a Trustee for paying portions, pays one child his full share and the Trust estate decays, he shall not be allowed such payment. 2 Chan. Ca. 132. If one devises land to Trustees until his debts are paid, with remainder over, and the Trustees misapply the profits, they shall hold the land only till they might have paid the debts, if the rents had been duly applied; and after that the land is to be discharged, and the Trustees are only answerable. 1 P. Wms. 519. A person having granted a lease of land to Trustees, in trust to pay all the debts which he should owe at his death, in a just proportion, without any preference; it was here declared, that the simple contract debts became as debts due by mortgage, and should carry interest. Ibid. 229.

Trust of a fee-simple estate, or fee-tail, is forfeited by Treason, but not by Felony; for such forfeiture is by way of escheat, and an escheat cannot be but where there is a defect of a tenant; and here is a tenant. Hard. 495. See Jenk. Cent. 245. A Trust for a term is forfeited to the King, in case of Treason or Felony; and the Trustees in Equity shall be compelled to assign to the King. Cro. Jac. 513. If a bond be taken in another’s name, or a lease be made to another in trust for a person, who is afterwards convicted of Treason or Felony, they are as much liable to be forfeited, as a bond or lease made in his own name, or in his possession. See title Forfeiture; and Treat. Eq. lib. ii. c. 7. § 1. in n.

Trustees being obliged to join in receipts, one is not chargeable for money received by the other; In the case of executors it is otherwise. 1 Salk. 318: 2 Vern. Rep. 515.

But where Trustees so join in a receipt, that it cannot be distinguished what was received by one, and what by the other, there they shall both be charged with the whole: So, where one Trustee, having received the Trust-money, handed it over to his companion, he shall be charged; for where, by any act or any agreement of a Trustee, money gets into the hands of his companion, whether a Trustee or Co-executor, they shall both be answerable. So, if a Trustee be privy to the embezzlement of the Trust-fund by his companion, he shall be charged with the amount. Treat. Eq. ii. c. 7. § 5, in n.

It seems now to be settled, notwithstanding some old determinations to the contrary, that a Trustee (or Executor) is chargeable in Equity, with Interest on the Trust-fund in his hands, wherever it appears that he has made interest; and not only so, but if he appear to have employed the Trust money in trade, whence he has derived profits beyond the rate of Interest, he shall account for the whole of such
profits: And still further, if a Trustee, or executor, retain money in his hands for any length of time, which he might by application to the Court, or by vesting in the Funds, have made productive, he shall be charged with Interest thereon. *Treat. Eq.* ii. c. 7. § 6, in n.—A Trustee is entitled to no allowance for his trouble in the Trust; but he will be paid his costs in case of an unfounded suit against him. *Treat. Eq.* ii. c. 7. § 3, in n.

A Trustee, robbed by his own servant, shall be discharged of it on account; though great negligence may charge him with more than he hath received in the Trust. 2 *Chan. Ca.* 2: *Vern.* 144.

Lord Hobart is stated to have been of opinion, that an action at Law might be maintained against a Trustee for Breach of Trust. See 1 *Eq. Ab.* 384, in n. But this opinion is inconsistent with Lord Hardwicke's definition of a Trust; which is, that it is such a confidence between parties, that no action at Law will lie, but is merely a case for the consideration of Courts of Equity. 2 *Atk.* 612.—That a Trustee is liable, in Equity, for a Breach of Trust, was expressly determined in *Vern* v. *Vaudrey*, *Barn.* C. 303. But it is material to observe, that even in Equity the *Cestui-que-Trust* is considered but as a simple-contract Creditor, in respect of such Breach of Trust; unless the Trustee has acknowledged the debt to the Trust-estate under hand and seal. See 2 *Atk.* 119: *Forrest.* 109.

*Of a Resulting Trust, or Trust by Implication of Law.*

It was ruled, by Lord Chancellor Cowper, that the Statute of Frauds, *stat. 29 Car.* 2. c. 3. § 8, which says, "That all Conveyances, where Trusts and Confidences shall arise or result by implication of Law, shall be as if that act had never been made," must relate to Trusts and equitable Interests, and cannot relate to any use which is a legal estate. 1 *P. Wms.* 112. See *Treat. Eq.* l. ii. c. 5. § 1. and note there.

No rule is more certain than that if a man makes a conveyance in Trust for such persons, and such estates as he shall appoint, and makes no appointment, the Resulting Trust must be to him and his heirs. The Trust in Equity must follow the rules of Law in the case of an Use, and it would be so in the case of an Use, is undoubtedly true, and that was Sir Edward Cleer's case, in 6 *Rep.* per Lord Chancellor *Fitz-Gib.* 223.

Where a daughter's portion was charged upon the father's land, she, at the request of her father, had released her interest in the land, to the intent that he might be enabled to make a clear settlement thereof upon the son. It was declared by the Lord Keeper, that if this was done by the daughter without any consideration, there would be a Resulting Trust in the father, whereby he should be chargeable to the daughter for so much money. *Freem.* 305.

Where a Trustee purchases lands out of the profits of the Trust-estate, and takes the conveyance in his own name; it was formerly held, that though probably, if he could not make other satisfaction for the misapplication, these lands might be sequestered, yet they could not be declared to be a Trust for *Cestui-que-Use*, no more than if *A.* borrows money of *B.*, for it is not a Trust in writing; and a Resulting Trust it could not be, because that would be to contradict the deed by parol proof, directly against the Statute of Frauds. But it was allowed, that if this purchase had been recited to have been made with the profits of the Trust-estate, this appearing in writing might
ground a resulting Trust. And on appeal to the House of Lords, this decree was affirmed. Kirk v. Webb, Chan. Prec. 84. pl. 77. See 2 P. Wms. 414.

So, where a testator empowered the executor to lay out the personal estate in land, and settled it on A. and his heirs; and the executor being about to purchase, told A.'s mother of it, and asked her consent, but took the conveyance in his own name, and no Trust in writing was declared, but it was proved that he at several times declared it must be sold to make A. satisfaction; yet the Court (though inclined to decree a conveyance to A. the executor being dead insolvent) declared it could not, because there was no express proof of the application of the Trust-money. Chan. Prec. 168. pl. 139.—It has, however, been held in more modern cases, that evidence aliundé is admissible to shew, that the purchase was made with the Trust-money; and that upon such fact being clearly proved, a Trust will result. See Ambl. 409.

If a person jointly interested with an Infant in a lease, obtain a renewal to himself only, and the lease prove beneficial, he shall be held to have acted as Trustee: and the Infant may claim his share of the benefit: but if it do not prove beneficial, he must take it upon himself. 1 Bos. & Pul. 376.

With respect to the cases in which a Trust shall result to the heir, where the particular purpose for which land was to be converted into money may have failed, see 3 P. Wms. 20. and Mr. Cox's note (1) there, where the cases are collected and referred to their respective principles.


TUB, A measure containing sixty pounds weight of tea; and from fifty-six to eighty-six pounds of camphire, &c. Merch. Dict.

TUB-MAN; See title Pre-audience.

TUMBRELL, Tumbrellum, Turbi hetum.] Is an engine of punishment which ought to be in every Liberty that hath view of frank-pledge, for the correction of scolds and unquiet women. Kitchin, fol. 13. See titles Castigatory; Pillory.

TUN, Sax.] In the end of words, signifies a Town, or dwelling-place.

Tun, Lat. Tunellum.] A vessel of wine and oil, being four hogsheads. Stat. 1 R. 3. c. 12.—A Tun of Timber is a measure of forty solid feet, cut to a square. Stat. 12 Car. 2. c. 18. Twenty hundred weight is a Tun of Coals, &c. Stat. 9 & 10 W. 3. c. 13.

TUNNAGE, Lat. Tunnagium.] A custom or impost granted to the Crown for merchandise imported or exported, payable after a certain rate for every Tun thereof. See title Customs on Merchandize.

TUN-GREVE, Sax. Tunergæva, i. e. ville propositus.] A Town-Reeve or Bailiff, qui in villis ( & que dicimus manerii) Domini personam sustinet, ejusque vice omnia disponit & moderatur. Spelman.


TURBARY, Turbaria, from Turbus or Turba, an obsolete Latin word for Turf.] Is a right to dig Turfs on a common, or in another man's ground. Kitch. 94. Also it is taken for the place where Turfs are dug. See title Common of Turbarie.
TURBOTS. The importation of, is regulated by the Navigation Acts. See that title.

TURKEY COMPANY. The trade to the Levant subsisted under a charter in the 3d year of King James I., confirmed by letters patent of 13 Car. II. The incorporation was by the name of The Governor and Company of Merchants of England trading into the Levant Seas. The qualifications for admission to this company were these: They were to be mere Merchants; and no person residing within 20 miles of London was to be admitted, unless he was made free of the city. The fee of admission was, by the charter of Jac. I., 25l. for those under 26 years old, and 50l. for those above that age. The greatness of this fee, and the peculiarity of the description of candidates, were thought unnecessary restraints: And by stat. 26 Geo. II. c. 18. it was enacted, that every Subject of Great Britain may be admitted, upon proper application, into The Turkey Company, upon paying the sum of 20l., and no more. § 1.—And all persons free of that Company may, separately or jointly, export from Great Britain to any port or place within the limits of the letters patent, in any British or Plantation-built ship, navigated according to Law, to any person being a freeman of the Company, and a Christian Subject, and submitting to the direction of the British Ambassador, and Consuls, any goods not prohibited to be exported; and import, in like manner, from any place within the said limits, raw silk, or any other goods, purchased within those limits, and not prohibited by Law. § 3. By 32 G. 3. c. 65. British subjects resident in foreign parts, may be admitted into the company; on taking the oaths before persons whom the company are enabled to appoint for that purpose.

The limits of this trade were mentioned very generally in the first charter granted in 1581; the liberty there given was "to trade to Turkey." In the 2d charter, in 1593, the trade is specified more particularly; namely, "to Venice, Zaul, Cephalonia, Candia, and other Venetian territories, the dominions of the Grand Seignior, by land and sea, and through his countries over land to the East Indies." These charters were both temporary; the first for seven the second for twelve years. Quere, Did the limits continue the same under the charters of King James and Car. II.? Reeves's L. S. 213, 214.

TURKINS, A kind of sky-coloured cloth, mentioned in stat. 1 B. 2. c. 8.

TURN, or TOURN, The great Court-Leet of the County, as the County-Court is the Court-Baron; of this the sheriff is judge, and this court is incident to his office; wherefore it is called the Sheriff's Tourn: And it had its name originally from the sheriff's taking a turn or circuit about his shire, and holding this Court in each respective hundred. See 4 Comm. 273: 2 Hawk. P. C. c. 10.

The nature of the jurisdiction of this and the Court-Leet are exactly the same, the former being only a larger species of the latter, extending over more territory, but not over more causes. Much of the business of both has now (we will not say whether properly or not) by degrees devolved on the Court of Quarter Sessions. See titles County Court; Court-Leet; and 2 Hawk. P. C. ubi supra; and Com. Dig. title Leet.

The Turn is a Court of Record; and, by the Common Law, every sheriff ought to make his Turn or circuit throughout all the hundreds in his county, in order to hold a court in every hundred for re-
dressing common grievances, and preservation of the peace; and this court might be holden at any place within the hundred, and as often as the sheriff thought fit: But this having been found to give the sheriff too great power of oppressing the people, by holding his court at such times and places at which they could not conveniently attend, and thereby increase the number of his amercements; by the statute of Magna Charta, c. 35. it was enacted, that no sheriff shall make his Turn through a hundred but twice in a year, viz. once after Easter, and once after the feast of St. Michael; and at the place accustomed. Also a subsequent statute ordained, that every sheriff shall make his Turn yearly, one time within the month after Easter, and another time within the month after Michaelmas; and if they hold them in any other manner, they shall lose their Turn for that time. Stat. 31 Ed. 3. st. 1. c. 15.

Since these statutes, the sheriff is indictable for holding this court at another time, than what is therein limited, or at an unusual place: And it has been held, that an indictment found at a sheriff’s Turn, appearing to have been holden at another time, is void. Dalt. Sher. 390, 391: Dyer 151: 38 Hen. 6.

At Common Law, the sheriff might proceed to hear and determine any offence within his jurisdiction, being indicted before him, and requiring a trial, till sheriffs were restrained from holding pleas of the crown by Magna Charta, cap. 17. But that statute doth not restrain the sheriff’s Turn, from taking indictments or presentments, or awarding process thereon; though the power of awarding such process being abused, was taken from all the sheriffs (except those of London) by stat. 1 Ed. 4. c. 2. and lodged in the justices of peace at their sessions; who are to award process on such indictments delivered to them by the sheriff, as if they had been taken before themselves, &c. 2 Hawk. P. C. c. 10.

The sheriff’s power in this court is still the same as antiently it was, in all cases not within the statutes above-mentioned; he continues a Judge of Record, and may inquire in his Turn of Treasons and Felonies, by the Common Law; as well as the lowest offences against the King, such as purprestures, seizure of treasure-trove, of waifs, estrays, goods wrecked, &c. All common nuisances and annoyances, and other such like offences; as, selling corrupt victuals, breaking the assise of beer and ale, or keeping false weights or measures, are here indictable; also all common disturbers of the peace, bar- rators, and common oppressors; and all dangerous and suspicious persons, &c. The sheriff, in his Turn may impose a fine on all such as are guilty of contempts in the face of the court; and upon a suitor to the court making default, or refusing to be sworn on the jury; or on a bailiff not making a panel; on a tithing man neglecting to make his presentment; or a person chose constable refusing to be sworn, &c. He may amerce for offences; which fines and amerciaments are leivable and recoverable by distress, &c. See 2 H. P. C. c. 10.

TURNIPS, Stealing; see title Larceny I. 1.

TURNO VICECOMITUM, A Writ that lieth for those that are called to the sheriff’s Turn out of their own hundred. Reg. Orig. 173.

TURNPIKES; See title Highways, Div. 7. B.

TURNY; See Tournament.

TUTORS; See Schoolmaster.—Tutor is the Scotch Law Term for guardian.
TWAITIE, A wood grubbed up, and converted to arable land. Co. Litt. 4.

TWANIGHT GESTE, Hospes Duarum Noctium. A guest at an inn a second night. See Third-Night-Awn Hinde.

TWELFHINDI, Sax.] The highest rank of men in the Saxon government, who were valued at one thousand two hundred shillings; and if any injury were done to such persons, satisfaction was to be made according to their worth. Leg. King Alfred. c. 12, 13, &c.: H. 1. c. 76.

TWELVE MEN; See Jury.

TWO WITNESSES, When necessary. See title Evidence.

TWYHINDI, Sax.] The lower order of Saxons, valued at 200s. as to pecuniary mulcts inflicted for crimes, &c. Leg. Alfred. c. 12.

TYHTLAN, An accusation, impeachment, or charge, of any trespass or offence. Leg. Ethelred. c. 2.

TYLWITH, Brit. from Tyle, i. e. locus ubi stetit domus, vel locus adificandae domui aptus, or from tylath, trabs, signus.] Signifies a place whereon to build a house, or a beam in the building: And it is applied to familia, a tribe or family branching forth of another, which, in the old English Heraldry, is called Second or Third Houses; so that in case the great paternal stock brancheth itself into several Tylwiths, or houses, they carry no second or younger houses farther; and the use of these Tylwiths was to shew not only the originals of families as to the pedigree, but the several distinctions and distances of birth, that in case any line should make a failure, the next in any degree may claim their interest according to the rule of descent, &c. Cowell. See title Descent.

TYNemouth. There is a customary descent of lands in the honour of Tynemouth, that if any tenant hath issue two or more daughters, and die seised in fee, the land shall go to the eldest daughter for life only, and after to the cousins of the male-line; and for default thereof, to escheat. 2 Keb. 111. 114.

TYTHES; See Tithes.