THE UTILITY of a Dictionary, containing not only a Definition and Explanation of the Terms used in the Science of the English Law, but also a general Summary of the Theory and Practice of the Law itself, having been so fully evinced by the success of Ten Editions of the Work on which the Volumes here presented to the Reader are founded; any observations upon that subject would be superfluous:—Something, however, is requisite to introduce the following Sheets; as due both to the Proprietors and the Editor of this General Law-Dictionary; which is offered to the attention and patronage, not only of The Profession, but of All who wish to obtain a knowledge of the Duties imposed upon them, and the Rights secured to them, by the Laws of their Country.

It is now more than Four Years since the Proprietors of Jacob's Law-Dictionary (the last Edition of which was published in the year 1782) applied to the present Editor, to prepare the Work for republication. This he very cheerfully undertook; imagining at first that nothing more could be required than to employ his attention on such Statutes and Reports as the course of time had produced since that Edition: little aware that a thorough Revival of the whole had become absolutely necessary, from the numerous Improvements in our Law; which had by no means been sufficiently attended to, either in that, or even in the preceding Edition.

A Cursory Perusal of Jacob's Dictionary soon convinced the Writer, that, to render the Work really useful to the Profession and the Public, in the present State of the Law, much Labour, Time, and Study must be employed; that unremitting Diligence alone could collect and digest the materials for such a Compilation; and that, strictly keeping in view Jacob's original Plan, it would demand some Judgment so to arrange, simplify, and methodize the Information obtained, as to preserve the general Character of the Work, and yet to introduce every proper Correction and Improvement.

To
To this Task then he seriously applied himself.—He first carefully examined the Text, as it stood in the Tenth Edition. —Here he found much found Learning on the Origin and Antiquity of our Law, defaced with unskillful Interpolations: Innumerable Statutes, long repealed, detailed at large as Existing Laws *: The other Statutes quoted throughout the Work, (by continued errors of the Pref through various Editions,) incorrectly cited: Except in some few instances, a want of Method, and Poverty of Language, pervading the whole body of the Work: And the Improvements of our Law, during the last Thirty Years and more, either wholly passed over, or very superficially noticed.

His next Step, therefore, was to correct the Errors which appeared.—Solely to perform this was a long and tedious labour: Every Statute quoted has been examined; and it is by no means an exaggeration to say, that many thousand Errors, in this particular alone, have been detected and amended.—To erase whatever was superceded or contradicted by modern Laws or Determinations, was next requisite: And, when thus much was performed, a vast void remained, to be filled up with a Summary of the State of the Law, as at present existing.

In many instances, where the Law relative to one Subject was scattered through the Book, the whole has been brought together under a single Title, consolidated, re-arranged, and enlarged; and the proper References made from Title to Title †. In some few others, it was found convenient to remove the whole of a Title, as it stood in the former Work; and to supply its place by a New Abridgment of the Law on that particular Subject ‡.—In no case, however, has any alteration been made, without mature consideration, and a sincere wish for the Improvement of the Work, and the Instruction of the Reader.

In the next place, The Editor considered himself called upon to introduce many New Titles; some on the Origin and Antiquity of our Law §; and several connected with the Commercial Concerns of the Country ||; which had for the most part been entirely omitted, or at best very slightly referred to, by Jacob or his Continuators.—These Additions, it is believed, do not make less than One Fourth Part of the present Volumes.

* Titles Highways, Turnpikes; and others.
† Award, Arbitration;—Homicide, Murder, Manslaughter;—Executor, Administrator;—Advowson, Presentation, Usurpation; and very many others.
‡ Bankrupt, Bill of Exchange, Highways, Wills, &c.
PREFACE.

To enable himself to perfect the Plan which his Mind soon formed, in the order above stated, The Editor has applied to all such Publications as seemed more immediately adapted to his purpose.

The Statutes have been perused with peculiar care and diligence: Almost all which are material, even to the end of the Session of Parliament in 1796, are introduced; and throughout the Work, it is believed, that none are omitted to be noticed which passed before the Thirty-third year of the present Reign. The long time which the Dictionary has taken in going through the Press, has therefore, it is hoped, on the whole, operated rather to the benefit than the prejudice of All who may have occasion to consult it.

To the excellent Series of modern Term-Reports in the Courts of Westminster-Hall, which have appeared within the last ten years:—To the various new Editions of former Reports, and other Law-Books of long-established reputation; in alluding to which, it would be injustice not to particularise The Coke upon Littleton, Peere Williams's Reports, and Hawkins's Pleas of the Crown:—Together with many other smaller Volumes well deserving notice, as including Systems of particular branches of the Law:—To all these recourse has been had; and the Information contained in them has been applied to the present purpose, with a care and attention which, the Editor trusts, have not been totally fruitless.

But, above all, The Commentaries of the learned Blackstone have been fully and freely applied to, and the most material parts of them adopted; sometimes abridged; but more frequently enlarged by Additions from the various sources above alluded to. The Edition last published has been used, whenever the Term of its publication allowed; and many of the new Notes there introduced have been added to the mass of modern intelligence here presented to the Reader.

Whenever, in consulting any of the above Authorities, the Writer of this had occasion to question or differ from the positions there laid down, he intended to state his dissent, with modesty and candour.—To Error every Author is liable—Opere in longo fas est. Many mistakes have been silently corrected in all the Books consulted on this occasion. The Editor seeks only that Indulgence which he has bestowed, with a liberality more unbounded than can well be imagined.

SYSTEMATICAL
PREFACE.

Systematical Rules, and their Exceptions, seem in general of more consequence than a multiplied variety of Cases: Rules give the effect of Cases, without the tediousness of their detail. It has been said by a very eminent Lawyer, "That precedents are frequently rather apt to confound; that every Case has its own peculiar circumstances, and therefore ought to stand on its own bottom." On this Maxim chiefly are all the Additions to the Work compiled, and the whole re-digested: The Deviations from it, where they still occur, have frequently arisen, rather from a deference to the names of former Editors, and from a desire of not making alterations which might be thought merely capricious, than from a conviction of the necessity or propriety of such a mode of Compilation.

The Principle therefore of this Dictionary, thus enlarged and improved, is, to convey to the Uninformed a competent general Knowledge of every subject connected with the Law, Trade, and Government, of these Kingdoms: To show the Origin, Foundation, Progress, and present State of our Policy and Jurisprudence. —Information of this nature must interest every Man of liberal Education, in whatever sphere: To Magistrates, whether superior or subordinate, it will be found particularly useful: By Lawyers it will, doubtless, be applied to, as a Digest of Learning previously obtained; and an Index to further Inquiries on the Theory and Practice of our Law, in all its various branches.

In endeavouaring to complete an Undertaking of such length and importance, The Editor is fully conscious that many Errors and Inadvertencies must, even yet, have escaped; — Omissions, he hopes, there are now but few; — and for the Inconsistencies which must inevitably appear, he relies for pardon on the good sense of all who are competent to judge on a Work so multifarious and extensive.

It was impossible to enter into the great variety of Subjects contained in these Volumes, without being occasionally led into observations, which apply rather to the System of Politics, and the general Theory of Government, than to the confined Question of Law: This Licence was necessarily taken by former Editors of Jacob; and was used, to some extent, by Cowel in his Interpreter.

The true Interest of Nations would best be consulted by preserving the greatest Harmony between those, whom it seems to be the business and the pleasure of political (at least of party) Writers, — "more studious to divide than to unite," — to set at variance. Government has no Rights, and the People have no Duties, inconsistent with the true welfare of each other: The reciprocal conditions of their Friendship
PREFACE.

Friendship and Security may be comprised in two words—PROTECTION and OBEDIENCE. It has been the constant wish of The Editor, in compiling the following Sheets, to place in the strongest light every Argument and Decision which may tend to show, what care the Laws and Constitution of GREAT BRITAIN have progressively taken to enforce both those Principles, and to guard Britons against the fatal consequences which must attend a violation of either.

The indulgence of the Reader is yet a little longer requested, to a few words, which The Editor hopes to be excused for stating, respecting Himself.

Anxious, from very early youth, to become a Member of the Profession to which he has the Honour to belong, it was his misfortune to be compelled, by certain untoward circumstances, to enter into that Profession, and into Life, prematurely; without either Education or Experience, sufficient to enable him to perform the Duties imposed upon him by such a situation. He very soon perceived his deficiencies, and endeavoured to supply them by diligent study and observation. A few years brought him near the point at which he aimed: But at the moment when assistance was most wanted, he was disappointed of receiving it; through his own neglect, in omitting to apply to those who were really capable and desirous to have afforded it. He retired, for awhile, from his public practice at the Bar; and betook himself to more silent, but not less laudable, Employments. He found Friends;—where indeed he least expected them! He has since succeeded in life beyond his merits—almost beyond his hopes. His former Literary Efforts have not been thought wholly unworthy approbation; on the present he rests with somewhat more confidence, though with no small portion of fear; since his future fate and pursuits may depend on its success. On the Candour of The Public (more particularly of The Profession) he relies; and whether he shall retain the Pen, or resume the Gown, in public or in private, it shall be his unceasing study to deserve that Encouragement, which seldom fails to await on well-meant Endeavours, and honourable Exertions.

T. E. TOMLINS.

Doctors'-Commons,
Jan. 23, 1797.
A Modern Law Dictionary;
CONTAINING
The PRESENT STATE of the LAW in THEORY and PRACTICE;
With a DEFINITION of its TERMS; and the
HISTORY of its RISE and PROGRESS.

ABA

A, from the word abbot, in the beginning of the name of any place, shows that probably it once belonged to some abbey; or that an abbey was founded there. Brought.


ABACTORS, abattees, ab abigens.] Stealers and drivers away of cattle by herts, or in great numbers. Conv.

ABACUS. Arithmetick: from the abacus, or table strewn with dust, on which the ancients made their characters and figures. Conv: De Peric. Fience

ABACISTA. An Arithmetician. Conv.

ABANDON, abandoan.] Any thing sequeftered, proconfcribed or abandoned. Abandon, i.e. in homunum reftitutum; a thing banned or denounced as forfeited and lost; from whence, to abandon, defert, or forfeite as lost and gone. See Title Influences.

ABARNARE, from Sen. Abarion.] To discover and difcove to a magistrate any secret crime. Leg. Canari, c. 194.

ABATEMENT. An entry by interposition.

1. Aba. 277. See the succeeding articles.

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

To abate a writ, is to defeat or overthrow it, by flowing some error or exception. Brit. c. 48. In the statute de componibift fefflaus, it is faid the writ halt be abated; i.e. disabled and overthrown. Stat. 34 El. 1. f. 1. So it is faid an appeal shall abate, and be defeated by reason of covin or decel. Sow. P. C. 148. And the justices halt caufe the faid writ to be abated and quaffed. Stat. 11 H. 6. c. 2.

The word abate, is also used in contradiftion to diffuse; for as he that puts a person out of posftion of his house, land, &c., is faid to diffuse; fo he that steps in between the former possifior, and his heir, is faid to abate; he is called an abator, and this act of intrusion or interposition is termed an abatement. 1 Ing. 277 c: Kitch. 175: Old Nat. Br. 91, 115.

ABATIMENT. For its least usual meanings fee the two preceding articles.

In its present most general significatian it relates to writs or plaints; and means, the quaffing or destroying the plaintiffs wit or plaint.

A Plea in Abatement, is a plea put in by the defendant, in which he fows caufe to the court why he should not be impleaded or sued; or if impleaded, not in the manner and form he then is; therefore praying that the wit or plaint may abate; that is, that the fuit of the plaintiff may for that time ceafe. 1 Ing. 134 b, 277: F. N. B. 115: Conv. Gilb. H. C. P. 185: Terms de Ley 1.

On this subject shall be considered

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

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

III. The Judgment in Abatement.
ABATEMENT I. 1. 2. 6.

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

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

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

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

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

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

2. a. Outlawry may be pleaded in abatement, because the plaintiff having refused to appear to the process of the law, whereby loses its protection; but this is only a disability till the outlawry is reversed, or till he has obtained a charter of pardon. 1 Inst. 128; 4 Inst. 197; 5 Ky. 72; 20 H. 6. 25; Kdll. 226.

When outlawry is pleaded in the plaintiff, he shall not reply that he has appealed from the sentence; for it is in force until repealed, and whilst it is in force he cannot appear in any of the courts of justice; but he may reply that he is absolved, for then his disability is taken away. Br. Exon. 3. 3 Buls. 72; 20 H. 6. 25; Kdll. 226.

When prohibition is brought against a bishop and he pleads excommunication against the plaintiff, and in the excommunication there is no cause thereof flown, this is not a good plea; for in such case it will be intended, that the excommunication was for endeavouring to hinder the bishop's proceeding, by application to the temporal court; and if such excommunication were allowed, it would destroy all prohibitions. 1 Inst. 10, 11; 28 E. 3. 27; 8 Co. 68.

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

It may be pleaded in abatement, in an action real, personal or mixed that the demandant or plaintiff is an alien,
alien, if he be an alien enemy; and in an action real or mixed, that he is an alien, though he be in amity. But in an action personal it is no plea that he is an alien if he be in amity, 1 Inq. 129 b; Ait. Ext. 111; 9 El. 47. 7 Eliz. 158; 1 Bull. 154; Bro. tit. Denuisam. But see 1 Lt. Raym. 282.

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

Where the defendant pleaded that the plaintiff was an alien, born at Rouen in the kingdom of France, within the ligance of the king of France; the plaintiff replied that he was an alien friend, born at Hamburg, within the ligance of the Emperor, and traversed that he was born at Rouen. Holt inclined that it was an ill traverser and offered an ill issue. Comb. 212. See title Alien.

d. Attorney; It may be pleaded in abatement, that the plaintiff is attained of treason or felony; or attained in the county; or mixed, that he is an alien enemy; and therefore the cause is legally attached in the court where the plaintiff is an alien, though he be in amity. 7 Eliz. 158; 1 Bull. 154; Bro. tit. Denuisam. But see 1 Lt. Raym. 282.

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


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

The court of K. B. will take notice of the privilege of their own officers; as where a flaver of the king's bench was arrested by writ, he was discharged on common bail; being an immediate officer of the court where his attendance was absolutely necessary. Salt. 544. But where an attorney of the common pleas was sued by bill in the court of K. B. on motion for his being discharged the court denied it and put him to plead his privilege. 1 Mod. Ext. 25. See 1 Will. 306: 2 Black. Rep. 1085.

After a general imparlance an officer cannot plead his privilege, because by impairing he affirms the jurisdiction of the court, but after a special imparlance he may plead his privilege. 16 Br. Priv. 25; 22 H. 6. 6; 22, 71: 1 Ro. Reg. 194; 1 Sid. 197; 2 Ro. Ab. 273, 9: Hardw. 355: 1 Lutt. 401: 1 Salt. 1. And now the common practice is to use a special imparlance. See further this Dict. tit. Privilege. Indeed no plea in abatement is good after a general imparlance. 4 Term Rep. 227.

b. Mifnamer, is the using one name for another, the misnaming either of the parties. This may be pleaded in abatement by the defendant, whether the mifnamer is in his own name, or in that of the plaintiff, and this in christian or surname, name of dignity, name of office or addition. See post. and Con. Dig. tit. Abatement. (E. 4.)

But though a defendant may by pleading in abatement take advantage of a mifnamer, yet in such plea he must set forth his right name, so as to give the plaintiff a better writ. Civ. Pr. 103: 9 H. 5, 1.—which is the intent of all pleas in abatement. 4 Term Rep. 227.

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

One defendant cannot plead mifnamer of his companion, for the other defendant may admit himself to be the person administrating, they then represent common persons and are entitled to no privilege. H. 4. 177.

So if an officer of one court sue an officer of another, the defendant shall not plead his privilege; for the attendance of the plaintiff is as necessary in his court as that of the defendant in his; and therefore the cause is legally attached in the court where the plaintiff is an alien, 2 Mod. 298: 2 Ro. Ab. 275; pl. 4; Mod. 546. So if a privileged person brings a joint action, or if an action be brought against him and others, he shall not have his privilege; but if the action can be severed without doing any injury, the officer shall have his privilege.
perfon in the writ. 1 Lorr. 36. The defendant, though
his name be mistaken, is not obliged to take advantage
of it; and therefore if he be impeached by a wrong name,
and afterwards impeached by his right name, he may
plead in bar the former judgment, and aver that he is the
same person. Gibb. H. C. P. 218.

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

1. Addition, is a title given to a man besides his che
fian and surname, setting forth his estate, degree, trade,
&c. Of estate, as yeoman, gentleman, esquire, &c. Of
degree as knight, earl, marquis, duke, &c. Of trade as
merchant, clothier, carpenter, &c. There are likewise
additions of place of residence as London, Tuck, Bridgt,
&c. If one be both a duke and earl, &c. he shall have the
addition of the most worthy (i.e. superior) dignity. 2
Inf. 669. But the title of duke, marquis, earl, &c. are
not properly additions but names of dignity. Termi
de Ley 20. The title of knight or baronet is part of
the party's name [as is also Clarence or King at arms, &c.]
and ought to be exactly used; but the titles of esquire,
gentleman, yeoman, &c. being no part of the names are
merely additions. 1 Litt. 34. An earl of Ireland is not an
ddition of honour here in England, but such person must
be called by his christian and surname with the addition of
esquire only; so sons of English noblemen, though they
have titles given them by curtesy in respect of their fami
lies, if they are feud, must be named by their christian
and surnames, with the addition of esquire; as, A. B. Esq.
commonly called Lord A. 1 Inf. 16 b 2 Inf. 595, 666.

By the common law, if a man had no name of dignity,
the name of dignity was named by his christian and surname in all writs
it was sufficient. If he had an inferior name of dignity, as
knight, &c. he ought to be named by his christian and
 surname, with the name of dignity; but a duke, &c.
might be named by his christian name only, and name of
dignity, which stands for his surname. 2 Inf. 652, 5.

By Stat. 1 H. 5 e. 5, it is enacted that in suits or actions where
process of another lies, (See 1 Blks. 5) additions are to
be made to the name of the defendant to shew his estate,
mystery, and place of dwelling; and that in writs not hav
ing such additions shall be abated, if the defendant take
exception thereto, but not by the court ex officio. See Cro.
Fac. 610 1 Ro. Reg. 750. If a city be a county of
itself, wherein are several parishes, addition thereof, as
London is sufficient. But addition of a parish not in
a city must mention the county, or it will not be good.
1 Doros. 257.

The name of earl if omitted abates the writ; Dav.
Rep. 60 a; and it shall not be amended, Hob. 127 1
Vest. 154. But if a person is created an earl pending
the action, bill, or suit, it shall not abate. See Stat. 1 E. 7
e. 7 § 3. But there must be an entry on the roll dating
that after the last continuance, if on such a day and year,
the king by his letters patent created, &c. setting them
forth with a present in curia, &c. which the said defendant
do not deny, &c. 1 Mal. Est. 31, 32.

If there are two persons father and son, with the same
name and addition, in an action brought against the son,
he ought to be distinguished by the appellation of the
younger, added to his other description, or the writ may be
abated; but in an action against the father he need not
be distinguished by the appellation of the elder. See
2 Hawk. P. C. 137.

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

4. The writing the foundation of the subsequent
proceedings, great certainty and exactness is requisite,
to the end that no person be arrested or attached by
his goods, unless there appear sufficient grounds to warrant
such proceedings; so that if the writ vary materially from
that in the register, or be defective in substance, the
party may take advantage of it. See 5 Co. 12 9 H. 7
16 10 El 3 10 Hob. 1 51, 52, 80: Carb. 172. But
where the writ shall not abate for variance from the regi
s, so that it be equivalent, see Hob. 1, 51, 52.

Where a demand is of two things, and it appears the
plaintiff hath action only for one, the writ may not be
abated in the whole, but shall stand for that which is
good; but if it appear that the plaintiff cannot have
this writ which he hath brought for part, he may have
another, the writ shall abate in the whole. 11 Reg. 45:
1 Sound. 385.

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

It is a good plea in abatement that another action
is depending for the same thing; for whenever it appears
on record, that the plaintiff has sued out two writs against
the same defendant, for the same thing, the second writ
shall abate; and it is not necessary that both should
be pending at the time of the defendant's pleading in abate
ment; for if there was a writ being at the time of filing
out the second, it is plain the second was vacatious and
ill ab initio. But it must appear plainly to be for the
same thing; for an 'affize of lands in one county shall
not abate an affize in another county, for these cannot
be the same lands. 4 H. 6 24 9 H. 6 12 5 Co. 61:
Dow. Pl. 10.

In general writs, as trophys, affrfs, covenants, where
the special matter is not alleged, and the plaintiff is non
suisited before he counts, and the second writ is sued
pending the other, yet the former shall not be pleaded
in abatement; because it doth not appear to the court
that it was for the same thing; for the first writ being
general, the plaintiff might have declared for a distinct
thing from what he demanded by the second writ; but
when the first is a special writ, and sets forth the particular
demand, as in a precise good redain, &c. there the court
may readily see that it is for the same thing; and there
though the plaintiff be nonsuisited before he counts,
yet the first shall abate the second writ, it being ap
parently brought for the same thing. 5 Co. 61: Dow.
Pl. 11, 12. In an action of debt, &c. another action
depending in the courts of Westminster for the same
matter is a good plea in abatement; but a plea of an
action in an inferior court is not good, unless judgment
be given. 5 Co. 86: and see 5 Co. 62.

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

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

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

5. After the party suing has declared, the party implicated may demand yer of the writ; and then if there be any fault or insufficiency in the count for a cause apparent in itself, or if there be a variance between the count and the writ, or between the writ and a record, specially & c. mentioned in the court, the party implicated ought to shew it by his pleading. Tho. lib. 10. c. 1. § 3: Fitz. Count. 27.

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

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

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

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

b. With respect to the marriage of the parties; coverture is a good plea in abatement, which may be either before the writ was filed or in pending the writ. By the first the writ is abated de facto, but the second only proves the writ abatable; both are to be pleaded, with this difference, that coverture, pending the writ, must be pleaded, after the last continuance; whereas coverture before the writ brought, may be pleaded at any time, because the writ is de jure abated. Don. Pl. 3: 1 Leom. 168, 169: Vide 2 Leom. 125: Comb. 449: Litt. 1659.

If a writ be brought by A. and B. as baron and feme, whereas they were not married until the suit depended, the defendant may plead this in abatement; for though they cannot have a writ in any other form, yet the writ shall abate, because it was false when sued out. Fitz. Brief. 476. If a writ be brought against a feme covert as sole, the may plead her coverture; but if she neglects to do it, and there is a recovery against her as a feme sole, the husband may avoid it by writ of error, and may come in at any time and plead it. Latch. 14: Stae 254, 280: 2 Rell. Rep. 53: If an action be brought in an inferior court against a feme sole, and pending the suit the intermarries, and afterwards removes the cause by habeas corpus; and the plaintiff declares against her as a feme sole, she may plead coverture at the time of suing the habeas corpus, because the proceedings here are de novo, and the court takes no notice of what was precedent to the habeas corpus, but upon motion on the return of the habeas corpus, the court will grant a proceeding. For though this be a writ of right, yet where it is to abate a rightful suit, the court may refuse it, and the plaintiff had bail below to this suit, which by this contrivance he might be ousted of, and possibly by the same means of the debt. 1 Batt. 8.

In ejectment against baron and feme, after verdict for the plaintiff, baron dies between the day of Nisi prius and the day in Bank; adjudged that the writ should stand good against the feme, because it was in nature of a trespass, and the feme was charged for her own act; and therefore the action survives against her. So if the wife had died, the baron should have judgment entered against him. Cro. Jenc. 356: Cro. Card. 509: 1 Rell. Rep. 14: Mor. 469.

If a feme sole plaintiff, after verdict, and before the day in Bank, takes husband, the shall have judgment, and the defendant cannot plead this coverture, for he has no day to plead it at. Cro. Card. 232: 1 Batt. 5.

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

If the wife be married in a different county from that in which the writ is brought, the writ of a feme sole, and before the return the wife marries, you may declare against her without taking notice of her husband, for her intermarriage is no abatement of the writ in fact, but only makes it abatable. Comb. 449: 1 Rell. Rep. 53.

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

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

The death of a plaintiff did generally at common law abate the writ before judgment, till the Stat. 8 Eliz. 9 W. 3 c. 11; which declares that neither the death of plaintiff or defendant after interlocutory judgment shall abate it, if the action might be originally prosecuted by and against the executors or administrators of the parties and if there are two or more plaintiffs or defendants, and one or more dies, the writ or action shall not abate, if the cause of action survives to the surviving plaintiffs, or against the surviving defendants, but such death being suspected on record the action shall proceed. For the cases previous to this statute, see Cro. Eliz. 572: 1 Leom. 139: Dr. 279: Hand. 171, 164: Stoe. 293: 5 Mod. 243: Cro. Card. 410: 1 Foss. 367: 1 Rell. Abr. 56: 1 Show. Rep. 14: 1 Vent. 34: 1 Med. 249.

But in a writ of error, if there be several plaintiffs, and one dies, the writ shall abate, because the writ of error is for persons in fact quo, before the erroneous judgment given below; and they that are plaintiffs in error are defent sufferers in the judgment, since there might be different executions issued thereupon, and different representatives were by such judgment affected; and by consequence the survivor cannot prosecute the writ of error for the whole, left by a collusive perfusion, or by negligence or design he should hurt the representative of the deceased. Bridg. 78: Pult. 268: 10 Cro. 151: 1 Vent. 34:
ABATEMENT II.

34: 1 Stal. 419. cont. But if any of the defendants in error die, yet all things shall proceed, because the benefit of such judgment goes to the survivour, and he only is to defend it. 1 Sid. 419: 1 Yelv. 208: 1 L. Raym. 439. If there be several persons named as plaintiffs in the writ, and one of them was dead at the time of purchasing the writ, this may be pleaded in abatement; because it falls the writ; and because the right was in the survivors, at the time of filing the writ, and the writ not according to the case. 20 Hen. 6. 30: 18 Eliz. 7. 14: 1 Bracol. 3. 41. Clist. Ent. 6: Raff. Ent. 126.

By Stat. 17 Car. 2. c. 8, (made perpetual by 1 Jack. 2. c. 17. § 5,) it is enabled, that the death of either of the parties between verdict and judgment, shall not be alleged for error, so as judgment be entered within two terms after such verdict. See 1 Salk. 8: 2 Ed. Raym. 1453: Sid. 385.—See tit. Amendment.

II. A plea in abatement must be put in within four days after the return of the writ, because the person coming in by the process of the court ought not to have time to delay the plaintiff. 1 L. Raym. 1181: 2 Strot. 1192. But if a declaration be delivered against one in custody, he has the whole term to plead in abatement. Salk. 515.

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

As pleas in abatement enter not into the merits of the cause, but are dilatory, the law has laid the following restrictions on them. 1st, by the statute of 4 & 5 Ann. cap. 16. for amendment of the law, no dilatory plea is to be received unless on oath, and probable cause shown to the court. Secondly, no plea in abatement shall be received after responsum offerito, for then they would be pleaded in infinitum. 2 Sound. 41. Thirdly, they are to be pleaded before imparsion. See Titus. 112: 1 Lutw. 46. 178: 2 Lutw. 1117: Dott. Pla. 224: 4 Term Rep. 327. 520. Except where ancient demesne is pleaded, for this may be done after imparsion, because the lord might reverse the judgment by writ of dinitely, and it goes in bar of the action itself. For this see Dyer in marg. 210: Stile 30: Latch. 83: 5 Co. 105: 9 Co. 31. Han. Ent. 103.

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

With respect to pleas to the jurisdiction of the court, it is to be observed that the defendant must plead in propriam personam; for he cannot plead by attorney without leave of the court first had, which leave acknowledges the jurisdiction; for the attorney is an officer of the court; and if he put in a plea by an officer of the court, that plea must be supposed to be put in by leave of the court. 1 New Abr. 2.

The defendant must make but half defence, for if he makes the full defence quando & ubi cura confederavit, &c. he submits to the jurisdiction of the court. Lutw. 9: 1 Showr. Rep. 386.

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

Plea in diffusility of the plaintiff, may not be pleaded after a general imparsion: 1 Lutw. 19. In pleading outlawry in disability in another court, the ancient way was to have the record of the outlawry itself sub pede his at the feet of the court from whence it issued; for the issuing of execution could not be without the judgment; and therefore such execution is a proof to the court that there is such a judgment, which is a proof of the defendant's plea of matter of record is proved by a matter of record; and consequently appears to the court not to be merely dilatory; and therefore on showing such execution, if the plaintiff will plead sub tuto record, the court will give the defendant a day to bring it in. 1 G. Lit. 128: Dict. Plac. See tit. Outlawry.

Outlawry may be pleaded in bar, after it is pleaded in abatement, because the thing is forfeited, and the plaintiff has no right to recover. 11 H. 7. 11: 2 Lutw. 1604. Outlawry may be always pleaded in abatement, but not in bar, unless the cause of action be forfeited. 2 Lutw. 1604: 3 Lev. 29; 2 Term. 823: 3 Lev. 197, 205: C. Eliz. 204: Owen 22.

Where excommunication is pleaded, it is not sufficient to shew the writ de excommunicato capiendo under the seal of the court; for the writ is no evidence of the continuance of the excommunication, since he may be absoved by the bishop; and that will not appear in the king's court, because such assent is not returned into the king's court from whence the jurisdiction is sent. Allenage may be pleaded either in bar or abatement:

In the latter case to an alien in league; in the former to an alien enemy. 1 Isth. 129 b. See ante L. 2. c.

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

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

If it be pleaded to the writ, then the plea concludes with the prayer of judgment of the writ, and that the writ may be quashed. When it is to the action of the writ, there it should shew that the party ought not to have that writ, but by the matter of his plea should intimate to him how he should have a better. Latb. 178. Respondeat venire debetur is a proper beginning to a plea to the jurisdiction of the court, but a plea of ne venire executum ought to begin with petit judic. de vend. 5 Mod. 135, 136. 122. 2 Sound. 83: 2 Sound. 97, 189, 190. 339: Lutw. 44: Showr. 4. In a replication to a plea in abatement where matter of fact is pleaded, the plaintiff must pray his damages; but where matter of law is pleaded, the plaintiff must only pray that his writ may be maintained. 1 L. Raym. 330: 594: 2 L. Raym. 1012. If one pleads matter of abatement, and concludes in bar, Et petit judicatum jure est.
ABATEMENT III.

actio hominum debet, though he begins in abatement, and the matter be also in abatement, yet the conclusion being in bar, makes it a bar; and the reason is, because you admit the writ by concluding specially against the action.

18 H. 6. 27: 32 H. 6. 17: 36 H. 6. 18: 22 H. 6. 536: 1 Show. 4: 2 Ld. Rynm. 1018.—If a man pleads matter in bar, and concludes in abatement, it shall be taken for a plea in bar, from the nature and reason of the thing; for the plaintiff can have no writ if he has not a cause of action, and therefore the court will take the plea to be in bar. 35 H. 6. 24: 35 H. 6. 24: 2 Med. 6.

The nature of a plea in abatement is to institute the plaintiff to a better suit: See 4 Term Rep. 277; and it hath been expressly resolved, that where the plea is in abatement, and it is of necessity that the defendant must disclose matter of bar, he shall have his election to take it either by way of bar or abatement. 2 Kell. Rep. 64. Sal-kill v. Shilton. In short, whatever destroys the plaintiff’s action, and disables him for ever from recovering, may be pleaded in bar. But the defendant is not always obliged to plead in bar, but may plead in abatement, as in replevin for goods, the defendant may plead property in himself, or in a stranger, either in bar or in abatement, for if the plaintiff cannot prove property in himself, he fails of his action for ever; and it is of so avail to him who has the property if he has it not. 1 Fint. 249.

2 Lea. 22: 1 Sal. 5: 94: 3 Carb. 243.

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

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

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

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

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

Upon a judgment in quoque for the damages recovered, the defendant dies metam in abatement, and partly in bar, the court shall give judgment in chief. Show. 255.

In debt, if the defendant pleads in abatement to the writ, to which the plaintiff impairs, and at the day given, the defendant makes default, judgment is final upon the default, though the plea was only in abatement. 10 Ed. 4: 7: Mod. Cofes 5. The judgment for the defendant, on a plea in abatement, is queae breae, or narrare causer; if issue be joined on a plea in abatement, and it be found for the plaintiff, it shall be peremptory against the defendant, and the judgment shall be queae recausa.

cause the defendant charging to put the whole weight of his cause upon this issue, when he might have had a plea in chief, is an admissibility that he had no other defence.” Yorb. 112: 2 Show. 42: Sor. 532. and in this case the jury who try that issue shall assess the damages.

If there be two defendants and they plead several pleas in abatement, and there be issue to one and demurrer to the other, if the issue be found for the defendant the court will not proceed on the demurrer; and fic vice vera, for either way the writ is abated, and the other plea becomes uscuits. Hdb. 250: 1 Bag. Abr. 15.

ABBAT, See Abate.

ABBATUDA. Any thing diminished.—Monta abatuda, is money clipped or diminished in value. Caw. Du Fraer.

ABBACY, abbati. The government of a religious house, and the revenues thereof, subject to an abbot, as bishopric from bishop.

ABBAT, or Abar, abbas, Lat. — abed, Fr. — aghud, Sax. by some derived from the Syriac abbas, pater.] A spiritual lord or governor, having the rule of a religious house. Of these abbots here in England some were elective, some prelatifis; and some were mitred, and some were not; such as were mitred had episcopal authority within their limits, being exempted from the jurisdiction of the diocesan; but the other sort of abbots were subject to the diocesan in all spiritual government. The mitred abbots were lords of parliament, and called abbots sovereign, and abbots general, to distinguish them from the other abbots. And as there were abbots, so there were also lords prior, who had exempt jurisdiction, and were likewise lords of parliament. Some reckon twenty-five of these lords abbots and priors that sat in parliament. Sir Edw. Coke says, there were twenty-five parliamentary abbots and two priors. 1 Lev. 57. In the parliament 20 R. 2, there were but twenty-five; but anno 4 Ed. 3, in the summons to the parliament at Westminster more were named. In the Monasticism Anglicanam there is also mention of others, the names of which were as follow: abbots of St. Albin Canterbury, Ramsey, Peterborough, Crowland, Evesham, St. Benet de Holm, Thorney, Colchester, Leicester, Winchester, Wigtotum, Crowstet, St. Alban’s, St. Mary York, Shrewbury, Salis, St. Peter’s Gloucester, Malmesbury, Waltham, Torre, St. Edmunds, Beaulieu, Abingdon, Hildes, Reading, Gloucester, and etc. —And priors of Spalding, St. John’s of Jerusalem, and Lerer. —To which were afterwards added the abbots of St. Austin’s Bristol, and of Barnstable, and the priory de Sempingham. See also Speelman’s Glossary. These abbots and priors were founded by our ancient kings and great men, from the year 602 to 1153. An abbot with the monks of the same house were called the convent, and made a corporation. Terms de Ley 4. —By bat. 27 H. 8. c. 28, all abbots, monasteries, priories, &c. not above the value of 200l. per annum, were given to the king, who sold the lands at low rates to the gentry. Anno 10 H. 8, the rest of the abbots, &c. made voluntary surrenderers of their houses to obtain favour of the king; and anno 31 H. 8, a bill was brought into the house to confirm those surrenderers; which passing, completed the dissolution, except the hospitals and colleges, which were not dissolved, the first till the 33d, and the last till the 37th of H. 8; when commissiories were appointed to enter and seise the said lands, &c.
ABB

ABRATIS. An averner or steward of the fables; an offerer. Spira.

ABRACOCHMENT, abracoctamentum.] The forealling of a market or fair. MS. Auth.

ABUTTALS. See Abutions.

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

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

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

ABREMERURDER, abermurder.] Plain or downright murder, as distinguished from the less heinous crimes of man-slaughter and change medley. It is derived from the Saxon aber, apparent, notorious, and murder, and was declared a capital offence, without fine or commutation, by the laws of Canute, cap. 93; and of Hen. 1, cap. 13. Spira.

To ABET, abetters, from the Saxon, (and in Anglo) and danan or bettoran, to stir up or incite.] In our law signifies to encourage or set on; the substantive abetment is used for an encouraging or incitement. Stonefof. Pl. Co. 109. An abettor (abetor) is an instigator or letter on; one that procures or procures a crime. Old Nat. Br. 21. See Title Accessory.

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

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

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

Fee-simple in abandonment cannot be charged until it comes in effe to be certainy charged or aliened; though by possibility it may fall every hour. 1 Inst. 378.

The necessity there was in the old law, that there should always be some person to do the feudal duties, to fill the position and to answer the actions which might be brought for the fees. Introduced the maxim that the freehold could never be in abandonment. (See 2 Wilf. 165.) But it was admitted there were some cases in which the inheritance when separated from the freehold might be so. But this abandonment or suspension of the inheritance could not be considered with a jealous eye, and it was agreed that it should be discontinued and discouraged as much as possible, and allowed upon none but the most urgent occasions—The chief reasons of this may be found in Blackstone's argument in the case of Perney and Blake; and Mr. Hargrave's observations on the rule in Shell's case. To these reasons the modern law has added her marked and unreserved edicts upon renunciation; declaring clear that no renunciation could be more decisive than the admission of a suspension of the inheritance. The same principles have in some degree given rise to the well-known rule of law, that a preceding estate of freehold is indispensably necessary for the support of a contingent remainder; and they influence in some degree the doctrines respecting the destruction of contingent remainders. See 1 Inst. 216 a, and 342 b, and the notes there.

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

ABGETORIA, abgeteria. The alphabet. Mat. Wifm.—The Loffe still call the alphabet abgetina.

ABIGEVUS, for abigius. The name as Aby, which fee, and Brad. Tract. 111. 1, 3. cap. 5. 105 a.

ABILITY to inherit. See title Alien.

ABISHING or ABISHERSING. Is understood to be quit of amencements. It originally signified a forfeiture
feiture or amercement, and is more properly misforring, misforring, or misforring, according to Spelun. It hath, since been termed a liberty or freedom; because wherever this word is used in a grant or charter, the persons to whom made, have the forfeitures and amercements of all others, and are themselves free from the control of any within their fee. Ralph's Ait: Terms de Ley 7.

ABJURATION, abjuratio.] A forsaking or renouncing by oath; in the old law it signified a sworn banishment, or an oath taken to forfake the realm for ever. Staint. Pl. C. i. 2. c. 40.

Formerly in king Edward the Confessor's time, and other reigns down to the 32 H. 8, (in imitation of the elec­mency of the Roman emperors towards such as fled to the church,) if a man had committed felony here, and he could fly to a church or church-yard before his apprehension, he might not be taken from thence to be tried for his crime; but on confession thereof before the justice, or before the coroner, he was admitted to his oath, to abjure or forfake the realm; which privilege he was to have forty days, during which time any person might give him meat and drink for his sustenance, but not after, on pain of being guilty of felony. See Hen.'s Mirror, ub. 1. But at last, this punishment being but a perpetual confinement of the offender to some sanctuary, wherein (upon abjuration of his liberty and free habitati­on) he would cbue to spend his life, (as appears by the stat. ann. 22 H. 8. c. 14,) this privilege was abolished by sta. 21 Jac. 1. cap. 28; and this kind of abjuration ceased. 2 Lev. 629.

As to the effect of abjuration, on the marriage tie, see tit. Banns & Foms.

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

ABOLITION. A destroying or effacing, or putting out of memory; it also signifies the leave given by the king, or judges, to a criminal accuse to defit from further prosecution. Stat. 25 H. 8. c. 21.

TO ABRIDGE, abbreviare,] To make shorter in words so as to retain the sense and substance. And in the common law it signifies particularly the making a declaration or count shorter, by lever­aging some of the substance from it; a man is said to abridge his plaint in affize, and a woman her action in demand of dower, where any land is put into the plaint or demand which is not in the tenure of the defendant; for if the defendant pleads non-tenuor; joint-tenancy, &c. in abatement of the writ, as to part of the lands, the plaintiff may lay out those lands, and pray that the tenant may answer to the writ. See Brook. tit. Abridgment, vide 21 H. 8. 3. 3.

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

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

ABSENTIES, or de absentes. A parliament called, was held at Dublin 10 May, 8 Hen. 3. And mentioned in letters patent, dated 29 Hen. 8. 4 Lev. 354.

ABSOLV. See Affiate.

VOL. I.

ABSOlivE, from Rome. See title Papists.

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

ABSQUE HOC. See title Transfus.

ABUTTALS, from the French abutant or abutant, to limit or bound.] The buttinings and boundings of lands. Exit, West, North or South, with respect to the places, by which they are limited and bounded. Can. tells us that limits were differing from hillocks raised in the lands called Batemant, whence we have the word buttin. The sides on the breadth of lands are properly adjacents, lying or bordering; and the ends in length abutants, abutting or bounding. The boundaries and abutals of corporation and church lands, and of parishes, are serv­ved by an annual procession. Boundaries are of sev­eral sorts: such as inclosures of hedges, ditches and stones in common fields, brooks, rivers, and highways, &c. of manors and lordships.

ACCCAPITARE, accipitare. To pay relief to lords of manors.—Capitale dominos accipitare. Flor. l. 2. c. 50.

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

ACCEDES AD VICERE COMITEM. Where a sheriff hath a writ called Pane delivered to him, but supposer­ith it, this writ is directed to the coroner, commanding him to deliver a writ to the sheriff. Reg. Orig. 8.

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

As to the effect of acceptance of Rent, See titles Rent, Lease.

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

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

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

Where the condition of a bond is to pay money, ac­ceptance of another thing is good. But if the condition is not for money, but a collateral thing, it is otherwise. Dyer 59: 9 Rep. 79. The acceptance of uncertain things, as curvans, &c. made over, may not be pleaded in sati­faction of a certain sum due on bond. Gro. Car. 153. If a woman hath title to an estate of inheritance, as dow­er, &c. she shall not be barred by any collateral satisfaction or repercussion; and no collateral acceptance can bar any right of inheritance or freehold, without some release, &c. 4 Reg. 1. When a man is entitled to a thing in gross, he is not bound to accept it by parcels; and if a lefer donit for rent, he is not obliged to accept part of it; nor in action of detinue, part of the goods, &c. 3 Salk. 2.

C

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

Acceptance of a life tenant may be in satisfaction of a greater sum, if it be before the day on which the money becomes due. 3 Bdf. 301. See title Payment.

ACCESSORY OR ACCESSORY. Accesorius, Particeps criminis. One guilty of a felonious offence, not principally, but by participation; as by command, advice, or concealment, &c.

Accessors and Acquiescents also come in some measure under the same, though the former not strictly under the legal definition, of Accessories. An Accessor is one who, with assent, invites, incites, or encourages, or who commands, counsels or procures, another to commit felony; and in many, indeed in almost all cases, is now considered as much a principal as the actual felon, in some cases more, as in the case of murder. See Lord's Hawk. P. C. 12. c. 39. § 7. & c. 33. § 58" 103. An Acquiescent is one of many equally concerned in a felony, and is generally applied to those who are admitted to give evidence against their fellow criminals, for the furtherance of justice which might otherwise be eluded; and this is done on the ancient principle of law relative to Accessorius, See Lord's Hawk. P. C. 12. c. 37. § 5. 7. & notes. 4 Gom. 329.

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

I. Of Principals.—A man may be principal in an offence in two degrees. A principal in the first degree, is he that is the actor, or absolute perpetrator of the crime; and in the second degree, he who is present, aiding and abetting the fact to be done. 1 Hale's P. C. 615. Which principle need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a contributive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance. Foster 350. And this rule hath also other exceptions; for, in case of murder by poisoning, a man may be a principal felon, by preparing and laying the poison, or persuading another to drink it. (Abb. 52.) who is ignorant of its poisonous quality, (Foster 440) or giving it to him for that purpose, and yet not admiring it himself, nor being present when the very deed of poisoning is committed. 4 East. 118. And the same reason will hold, with regard to other murders committed in the absence of the murderer, by means which he had prepared before-hand, and which probably could not fail of their mischiefous effect. As by laying a trap, or pitfall, for another, whereby he is killed; letting out a wild beast, with an intent to mischief; or exciting a madman to commit murder, so that death thereupon ensues; in every of these cases the party offending is guilty of murder as a principal in the first degree. For he cannot be called an accessory, that necessarily presupposing a principal; and the poison, the pitfall, the beast, or the madman cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty either as principal or accessory, and cannot be so as accessory, it follows that he must be guilty as principal: and if principal, then in the first degree, for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist. 1 Hale's P. C. 617; 2 Hawk. P. C. 441. 2.

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

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

Though generally an act of parliament, creating a felony, renders (consequentially) accessories before and after, within the same penalty, yet the special penning of the act of parliament in such cases sometimes varies the case. Thus the statute of 3 Geo. 7. c. 2, against taking away maidens, makes the offence and the procuring and abetting,
ACCESSION. II. 2-4.

Abetting, plea and wittingly receiving also, to be all equally principal felonies, and excluded of clergy. 1 Hale's P. C. 614.

In what cases annexaries are excluded from clergy, see tit. Felonies without Clergy.

2. Sir Matthew Hale (5 Hale's P. C. 615, 616) defines an accessory before the fact to be one, who being absent at the time the crime was committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory: for if such procurer, or the like, be present he is guilty of the crime at principal. If A. then advises B. to kill another, and B. does, in the absence of A. now B. is principal, and A. is accessory in the murder. And this holds though the party killed be not in renum natural at the time of the advice given. As if A. the reputed father, advises B. the mother of a bastard child, unborn, to slay it when born, and the does so. A. is accessory to the murder. 1 Dyer 188. And it is also settled, (Plarker 125.) that whoever procures a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact, and is likewise a rule, that he who in anywise commands or counsels another to commit an unlawful act is accessory to all that ensues upon that unlawful act, but is not accessory to any act distinct from the other; as if A. commands B. to beat C. and B. beats him so that he dies. B. is guilty of murder as principal, and A. as accessory; but if A. commands B. to burn C.'s house, and he in so doing commits a robbery, now as though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and unconditional nature. 1 Hale's P. C. 615. But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison A. he is stabbed or shot, and dies, the commander is still accessory to the murder, for the substance of the thing commanded was the death of A. and the manner of its execution is a mere collateral circumstance. 2 Hawk. P. C. 443. By flat. 3 & 4 W. & M. c. 9. bleeding of clergy is taken away from accessories before the fact to burglary, by commanding, counsel, &c.

3. An accessory after the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or allits the felon. 1 Hale's P. C. 618. Therefore to make an accessory ex post facto. It is in the first place requisite that he knows of the felony committed. 2 Hawk. P. C. 444. In the next place, he must receive, relieve, comfort, or allit him. And generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the felon an accessory. As furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force or violence to rescue or protect him. 2 Hawk. P. C. 444, 5. So likewise to convey instruments to a felon to enable him to break goal, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. And by flat. 12 & 13 W. 3. c. 7. the receiving a pirate or any vessel or goods piratically taken renders the receivers accessory to the piracy. But to relieve a felon in goal with cloaths or other necessaries, is no offence: for the crime imputable to this species of accessory is the hinderance of public justice, by assisting the felon to escape the vengeance of the law. 1 Hale's P. C. 614. To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions; it was therefore at common law a mere misdemeanor, and made not the receiver accessory to the theft, because he received the goods only, and not the felon. 1 Hale's P. C. 620. To remedy this the flat. 3 W. & M. c. 9; & 1 Anne, c. 9, were passed against such receivers; and now by the flat. 5 Anne. c. 11, and 4 Geo. 1. c. 11, all such receivers are made accessories (where the principal felony admits of accessories) with ye. and may be transported for fourteen years; and in the case of receiving stolen goods stolen from the bleaching grounds, are by flat. 18 Geo. 2. c. 27. declared felons without benefit of clergy.

The felony must be complete at the time of the assistance given; else it makes not the allitant an accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make him accessory to the homicide; for till death ensues, there is no felony committed. 2 Hawk. P. C. 447. But so shield is the law where a felony is actually complete, in order to prevent the hinderance of justice, that such an accessory as is not suffered to aid or receive another. If the parent allits the child or the child his parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who may have any of them committed a felony, the receivers become accessories, ex post facto. 3 Inf. 102: 2 Hawk. P. C. 512. But a false covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she to discover her lord. 1 Hale's P. C. 521.

4. The general rule of the ancient law is, that accessories shall suffer the same punishment as their principals; if one be liable to death, the other is also liable. 3 Inf. 188. Why, then, it may be asked, are such elaborate distinctions made between accessories and principals, if both are to suffer the same punishment? For these reasons: 1st. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted: the commission of an actual robbery being quite a different accusation from that of harbouring the robber. 2dly. Because, though by the ancient common law the rule is as before laid down, that both shall be punished alike, yet now by the statutes relating to the benefit of clergy, a distinction is made between them; accessories after the fact being still allowed the benefit of clergy in all cases (except horse-dealing, flat. 31 Eliz. c. 12; and stealing of linen from bleaching-grounds, flat. 18 Geo. 2. c. 27) which is denied to the principals, and accessories before the fact, in many cases; as among others in petit treason, murder, robbery, and wilful burning. 1 Hale's P. C. 615. And perhaps if a distinction were constantly to be made between the punishment of principals and accessories, even before the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would be greater than that of his accomplices, by reason of the difference of his punishment. B. c. 37. 3dly. Because no man formerly could be tried as accessory till after the principal was convicted, or at least he must have been tried at the same
ACCESORY.

By the old common law, the accessory could not be arraigned till the principal was attainted, unless he chose it: for he might waive the benefit of the law; and therefore principal and accessory might and may still be arraigned and plead, and also be tried together. But otherwise if the principal had never been attainted at all, had fled mute, had challenged above thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the accessory in any of these cases could not be arraigned: for non assumpsit whether any felony was committed or not, till the principal was attainted; and it might so happen that the accessory should be convicted one day, and the principal acquitted the next, which would be absurd. However, this absurdity could only happen, where it was possible that a trial of the principal might be had subsequent to that of the accessory; and therefore the law still continues that the accessory shall not be tried so long as the principal remains liable to be tried sine die. But by 1 Anne, c. 9, if the principal be once convicted, and before attainer, (that is, before he receives judgment of death or outlawry) he is delivered by pardon, the benefit of clergy, or otherwise; or if the principal stands mute, or challenges peremptorily above the legal number of jurors, so as never to be convicted at all; in any of these cases in which no subsequent trial can be had of the principal, the accessory may be proceeded against, as if the principal felon had been attainted; for there is no danger of future contradiction. And upon the trial of the accessory, as well after as before the conviction of the principal, it seems to be the better opinion, and founded on the true spirit of justice, that the accessory is accessory (if he can) to controvert the guilt of his supposed principal, and to prove him innocent of the charge, as well in point of fact, as in point of law. Fishing 365, &c. By the stat. 2 & 3 El. 4, c. 24, the accersory is inadmissible in that county where he was accessory; and shall be tried there, as if the felony had been committed in the same county; and the Justices before whom the accessory is, shall write to the Justices, &c. before whom the principal is attainted, for the record of the attainer. 1 Hale's His, P. C. 623.

Where the principal is not attainted, but discharged by being burnt in the hand only, the accessory after the fact ought to be discharged without burning in the hand, on being put to his book. Coke, on P. C. 566, 3.

Where there are two principals, the attainer of one of them gives sufficient foundation to arraign the accessory. 

5. The old doctrine of acquittal, when one criminal appealed or accused his accomplices in order to obtain his pardon is now grown into a nuisance: but it is generally provided for in the cases of coming, breaking, burglar, house-breaking, house-breaking, horse-breaking, and larceny, (from shops, warehouse, stables, and coach-houses) by stat. 4 & 5 W. & M. c. 8. 6 & 7 W. 3, c. 17: 10 & 11 W. c. 25: & 5 Anne, c. 31: which enact, that if any such offender, being out of prison, shall discover those who have committed the like offence, he shall on their conviction, in cases of burglary or house-breaking, receive the reward of 40 l. given to persons apprehending such felons; and in general be entitled to a pardon of all capital offences, excepting only murder and treason, and of them also in cases of coming; but under stat. 15 Geo. 2, c. 28; the pardon extends only to offences by coinage. And in cases of stealing iron, lead or other metals, the accomplice convicting receivers shall (under stat. 29 Geo. 2, c. 30) be pardoned all such offences. It is usual also for justices of peace to admit accomplices to other felonies, to be witnesses against their fellows; on an implied confidence that, in cases of complete discovery without prevention or fraud, they shall receive a pardon; but that they are not entitled of right. Leach's H. 1. 2, c. 37, § 7, and notes: 2 Camp. c. 30, § 4.

ACCOLA. An husbandman who came from some other parts of country to till the lands, as good and honest tenants. 

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

ACCOMPlice. See Accessory.

ACCOMPAT. See Account.

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

I. In what cases Accord may be pleaded. 

II. In what manner Accord may be pleaded.

I. When a duty is created by deed in certainty, as by bill, bond, or covenant to pay a sum of money, this duty accruing by writing, ought to be discharged by matter of record, or, at any rate, that the action is for a tort or default, &c. for which damages are to be recovered, there an accord with satisfaction is a good plea. 5 Rep. 43. In accord, one promise may be pleaded in discharge of another, before breach; but after breach, it cannot be discharged without a release in writing. 2 Mod. 44. Accord with satisfaction upon a covenant broken, is a good plea in satisfaction and discharge of the damages. Latou. 359. Accord made before the covenant broken, hath been adjudged a good bar to an action of covenant, as it may be in satisfaction of damage to come. 1 Dow. Abr. 546.
If a contract without deed is to deliver goods, &c., there money may be paid by account in satisfaction; but if one is bound in an obligation to deliver goods, or to do any collateral thing, the obligee cannot by account give money in satisfaction thereof; though when one is bound to pay money, he may give goods or any other valuable thing in satisfaction. 9 Rep. 78: 1 Sa. 212. Where damages are uncertain, a lesser thing may be done in satisfaction, and in such case an account and satisfaction is a good plea; but in action of debt on a bond, there a lesser sum cannot be paid in satisfaction of a greater. 4 Mod. 88. Accord with satisfaction is a good plea in personal actions, where damages only are to be recovered; and in all actions which fuppole a wrong or arms, where a capias and exigent lie at the common law, in trespass and ejectment, demnus, &c., account is a good plea; so in an appeal of militia. But in real actions it is not a good plea. 4 Rep. 1, 9, 70: 9 Rep. 77. Of late it hath been held, that upon mutual promises an action lies, and consequently, there being equal remedy on both sides, an account may be pleaded without execution, as well as an arbitration. Rym. 450: 1 Merc. 158. Acceptance of the thing agreed on in these accounts is the only material thing to make them binding. Hamb. 178: 5 Mod. 86.

II. Account executed only is pleadable in bar, and account not. 1 Mod. 69. See Com. Dig. title Account (C). Also in pleading it, it is the fadest by way of satisfaction, and not of account alone. For if it be pleaded by way of account, a precise execution thereof in every part must be pleaded: but by way of satisfaction the defendant need only allege, that he paid the plaintiff such a sum, &c., in full satisfaction of the account, which the plaintiff received. 9 Rep. 80. The defendant must plead, that the plaintiff accepted the thing agreed upon in full satisfaction, &c. If it be on a bond, it must be in satisfaction of the money mentioned in the condition, and not of the bond; which cannot be discharged but by writing under hand and seal. 1 Com. Dig. title Account. See tit. Acceptance, Award, Bond, Easement, Lease, Rent, Payment.

ACCOUNT or ACCOMPT; (comptus.) It is a writ or action which lies against a bailiff or receiver to a lord or another, who by reason of their offices and business are to render account, but refuse to do it. F. N. B. 116.

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

1. If a person receives money due to me upon an obligation, &c., I may either have an action of account against him as my receiver, or action of debt, or on the fair, as owing me so much money as he hath received, for I. 32. If I pay money in my own wrong to another, I may bring an action against him for so much money I received from him, but not for what he received from me; and then he may discharge himself by alleging it was for some debt, or to be paid over by my order to some other person, which he hath done, &c., 3 Litt. 32. But if a man have a servant, whom he orders to receive money, the master shall have account against him, if he were his receiver. Co. Lit. 172. If money be received by a man's wife to his use, action of account lies against the husband, and he may be charged in the declaration as his own receipt. Co. Lit. 249. Account does not lie against an infant; but it lies against a man or woman, that is guardian, bailiff, or receiver, being of age and disinterested: and though an apprentice is not chargeable in this action, for what he usually receives in his master's trade, yet upon collateral receipts he shall be charged as well as another. Co. Lit. 172: 3 Lev. 92.

As to other actions of account, they will not lie of a thing certain; if a man delivers rods. to merchandise with, he shall not have account of the rods. but of the profits, which are uncertain: and this is one reason why this action will not lie for the arrears of rent. 1 Dav. Abr. 215. Action of account may be brought against a factor that sells goods and merchandizes upon credit, without a particular commission so to do, though the goods are bona fide. 2 Mod. 106. If there are two demands in a declaration, to which the defendant pleads an account flated, the plaintiff can never after resort to the original contract, which is thereby merged and discharged in the account; if A. sells his horse to B. for 10 l. and there being divers other dealings between them, they come to an account upon the whole, and B. is found in arrear 5 l. A. must bring his informal comptes for it; but if there be only one debt between the parties, entering into an account for that would not determine the first contract. 1 Mod. Rep. 265: 2 Mod. 44. It has been held, that mutual demands on an account are not extinguished by settling it, and that a person that has no account may be brought. 2 Bull. 256. And if I deliver to another person goods or money beyond the parties, to be delivered again to me in England at a certain place, and he delivers it not, I may be relieved by this action. F. N. B. 18.

Account may be brought against the following persons:

1. If a man makes one his bailiff of a manor, &c., he shall have a writ of account against him as bailiff; where a person makes one receiver, to receive his rents or debts, &c., he shall have account against him as receiver, and if a man makes one his bailiff and also his receiver, then he shall have account against him in both ways. Also a person may have a writ of account against a man as bailiff or receiver, where he was not his bailiff or receiver; if a man receive money for my use, I shall have an account against him as receiver; or if he render money unto another to deliver over unto me, I shall likewise have account against him as my receiver: so if a man enter into my lands to my use, and receive the profits thereof, I shall have account against him as bailiff. 9 H. 6: 36 H. G. 10 R. 2: 5 Edw. Account, 6.

A judgment in account, as receiver, is so hard to action of account as bailiff; but 'tis said a bailiff cannot be charged as receiver, nor a receiver as bailiff, because then he might be twice charged. 2 Lev. 157: 1 Davy. Abr. 220, 221. The heir may have writ of account before or after his full age, against a guardian in loco; and if he sue the guardian for profits of his lands taken before
ACCOUNT.

Before he is fourteen years old, he must charge him as guardian; but if it be for taking the profits after that age, there he must sue for him as bailli. 1 F. N. B. 115.

2. Where an heir for a stranger that doth intermeddle with his land, he shall charge him in account as guardian. 1 F. N. B. 18.

A man devises lands to be held by his executors, and the money thenese wishing to be distributed among his children; action of account is in this case, for the children against the executors. 1 T. R. Com. 215; 2 Roll. Abr. 285. An action of account lies against a bailiff, not only for what profits he hath made and raised, but also for what he might have made and raised by his care and industry, his reasonable charges and expenses deducted. Co. Lit. 172. In this instance the action of account may be preferable to that for money had and received.

One merchant may have account against another, where they occupy their trade together; and if one charges me as bailiff of his goods ad mercatum, I must answer for the increase, and be punished for my negligence; but if he charges me as receiver ad computationem, I must answer only for the bare money or thing delivered. F. N. B. 115; Co. Lit. 272; 2 Leon. Ca. 245.

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

Statutes.—In the writ of account the processes by the common law was summons, attachment, and distress in infinitum. The statute of Marlbridge (52 H. 3, c. 23) gave attachment by the body, if the bailiff had no lands by which he might be restrained. 2 Ten. 369.—By the statute, 28 Geo. 2, (13 I. 1. & 1.) c. 11, if the accountant be found in arrears of the auditors, that are assigned to him here power to award him to prison. In the processes of outlawry, &c. the statute, 53 I. 3. c. 23, gives an action of account to the executors of a merchant; the statute 25 Ed. 3. c. 12, to executors of executors; the statute of 31 Ed. 3. c. 11, to administrators; and by the statute 33 Ed. 3. and, 1 Hen. 6. c. 16, actions of account may be brought against the executors and administrators of every guardian, bailiff and receiver, and by one jointowner, tenant in common, his executors and administrators against the other, as bailiff, for receiving more than his share, and against his executors and administrators; and the auditors appointed by the court may examine the party on oath.

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

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

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

What may be pleaded in bar to the action, shall not be allowed to be pleaded before the auditors. Co. Cas. 32, 161. Some pleas are in bar of the account, and others in discharge before auditors; and some pleas will be allowed before auditors, that will not be in bar to the account. 2 Den. 21; 11 Rep. 8. In account the plaintiff declared of the receipt of money by the hands of a stranger; the defendant pleaded a gift of the money afterwards by the plaintiff; this was a good plea as well in bar of the action, as before auditors. Win. 9.

The pleas in this action are, quod munuam suit receptis; quod pleat computusuit, &c. It is no plea by an accountant that he was robbed; unless he alleges he was without his default and negligence, and then it will be a good plea. Co. Lit. 89. That the defendant never was bailiff, is the general bar; and it is a good plea in bar, by claiming a property in the things to be accounted for. 29 I. 3. 47.

A defendant, as receiver, cannot waste his law, where he receives the money by another's hands; 'tis otherwise where he received it of the plaintiff himself. 1 Co. 916.

It may be proper to add, that the process in account is summons, prise, and distress; and, upon a writ returned, the plaintiff may proceed to outlawry. The statute of Limitations, 21 Jac. 1. c. 16, doth not bar a man who is a merchant from bringing action of account for merchandise at any time; but all other actions of account are within the statute.

In Chancery upon an account of fifteen or twenty years standing, the defendant may be allowed to prove, on his own oath, what he cannot otherwise make proof of; but here the particulars must be named, as to whom the money was paid, for what, and when, &c. 1 C. Rep. 146. And a defendant shall be discharged upon his oath of facts under 40 s.; though it is held a plaintiff shall not so charge another, or be allowed any thing in equity on his oath. 2 C. C. Cas. 249; 2 Dears. 283; See oath. Vids. Compt. Dig. art. Account. — Kyd's Compt. Dig. Introd. to that title.

ACCOUNTANT-GENERAL. An officer in the court of Chancery, appointed by act of parliament, to receive all money lodged in court. He is to convey the money to the Bank, and take the same out by order; and he is only to keep the account with the Bank; for the Bank is to be as answerable for all money received by them, and not the Accountant-General. Sec. stat. 12 Geo. I. c. 32. No fees shall be taken by this officer or his clerks, on pain of being punished for extortion; but they are to be paid salaries. The Accountant-General 50l. per annum, out of interest made part of the suitors' money.

See title Chancery.

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

ACCOUNTS PUBLICK. By statute 25 Geo. 3. c. 52, the patents formerly granted to Lord S博物馆 and Lord Mountawen as auditors of the impeachment are voided, and the annual sum of 7,000l. each is made payable to them during their respective lives. § 1. 3.

Under this act his Majesty appoints five commissioners by letters patent; two of whom are to be comptrollers of the army accounts; salaries are granted to each, paid out of
of the aggregate fund, not exceeding in the whole 6000l. These are titled The Commissioners for auditing the public accounts; and hold their offices quamdiu, si bene gerint, (except the comptrollers of army accounts who continue commissioners so long only as they are comptrollers.) Before they act they take an oath before the chancellor of the exchequer "faithfully, impartially and truly to execute the powers and trusts vested in them." § 4.

The Treasury appoint officers, clerks, &c. for making up and preparing for declaration the public accounts of the kingdom, with salaries; and allow for all charges out of the aggregate fund to an amount not exceeding 6000l. per annum, which is in lieu of all fees and perquisites.

§ 5.

The commissioners under this act are invested with all the powers, and subject to the same duties and control as the auditors of the imprest formerly were; except as altered by the act. The commissioners administer oaths to the officers and clerks for the performance of their duties. § 6: and to accountants. § 12, 13. For their mode of proceeding see the act.

ACROCHE, from the Fr. accrocher, to hock or grapple unto.] It signifies to encroach, and is mentioned in the statute 25 Ed. 3. c. 8, to that purpose. The French use it for delay; as accrocher un procès, to stay the proceedings in a suit.

ACCUSATION, accusâre] The charging any person with a crime. By Magna Charta no man shall be imprisoned or condemned on any accusation, without trial by his peers, or the law. None shall be vexed upon any accusation, but according to the law of the land: and no man may be molested by petition to the king, &c. unless it be by indictment, or presentment of lawful men, or by process at common law. Stat. 25 Ed. 3. § 5. c. 4. § 28 Ed. 3. c. 3. None shall be compelled to answer an accusation to the king, without presentment, or some form of record. Stat. 42 Ed. 3. c. 3. See Stat. 38 Ed. 3. c. 9. By statute 5 and 6 Ed. 6. c. 11. § 12; and 1 F. and M. c. 10. 11, in treason there must be two lawful accusations. As to self-acquittal, see tit. Evidence. See tit. Malicious Prosecution.

ACEMANNES-CEASTER, Atemanns Civitas.]

BATH s. v. o.

ACEPHALI. The levellers in the reign of king Hen. 1. who acknowledged no head or superior. Legis Hen. 1. Cu-Canes.

ACETABIL BILL.-And also to a bill to be exhibited for 20cl. debt, &c.] Words in, or a clause of, a writ, where the action requires bail. The stat. 13 Car. 2. § 2. c. 2, which enjoins the cause of action to be particularly expressed in the writ or process which holds a person to bail, hath ordained the adding of this clause in writs to the usual complaints of trespasses, which latter gives cognizance to the court, while that of debt authorizes the arrest. This ought not to be made out against a peer of the realm, or upon a penal statute, or against an executor or administrator, or for any debt under 10l. in the superior courts. Nor in any action of account, action of covenant, &c. unless the damages are 10l. or mere; nor in action of trespass, for battery, wounding or imprisonment; except there be an order of court for it, or a warrant under the hand of one of the judges of the court out of which the writ issues. 1 Lech. de 13. See North's Life of Lord keeper Guildford, fol. 99, 100.

Imply's Instru't Clericis, K. B. and C. P. and this Dictionary tit. Arrest, Bail.

ACHAT, Fr. Abêt.] A contract or bargain. Purveyors by stat. 34 Ed. 3. c. 2, were called Abëtes.

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

ACHOLITE, Abëtes.] An inferior church servant, any other than the subdeacon, following or waiting on the priest and deacon, and performed the meaner offices of lighting the candles, carrying the bread and wine, and performing other servile attendance.

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

ACQUETANDIS PLEGIIS, A writ of justification, lying for the surety against a creditor, who refuses to acquit him after the debt is satisfied. Reg. of Wills 158.

ACQUETANTIA DE SHRISERIUM, To be free from suits and services in lives and hundreds.


ACQUIFFAL, from the French word Acquise, and the Latin compound Acquire] To free or discharge. It signifies in one sense to be free from entries and molestations of a superior lord for services arising out of land; (See Terms de la Loi;) and in another signification (the most general) it is taken for a deliverance and setting free of a person from the suspicion of guilt; as he that on trial is dischargèd of a felony, is said to be acquittus de jure; and if he be drawn in question again for the same crime, he may plead auter-fAlice acquit; as his title shall not be twice put in danger for the same offence. 2 Ift. 585.

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

If one be acquitted on an indictment of murder, supposed to be done at such a time; and after indicted again in the same county, for the murder committed at another time; here, notwithstanding that variance, the party may plead autre-fAlice acquit, by averring it to be the same felony; so where a person is indicted a second time, for robbery upon the same person, but at another vili, &c. 2 Thock. P. C. Where a man is discharged on special matter found by the grand jury, yet he may be indicted de novo seven years afterwards, and cannot plead this acquittal; as he may appear upon the special matter found by the petty jury, and judgment given thereon. Ibid. 26. See also Leach's Hawkins, c. 25. § 65.

If a person is lawfully acquitted on a malicious prosecution, he may bring his action, &c. for damages, after he hath obtained a copy of the indictment; but it is usual for the judges of gaol delivery to deny a copy of an acquittal to him who intends to bring an action thereon, when there was probable cause for a criminal prosecution. Corsh. Rep. 421. See Leach's Hawkins, c. 23. § 145, &c. By stat. 3 Hen. 7. c. 1, if neither principal or accessory be acquitted on an indictment for murder, the court may remit him to prifon, or bid him, at his discretion till the year and day (for appeal) be passed.
ACQUITTANCE, Acquittane. A signification of discharge in writing, of a sum of money, or debt due; as, when a man is bound to pay rent, reserved upon a lease, &c., and the party to whom due, on receipt thereof, gives a writing under his hand witnessing that he is paid; this will be such a discharge in law, that he cannot demand and recover the sum or debt again, if the acquittance be produced. 

T. de Lorp 17. 4 Dut. 6. 25. 7 1. An acquittance is a discharge and bar in the law to actions, &c. And if one acknowledges himself to be satisfied by deed, it may be a good plea in bar, without any thing received; but an acquittance, without seal, is only evidence of satisfaction, and not plendable.

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

But in some cases a court of equity will order accounts to be opened, even after an acquittance in full of all demands. And now, in the superior courts of law, the producing an acquittance will not bar the action, if the plaintiff can by any means show a mistake, and that he has not been paid, or paid so much as the acquittance is for.

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

A servant may give an acquittance for the use of his master, where such servant usually receives his master's rents, &c., and a master shall be bound by it. Co. Lit. 112. The manner of tender and payment of money shall be generally directed by him who pays it, and not by him who receives it; and the acquittance ought to be given accordingly.

ACRE, from the German Acker, Acre. A quantity of land, containing in length 40 perches, and in breadth 40 perches; or in proportion to it, be the length or breadth more or less. By the customs of various countries, the perch differs in quantity, and consequently the acre of land. It is commonly about 16 feet and a half, but in Staffordshire it is 24 feet. According to the statute 24 Hen. 8. c. 14, concerning the fowing of flax, it is declared that 160 perches make an acre, which is 40 multiplied by four; and the ordinance of measuring land, 33 Ed. 1. b. 6, agrees with this account. The word acre formerly meant an open ground or field; as a hedge-ace, walk-ace, &c., and not a determined quantity of land.

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

ACTITLIA, Military utensils. Du Cange.

ACTION, Actus is the form of a suit given by law for recovery of that which is one's due; or it is a legal demand of a man's right. Co. Lit. 285. The learned Bracca thus defines it, Actus habi diutum est quum jus profundit in judicio solum actitum. Actions are either criminal or civil; criminal to have judgment of death, as appeals of death, robbery, &c., or only to have judgment for damage to the party, fine to the king and imprisonment, as appeals of malam, &c. Co. Lit. 284; 2 Inf. 40. Civil actions are such as tend only to the recovery of that which by reason of any contract, &c., is due to us; as action of debt, upon the same, &c. 2 Inf. 41.

Under criminal actions may be included actions penal; which lie for some penalty or punishment on the party sued, be it corporal or pecuniary. Bred. 127.

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

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

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

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

Action mixed is an action that lieth as well for the thing demanded, as against the person that hath it; in which the thing is recovered, and likewise damages for the wrong sustained; it seeks both the thing whereof a man is deprived, and a penalty for the unjust detention. But detinue is not an action mixed, notwithstanding the thing demanded and damages for withholding it be recovered; for it is an action merely personal, brought only for goods and chattels.

In a real action, setting forth the title in the writ, several lands held by several titles may not be demanded in the same writ; in personal actions several wrongs may be comprehended in one writ. 2 Rep. 97. A bar is perpetual in personal actions, and the plaintiff is without remedy, unless it be by writ of error or assize; but in real actions, if the defendant be barred, he may commence an action of a higher nature, and try the same again.

5 Rep. 33. Action of waste sued upon tenant for life, is in the realty and personally; in the realty, the place wasted being to be recovered, and, in the personally, as treble damages are to be recovered. Co. Lit. 284.

Many personal actions die with the person. Real actions survive. If leases for years commit waste, and dies, action of waste may not be had against his executor or administrator, for waste done by the deceased. And where a keeper of a prison permits one in execution to escape, and afterwards dieth, no action will lie against his executors.
ACTION.

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

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

In personal actions, several wrongs may be joined in one writ; but actions founded upon a tort, and on a contract, cannot be joined, for they require different pleas and different processes. 1 Keb. 547; 1 Ynt. 366. So where there is a tort by the common law, and a tort by statute, they may not be joined; though where several torts are by the common law, they may be joined, if personal. 3 Salk. 293.

Traver and assumpsit may not be joined; but in an action against a common carrier, the plaintiff may declare in cases upon custom of the realm, and also upon trover and conversion; for not guilty answers to both. 1 Danv. Abr. 4. Debt upon an amortization, and upon a mutuum, may be joined in one declaration. Wilt. p. 1. 248. So case for a misfeasance and negligence may be joined with a count in trover, in the same declaration. 15. g. 2. 319. Two counts may be joined in the same declaration, where there is the same judgment in both. 30. 331. And any action may be joined, where the plea of not guilty goes to all. 8 Rep. 47. But, it seems, ejectment and battery cannot be joined; after verdict, where several damages were found, the plaintiff was allowed to release those for the battery, and had judgment for the ejectment. 1 Danv. 3. If this is law, it shows that causes of action cannot in every instance be joined, where the same plea will go to the whole. The doctrine in Darvis, seems to be law, for supposing, ejectment, assault, and battery, &c. joined in one action, and a general verdict on not guilty for the plaintiff; a new execution on such a judgment must be framed. Indeed the joining the two such actions, seems rather absurd. Although persons may join in the personalty, they shall always suffer in actions concerning the reality; and where being a mixed action, favouring of the reality, that being more worthy, draws over the personalty with it. 2 Med. 60.

A person cannot, as administrator, &c. join an action for the right of another, with any action in his own right; because the costs will be entire, and it cannot be distinguished how much is to have as administrator, and how much for himself. 1 Sel. 10. See a variety of cases, well selected and digested on this subject. Cam. Dig. tit. Action.

It remains now to consider,

I. By whom, and against whom, Actions may be brought.

II. What particular Actions are adapted to particular Causes.

It may be previously observed that an action does not lie before a cause of action accrued; and if it be not pleaded in abatement, yet if it appears on the record, it may be moved in arrest of judgment; 2 Lew. 197; 3 Carv. 114; vide Sh. 147; or aligned for error; 2 Cro. Eliz. 325. See further Kyd's Cam. Dig. tit. Abatement, (G. 5.), and Action, (E.)

In some cases, certain things are required by act of parliament to be done by the plaintiff, previous to the commencement of an action, or he cannot recover; as in actions against justices of the peace, a month's notice must be given by stat. 24 Geo. 2, c. 44. vide Morgan's Pave Mec. 20.
ACTION II.

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

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

II. There are various kinds of actions, suited to different cases, as actions of Comman, Debt, Divinity, Treason, Trespass, Trover, &c. which fall under their respective titles.

But where the law has made no provision, or rather, where no general action could well be framed before hand, the ways of injuring, and methods of deceiving being so various, every person is allowed to bring a special action on his own case. 1 New Abr. 44; Co. Lit. 55 a; 6 Mod. 53, 54.

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

Action upon the cafe is a general action given for redress of wrongs and injuries, done without force, and not particularly provided against by law, in order to have satisfaction for damage; and (by hat. 19 H. 7. 199) in actions upon the case, the like process is to be had as in actions of trespass or debt. It is called action in the case, because the whole case or cause, as much as in the declaration (except time and place) is set down in the writ; and there is no other action given in the case, save only where the plaintiff hath his choice to bring this or another action. Formerly, all actions were fixed in the court of Common Pleas, and there the foundation of the suit is, a writ, called an original, whereupon the process is grounded, and which original contains the nature of the plaintiff's complaint at large; and it is the same where suits are commenced in B. R. by original out of Chancery.

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

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

1. Action on the case for words spoken or written which affect a person's life, reputation, office, or trade, or tend to his loss of preference, in marriage or service, or to his disfranchisement, or which occasion him any particular damage. This action therefore will lie for charging another with any capital or other crime. To say of another he is a traitor, action lies. 1 Bulst. 145. But if one call another a tedious, traitorous knave, no action lieth; because the words imply an intention only, and not an unlawful act. 4 Rep. 19. Nor to say of a man he deserves to be hanged; nor to call another a rogue generally, or say he will prove him to be a rogue; though it will lie to say a man is a rogue on record. 4 Rep. 15; Dav. 92. Words which charge a person with being a murderer, highwayman, or thief, in express terms, are held actionable. 1 Rel. Abr. 47. Though for saying such a one would have taken his purse on the highway, or have robbed him, an action lies not; for nothing is shown to be done in order thereto. Cro. Eliz. 256. Likewise to say a man was in goal for stealing any thing is not actionable, for the words do not affirm the theft. Dav. 140. But to say, I think A. B. committed such a felony; or, I dreamt he stole a horse, &c. these words are actionable. 3 Del. 144; 1 Dav. 165. If a felony be done, and common fame is, that such a person did it, although one may charge or arrest him on suspicion of that felony; yet a man may not affirm that he did the same, for he may be innocent all the while, and therefore affirning it hath been held actionable. Hob. 138, 203, 381.

It was heretofore held, that no action would lie for words importing a charge of murder, without an averment that the person said to be killed was dead; but the latter and better opinion is, that the party shall be intended to be dead, unless the contrary appears in the pleadings. 1 Pint. 117; 3 Raw. 485; 5 Stil. 53; Cro. Eliz. 510, 823. Though where if the party is proved alive? So words accusing of fornication. 1 Sid. 373.

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

Some writers make a difference, where the subsequent words are introduced by the word and; as, you are a thief, and have stolen, &c. which are additional, and shall not correct; and the word for; as you are a thief, for you have, &c. Hob. 585; Style 115; Gold. 89. The words, He is a maintainer of thieves, and keeps none but thieves in his house, will not support an action, unless it be averred that he knew them to be thieves. Cro. Eliz. 746.

To say an alehouse-keeper keeps a bawdy-house, action lies. Cro. Eliz. 582. Though to say of an inn-keeper, that he harbours rogues, &c. is not actionable; for his inn is common to all guests. 2 Roll. Rep. 136. To say of another he hath the French pox, action will lie. Cro. Fac. 450. See Noy, 151. To call a man a whore-mater, or a woman whore, no action lies; for these are merely spiritual offences. Dav. Abr. 80. But calling a woman whose name is London, is actionable, as he is liable to be punished.
ACTION II.

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

Calling an officer in the government, lord justice, and injured in the exercise of his profession or trade; actionable. 

Act. 31. 107. To say a justice of peace doth not administer justice, is actionable. 

Art. 338. And so for other disgrace in his office. But words relating to a man's office, must have a plain and direct meaning, to charge him with some crime that is punishable; and be spoken of his office, or otherwise they are not actionable. 

6 Meta. 100. Thus the plaintiff, being a justice of peace, the defendant said Mr. Stubbe was a knave, a rascal and a villain, he is not fit to be a justice of peace; actionable, for though his office is not named, the words necessarily refer to it. 

4 Rep. 16. See 1 Law. 355; 1 Vent. 50.

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

The defendant spoke to an officer, (viz.) You have assaulted the State of 20,000l. and I will prove it for you, you have received 25,000l. of the office, and you have stained words in the order of your commission; actionable. Style 430.

In offices of profit, for such words as impute the want of underhand, ability, or integrity to execute them, this action lies. But in offices of honour, words that imply want of ability, are not actionable; as to say a judge or justice of peace, he is an ass, and a headless justice; the reason is, because a man cannot help his want of ability, as he may his want of honesty; otherwise words which impugne dishonesty or corruption are actionable. 2 Salk. 695. 

But if special damage can be proved, it is actionable; and indeed in every case, where special damage can be proved, an action will lie.

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

1 Roll. Ab. 62.

To say of a doctor in divinity, Doctor S. is robbing the church; and at another time Doctor S. hath robbed the church; actionable. 2 Car. 301, 417.

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

These words spoken of a preaching parson, Parrat is an adulterer, and had two children by B. G.'s wife, and I will cause him to be degraded for it; not actionable; for he is a spiritual degradation, and punishable in that court. 

Civ. Eas. 152.

To say of a counsellor, that he is no lawyer; that they are fools who come to him for law, and that he will get nothing by the law, action lies. 1 Danw. 117. And it is the same to say, he hath divulged secrets in a cause.

To call a doctor of physic fool, ass, empirick, and mountebank, or say he is no scholar, are actionable. 2 Car. 257. 

So to say of a schoolmaster, but not your son to him, for he will come away as very a dunce as he went. 

Holt. 71. Where one says of a midwife, that many have perished for her want of skill, an action will lie. 2 Car. 211. 

If one calls a merchant bankrupt, action lies. 1 Lawr. 316. And to call a trading person bankrupt, or knave, is actionable. 1 Danw. 90. Also if one says of a merchant, that he is a beggarly fellow, and not able to pay his debts; or say of a person that he is a runaway, and dares not shew his face, by reason whereof he is disgraced and injured in his calling, there are actionable. 

Reyn. 184.

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

As to words tending to a person's disinheritance, if one says of another that he hath a bastard; action upon the cause, lies, as it tends to his disinheritance. 2 Co. 29. But to say of a son and heir apparent, that he is a bastard, action lies not until he is disinherit, or is prejudiced thereby. 1 Danw. 83. To slander the title of another person to his lands is actionable; but the words must be false, and be spoken by one that neither hath, nor pretendeth title to the land himself; and who is not of counsel to him that pretendeth right. 4 Rep. 17. If a man shall pretend title to the land another hath in possession, and hath no colour of title to it; and shall say he hath such a deed or conveyance of it, where in truth he hath none, or if he hath any, it is a counterfeit and forged deed, and he knows it to be so; in such cases the words may bear an action; but if there be any colour for what is said, they will not be actionable. 2 Co. 165; Tves. 80, 88. And the party of whom the words are spoken must have, or be likely to have, some special damage by the speaking of them; as that he is hindered in the use of his lands, or in his preferment in marriage, &c. without which it is said action doth not lie. 1 Danw. 90; 2 Co. 213, 397; 2 Poth. 187: 2 Bull. 90. The affirming that another hath title to the land, where actionable, see 4 Rep. 175.

If A. says, that B. said that C. did a certain scandalous thing, C. shall have action against A. with averment that B. never said so, whereby A. is the author of the scandal. Supposing B. did not in fact say so. 2 Co. 406. See 1 Roll. Ab. 64.

It is to be observed in general, that though scandalous words
words are spoken before a man's face, or behind his back, by way of affirmation, or report, when drunk, or sober; and although they are spoken in any other than the English language, if they are understood by the hearers, they are actionable; also words may be actionable in one county, which are not so in another, by the different construction, 4 Rep. 14: Hob. 165, 235. But if the defendant can make proof of the words, he may, in an action for damages, plead a special justification. Co. 25. The words to maintain this action must be direct and certain, that there may be no intention against them; but as some words separate, without others joined with them, are not actionable; so some words that are actionable may be qualified by the precedent or subsequent words, and all the words are to be taken together. 4 Rep. 17: 1 Cro. 127: Mar. Ca. 174, 331. Vide 4 Rep. 20: Hob. 126. Where words spoken are somewhat uncertain, they may by apt averments be made certain and actionable. 2 Bull. 227. So by the pleadings of the parties, and verdict of a jury for the plaintiff. Cro. 107. The thing charged by the words must be that which is possible to have been done; for if it be of a thing altogether and apparently impossible, no action lies. 4 Rep. 16. No action will lie for words spoken in pursuit of a prosecution in an ordinary course of justice; as when a lawyer, in pleading his client's cause, utters words according to his instructions; as saying of one he is a bastard, when this is to defend the party's own title where he himself doth claim to be heir of the land that is in question, these words will not bear an action. Cro. 90: 4 Rep. 13.

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

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

3. Action on the cafe likewise lies upon an Affrayment or undertaking; and such action is founded on a contract either express or implied by law, and the verdict gives the party damages in proportion to the loss he has sustained by the violation of the contract. 4 Co. 421: Mar 627. See tit. Affrayment.

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

It was formerly held, that if my fire, by misfortune, burnt the goods of another man, for this wrong he should have action on the cafe against me; and if my servant put a candle or other fire in any place in my house, and this burnt my house and the house of my neighbour, action of the cafe lay for him against me. 1 Dorm. 19. But this action is now destroyed by Stat. 6 Ann. c. 31. See tit. Fire, W. A. F.

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

A common Inn-keeper is chargeable for goods stolen in his house. See tit. Inn and Inn-keeper.

This action lies for Deceit in contracts, bargains, and sales; if a vintner sells wine, knowing it to be corrupt, as good and not corrupt, though without warrant, action lies. Dorm. 173. So if a man sells a horse, and warrants him to be sound in his limbs, if he be not, action on the cafe lies. A person warrants a horse, wind and limb, that hath some secret disease known to the seller, but not to the buyer, this action may be brought: though if one sell a horse and warrant him sound, and he hath at the time visible infirmities, which the buyer may see, action on the cafe will not lie. Tel. 114: Cro. 675. Where one sells me any wares or commodities, and is to deliver, what is good, but deceives me that it is not; or sells any thing by false or deceitful words, and without warrant, action on the cafe lies; and so where a man doth sell corrupt victuals, as bread, beer, or other thing for food, and knows it to be unwholesome. Dyer 75: 4 Rep. 18: Cro. 270. Yet if the buyer or his servant shall see and taste the victuals, &c. and like and accept the same, no action can be maintained. 7 H. 4. 16. Nor will cafe lie upon a warranty of what is out of a man's power, or of a future thing; as that a horse shall carry a man thirty miles a day, or the like. Finch 188. If a man sells certain packes of wool, and warrants that they are good and merchantable, if they be damaged, action on the cafe lies against him. 1 Dorm. 177. The bare affirmation by the seller of a particular sort of diamond, without warranting it to be such, will not maintain an action. Cro. 4. 176. But where a man hath the possession of a personal thing, the affirming to it to be his own is a warranty that it is so; though it is otherwise in cafe of lands, where the buyer at his peril is to see that he hath title. 1 Saik. 210. If a person sells to another cattle or goods, that are not his own, action on the cafe lies; so if he warrants cloth to be of such a length, that is deficient of it. See tit. Deceit.

For Negligence or Malfeasance; as if a taylor, &c. undertakes to make a suit of clothes, and spoils them, action lies: and if a carpenter promises to repair my house before a certain day, and doth not do it, by which my house falls; or if he undertakes to build a house for me, and doth it ill, action on the cafe lies. 1 Dorm. 32. If a surgeon neglects his patient, or applies wholesome medicines, whereby the patient is injured, this action lieth. And if a counsel retained to appear on such a day in court, doth not come, by which the cause miscarries, action lies against him; so if after retain, he become of counsel to the adversary against the plaintiff. 11 H. 6. 18.

Where a smith promises to shoe my horse well, if he pricks him, action on the cafe lies; and so when he refuses to shoe him, on which I travel without, and my horse is damaged. For stopping up a water-course or way;
ACTION.

way; breaking down a party wall; slapping of ancient lights, and for any private nuisance to a man’s water, light, or air, whereby a person is damnsified, this action lieth. Cro. Eliz. 427; T. E. 159.

Where any one perpetuates another, for cheating at gaming, where a surety is not freed harmfully, 

If I lend another my horse to ride so far, and he rides further, or forward and backward, or doth not give him meat, this action lieth. Cro. Eliz. 14. And where one lends me a horse for a time, if he take him from me within that time, or disturb me before I have done what I hired him for; action on the case lies: though he ride the horse out of the way in my journey, he may not take him from me. 8 Rep. 140. See tit Bailment. This action lies for keeping a dog accustomed to bite sheep, if the owner knew the vicious quality of the dog. But not for a man’s dog running at my sheep, though he kills them, if it be without his consent, and he did not know that the dog was accustomed to bite sheep. Vide 1 Danv. Abs. 19: Helt 171.

Action on the case will lie against a Golder for putting iron on his prisoner; or putting him in the stocks, or not giving sufficient sustenance to him, being committed for debt. F. N. B. 83. The master may in many cases have this action against his servant, steward, or bailiff, for some abuse done to him, and for negligence, &c. Also it lies for taking or enticing away my servant, and retaining him; or threatening a servant, whereby I lose his service. Lane 65: Cro. Eliz. 777: 1 Sheep. Abs. 52, 59. A servant is trusted with goods and merchandise confined to him by a merchant, to pay the customs for them, and dispose of them to profit; if he deceive the merchant, and have allowance for it on his account, and, to defraud the king, lends some of the goods without paying the customs, by which they are forfeited, action on the case lieth. Lane 65: Cro. Jac. 260.

If I trust one to buy a lease or other thing for me, and he buys it for himself, or doth not buy it, this action lies against him; but if he doth his endeavour sufficiently. Brow. 117. Where a man is disturbed in the use of a seat in the church, which he hath had time out of mind; a steward is hindered in the keeping of his court; a keeper of a forest disturbed in taking the profits of his office; a bailiff in delaying for an amercement, or the like; action on the case will lie. Bedil. 89: Lib. Intr. 5: Mon. 937. An action on the case lies for him in reversion, against a stranger, for damage to his inheritance, though there be a term in fee. 3 Lev. 360. Also if a lessor comes to the house he has demised, to see if it be out of repair, or any waste be done, and meets with any disturbance therein; or if one disturbs a parson in taking his tithes, this action lies. Cro. Jac. 478: 2 Inf. 650. And for setting up a new mill on a river, to the prejudice of another who hath an ancient mill, an action will lie. Lib. Intr. 9.


Actions on the case may likewise be brought for malicious prosecutions: where a suit is without ground, and one is arrested, action on the case lies for unjust vexation: And for falsely and maliciously arresting a person for more than is due to the plaintiff, whereby the defendant is imprisoned, for want of bail; or if it be on purpose to hold him to bail, action on the case will lie, after the original action is determined. 1 Lev. 275: 3 Sal. 15.

An action likewise lies against sheriffs, for default in executing writs, permitting escapes, &c.

Actions on the case likewise lie for conspiracy, sales and sales, sales, &c. which lie under the several titles. And for a general abridgment of the law on this subject, see Com. Dig. tit. Action.

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

ACTION OF A WRIT, Is a phrase of speech used, when one pleads some matter, by which he shows the plaintiff had no cause to have the writ he brought, yet it may be that he may have another writ or action for the same matter. Such a plea is called a plea to the action of the court; whereas, if by the plea it should appear that the plaintiff hath no cause to have an action for the thing demanded, then it is called a plea to the action. Cowel: Ternes de la Ley.

ACTIONARE, i.e. In just vocare, or to prosecute one in a suit at law. Thom’s Chero.

ACTO, Acton, Acton, Fr. Hauwinton A coat of mail. Du Fréne.

ACTON BURNEL. The statute of 11 Ed. 1. ann. 1293. ordering the future merchant: it was so termed from a place named Acton-Burnel, where it was made; being a castle formerly belonging to the family of Burnel, and afterwards of Lovell, in Shropshire: Cowel: Ternes de la Ley.

ACTOR. The proctor or advocate in civil courts or causes. After dominants, was often used for the lord’s bailiff or attorney. After ecclesiastical was the ancient foemen- term for the advocate or pleading patron of a church. Actor villain was the steward or head bailiff of a town or village. Cowel.

ACTS DONE, Are distinguished into acts of God, the acts of the law, and acts of men. The acts of God shall prejudice no man: as where the law prescribes means to perfect or settle any right or estate: if by the act of God the means cannot be obtained, the law becomes imperfect, no party shall receive any damage thereby. Co. Lit. 123: 1 Rep. 97. As in an action on the case a bargain may justify, by pleading that there were several passengers in his barge, and a sudden tempest arising, all the goods in the barge were thrown overboard to save the lives of the passengers. See tit. Carrier.

The acts of the law are esteemed beyond the acts of man: and when to the perfection of a thing divers acts are required, the law hath mock regard to the original act. 8 Rep. 78. The law will continue things to be lawfully done, when it stands indifferent whether they should be lawful or not: but whatsoever is contrary to law is accounted not done. Co. Lit. 42: 3 Rep. 74. Our law doth favour substantial more than circumstantial acts; and regards deeds and acts more than words; and the law doth not require unnecessary things. Poul. 19.

As to acts of men: that which a man does by another, shall be said to be done by himself; but personal things cannot be done by another. Co. Lit. 153.
not do an act to himself, unless it be where he hath a double capacity; no person shall be suffered to do any thing against his own act, and every man's act shall be confirmed most strongly against himself. *Plow. 120. But if many join in an act, and some may not lawfully do it, it shall be adjudged the act of him who might lawfully do the same. *Dyer 192. Acts that men are forced by necessity and compulsion to do, are not regarded; and an act done between persons shall not injure a stranger not party or privy thereto. *Peth. 159: 6 Rep. 16.

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

ACTS OF PARLIAMENT. See tit. Statute.

ACTUARY, assessor. A clerk that registers the acts and constitutions of the Convocation.

ADDENDULITARE. To purge one's self of an offence by oath. *Legis Lex. c. 56.

ADDITION. The title or estate, and place of abode given to a man besides his name. See tit. Abatement. 1: 3: 4.

ADELING, Ephebium or Edeling. From the Saxon adelai, noble or excellent. A title of honor among the Anglo-Saxons; properly belonging to the king's children; it being usual for the Saxons to join the word king to the paternal name, signifying a son, or the younger. King Edward the Confessor having no issue, and intending to make Edgar, his nephew, the heir of the kingdom, gave him the title and title of Adeling. It was also used among the Saxons for the nobles in general. *Spaeth. Gloss. Lamb. 1: 4.

ADEPTION. A taking away of a legacy. See Legacy.

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

ADJOURNMENT, adjournamentum. Fr. adjournement. A putting off until another time or place. As adjournment in eye, (by writ.) *E. 3: 121: 25 E. 3: 121 is an appointment of a day, when the justices in eyre will sit again. A court, the parliament, and writs, &c. may be adjourned; and the substance of the adjournment is to give license to all parties that have anything to do in court to forbear their attendance, till such a time. Every half day of the term, and every day of a day in term, which is not dies juridicus, or a law day, the court is adjourned. 2 Lev. 26. The terms may be adjourned to some other place, and there the King's Bench and other courts at Westminster be held; and if the king puts out a proclamation for the adjournment of the term, this is a sufficient warrant to the keeper of the Great Seal to make out writs accordingly; and proclamation is to be made, appointing all persons to keep their day, at the time and place to which, &e. *1 Mod. 279: 1 Lev. 176.

Though by Magna Charta the court of Common Pleas is to be held at Westminster, yet necessity will sometimes supersede the law, as in the case of a plague, a civil war, &c. In the first year of Charles I. a writ of adjournment was delivered to all the justices, to adjourn two returns of Trinity term; and in the same year Michaelmas term was adjourned until Michaelmas next to Reading; and the king by proclamation signified his pleasure, that his court should be there held. *G. 1: 4: 27. In the 17th of Charles II. the court of H. R. was adjourned to Oxford, because of the plague; and from thence to Windsor; and afterwards to Westminster again. 1 Lev. 170, 178.

On a foreign plea pleaded in *officio, let. the writ shall be adjourned into the Common Pleas to be tried; and after adjournment, the tenant may plead a new plea pertinent to the first; but if he pleads in abatement a plea triable by the assize, on which it is adjourned, he cannot plead in bar afterwards. *Edw. 1. Dom. Ad. 22. The justices of assize have power to adjourn the parties to Westminster, or to any other place, and by the express words of Magna Charta, (cap. 12,) they may adjourn, &c. into C. R. before the judges there. *Dyer 132.

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

ADJURATUS, Stayed, lain. See *بط. 1: 3: Engl. 2: c. 32.

AD JURA REGIS. A writ brought by the king's clerk prefixed to a living, against those that endeavor to eject him, to the prejudice of the king's title. *Reg. of Writs. 41.

AD LARGUM. At large: It is used in the following and other expressions: the large, offce at large, writs at large, writs at large; to vouch at large, &c.

ADLEGARE, or actus in Fr. To purge himself of a crime by oath. See the laws of King Alfred, in *Brong. Chron. cap. 4 & 13.

ADM A N T I M E N T, Writ of, adharcufation. A writ brought for remedy against such persons as usurp more than their share. It lies in two cases: one is termed admeasurement of dower, (admeasurement dote,) where a man's widow after his decease holdeth from the heir more land, &c. as dower, than of right belongs to her; and the other is admeasurement of pasture, (admeasurement pasture,) which lies between those that have common of pasture, where any one or more of them usurp the common. *Reg. Org. 1: 16: 171. In the first case the heir shall have this writ against the widow whereby she shall be admeasured, and the heir reared to the overplus; and in the last case it may be brought against all the other commoners, and him that usurped; for all the commoners shall be admeasured. *T. de L. 25. See tit. Common and Dover.

ADMINICEL, administratio.] Aid, help, or support. See fl. 1: E. 4: c. 1.

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

ADMINISTRATRIX, Laur.] She that hath goods and chattles of an intestate committed to her charge, as an administrator.

ADMIRAL. Admiraltius, admirallus, admiralis, capitaneus or capite marii, from the French amiral, or from the Saxon, amiral, over all the sea; and in ancient time the office of the admiral was called eptuad marinaris. Co. Lit. 260. Many other fanciful derivations are recapitulated in Spelman's Glossary, and see *Co. Dig. tit. Admirals. — The term appears to have been first used temp. E. 1 and the first Admiral of England, by name, was Richard Fitz Alan Earl of Arundel in Ric. 2. 2.] A High Officer or magistrate, having the government of the king's navy; and (in his court of Admirals) the determining of all causes belonging to the sea and offences committed thereon. — The office is now usuall executed by Commissioners who, by fl. 2 W. & M. fl. 2: c. 2, are declared
declared to have the same authorities jurisdictions and powers as the Lord High Admiral, who is usually understood by this term in law, not adverting to the naval distinctions.

Under this head therefore shall be included all that relates as well to such Admiral as to the Court of Admiralty.

The warden of the Cinque Ports has the jurisdiction of Admiral within those ports exempt from the admiralty of England, as Inl. 223. 2 Inl. 556. 2 Jas. 67. 1 Jer. 85. It appears that anciently the Admirals of England had jurisdiction of all causes of merchants and mariners, happening not only upon the main sea, but in all foreign parts within the king's dominions, and without them, and were to judge them in a summary way, according to the laws of Oleron and other sea laws. 4 Inl. 75. In the time of king Ed. 1. and king John, all causes of merchants and mariners, and things arising upon the main sea, were tried before the lord Admiral; but the first title of Admiral of England, expressly conferred upon a subject, was given by patent of king Rich. 2. to the Earl of Arundel and Surrey. In the reign of Ed. 3, the court of admiralty was established, and Ric. 2. limited its jurisdiction.

By the statute 1 Rich. 2. c. 1. c. 5, it is enacted, that upon complaint of encroachments made by the admirals and their deputies, the admirals and their deputies shall mediate with nothing done within the realms, but only with things done out of the sea. For the construction of this statute, see 2 Balfr. 327. 3 Balfr. 205. 15 Ed. 52.

By Act. 15 Ric. 2. c. 3, it is declared, that all conquests, plunders, and quarrels, and other things done within the bodies of counties by land or water, and of wreck, the admiral shall be no cause, but they shall be tried, c. c. by the laws of the land; but of the death of a man, and of mischief done in great ships, being in the main stream of great rivers, beneath the points near the sea, and in no other place of the same river, the admiral shall have cause; and also to arrest ships in the great waters, for the great voyages of the king and the realm, failing to the king his revenues; and shall have jurisdiction in such states during such voyages, only saving to lords, &c. their liberties.

By the statute 2 Hen. 4. c. 11, reciting the 13 R. 2. c. 5, it is enacted, that he be that finds bimself aggrieved against the form of the statute, shall have his aid by suit grounded upon the case against him that so pursues in the admiralty, and recover double damages against him, and he shall have the pain of 10l. if he be admitted.

By Act. 27 H. 8. c. 4. All offences of piracy, robbery, and murder done on the sea, or within the admirals' jurisdiction, shall be tried in such places of the realm as shall be limited by the king's commissions, directed to the lord admiral and his lieutenant and deputies and other persons to determine such offenses after the common course of law, as if the same offenses had been done on land.

By the statute 28 Hen. 8. cap. 15, "all treasons, felonies, robberies, and murders, &c. upon the sea, or within the admirals' jurisdiction, shall be tried in such places of the realm as shall be limited by the king's commissions, as if done on land, and the consequencies of the offenses are the same. See 3 Inl. 111, 112. But in cases which would be manslaughter at land the jury is always directed to acquit."

It was held, Vido. 134, That by force of this statute, accessories to robbery, &c. could not be tried; but this is remedied by 11 & 12 W. 3. cap. 7; by which their aides and comforters, and the receivers of their goods are made accessories, and to be tried as pirates by 28 Hen. 8. cap. 15; also the said statute 11 & 12 W. 3. directs how pirates may be tried beyond sea, according to the civil law, by commission under the great seal of England.—See title Piracy.

By the statute 5 Eliz. cap. 5, several offenses in the act mentioned, if done on the main sea, or coasts of the sea, being no part of the body of any county, and without the Admiralty jurisdiction and liberties of the Cinque ports, and out of any haven and pier, shall be tried before the admiral or his deputy, and other justices of eye and terror, according to the statute of 28 H. 8. c. 15.

By the statute 1 Ann. cap. 9, captains and mariners belonging to ships, and destroying the same at sea, shall be tried in such places as shall be limited by the king's commission, and according to 28 H. 8. c. 15. The statute to Ann. cap. 10, directs how the trial shall be had of officers and soldiers, that either upon land out of Great Britain, or at sea, hold correspondence with a rebel enemy. See tit. Piracy, Treachery.

And by the statute 4 Geo. 1. cap. 11, all persons who shall commit any offense for which they ought to be adjudged pirates, felons, or robbers, by 11 & 12 W. 3. may be tried and judged for every such offense according to the form of 28 H. 8. c. 15, and shall be excluded from the benefit of clergy.

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

All ports and havens are sine a corpore constituient, and the admirality hath no jurisdiction of any thing done in them: between high and low water-mark, the common law and admirality have jurisdiction by turns; one upon the water and the other upon the land. 5 Inl. 113. By these statutes for disciplining the navy, every commander, officer and solder of ships of war, shall observe the commands of the admiral, &c. on pain of death or other punishment. See tit. Navy.

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

The admiralty is said not to be a court of record, by reason it proceeds by the Civil law. 4 Inl. 113. But the admirality has jurisdiction where the common law can give no remedy; and all maritime causes, or causes arising wholly upon the sea, it hath cognizance of. Vide as to the jurisdiction of the admiralty, 1 Com. Dig. tit. Admiralty. The admirality hath jurisdiction in cases of freight, mariners wages, breach of charter-parties, though made within the realm; if the penalty be not demanded: and likewise in case of building, mending, faving, and victualling ships, &c. as in the suit be against the ship, and
and not against the parties only. 2 Criv. 216. Mariners' wages are contracted on the credit of the ship, and they may all join in suits in the admiralty; whereas at common law they must all suffer: the master of a ship contracts on the credit of the owners, and not of the ship; and therefore he cannot prosecute in the admiralty for his wages. 1 Sulk. 33. It is allowed by the common lawyers and citizens, that the lord admiralty hath cognizance of feames wages, and contracts, and debts for making ships; also of things done in navigable rivers, concerning damage done to persons, ships, goods, annoyances of free passage, &c. And of contracts, and other things done beyond sea, relating to navigation and trade by sea. Woods's Inst. 248.

But if a contract be made beyond sea, for doing of an act or payment of money within this kingdom; or the contract is upon the sea, and not for a marine cause, it shall be tried by a jury; where part belongs to the common law, and part to the admiralty, the common law shall be preferred. And contracts made beyond sea may be tried in B. R. and a fact be laid to be done in any place in England, and so tried here. 2 Bell's 322.

Where a contract is made in England, and there is a conversion beyond sea, the party may sue in the admirality, or at common law. 4 Lees. 257. An obligation made at sea, it has been held, cannot be sued in the admiralty's court, because it takes its course, and binds according to the common law. 2 H. 12. The court of admiralty cannot hold plea of a matter arising from a contract made upon the land, tho' the contract was concerning things belonging to the ship: but the admiralty may hold plea for the feamas wages, &c. because they become due for labour done on the sea; and the contract made upon land, is only to ascertain them. 3 Lees. 60. Though where there is a special agreement in writing, by which feamas are to receive their wages, in any other manner than usual; or if the agreement at land be under seal, so as to be more than a parcel contract, it is otherwise. 2 Sulk. 31. See H. 79.

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

If a ship is taken by pirates upon the sea, and the master, to redeem the ship, contracts with the pirates to pay them 50l. and pawns his percon for it, and the pirates carry him to the Isle of S. and there he pays it with money borrowed, and gives bond for the money, he may sue in the admiralty for the 50l. because the original cause arose upon the sea, and what followeth was but accessory and confessional. Hard. 163.

If goods delivered on ship-board are imbezelled, all the mariners ought to contribute to the satisfaction of the party that lost his goods, by the maritime law, and the cause is to be tried in the admiralty. 1 Lill. 363. By the custom of the admiralty, goods may be attached in the hands of a third person, in causa maritime & civilis, and they shall be delivered to the plaintiffs, after defaults, on caution to redeliver them, if the debt, &c. be discharged, &c. But if the party refuse to deliver them, he may be imprisoned &c. March Rep. 294.

The court of admiralty may cause a party to enter into bond in nature of caution or ripulation, as bail at common law; and if he render his body, the security is discharged; and execution shall be of the goods, or of the bond. 180. not of the lands. Guth. 260. 1 Sheep. Abr. 199; Sec. 1 Sulk. 35; T. Ray. 78; 2 Lord Ray. 1266; Fitz. 197.

For a pardon in execution, on judgment in the admiralty's court, upon a contract made on the land in New England w. s. discharged, being out of the admiralty jurisdiction. 3 Criv. 503; 1 Criv. 635. And where failors' cloaths were bought in St. Katherine's parish near the Tower, London, which were delivered in the ship; on a bill in the admiralty for the money, an action was granted; for this was within the country: so of a ship lying at Blackwall, &c. Owen 122. Hugby's Abr. 113. But the admiralty may proceed against a ship, and the faults and tackle, when they are on shore, although alleged to be detained at land; yet upon alleging offer of a plea, claiming property therein, and refusal of the plea, on this suggestion a prohibition shall be had. 1 Shew. 179.

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

If an English ship takes a French ship, the French being in enmity with us, and such ship is libelled against, and after due notice on the exchange, &c. declared a lawful prize, the king's proritor may exhibit a libel in the admiralty court, to compel the taker (who converted the landing to his own use) to answer the value of the prize to the king; although it was objected, that by the first sentence the property was vested in the king, and that this second libel was in nature of an action of trover, of which the court of admiralty cannot hold plea. Curth. 390.—[This must be understood of a capture without the authority of letters of marque or reprisal.]

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

By the civil law and custom of merchants, if the ship be cast away, or perished through the mariners' defaults, they lose their wages; so if taken by pirates, or if they run away; for if it were not for this policy, they would forfeit the ship in a storm, and yield her up to enemies in any danger. 1 Sid. 179; 1 Med. 93; 1 Venet. 145.

The admiralty court may award execution upon land; tho' not hold plea of any thing arising on land. 4 Ingl.
ADMIRAL.

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

If one is sued in the admiralty, contrary to the statutes 13 R. 2. I. 1. c. 5; & 15 R. 2. c. 3, he may have a supersedeas, to cause the judge to stay the proceedings, and also have action against the party suing. 10 Rep. 75. A ship being privately arrested by admiralty process only, and no suit, it was adjudged a prosecution within the meaning of the statutes; and double damages, &c. shall be recovered. 1 Salk. 31, 32.

By flat. 8 Edw. c. 5, if an erroneous judgment is given in the admiralty, appeal may be had to delegates appointed by commission out of chancery, whose sentence shall be final. See 4 Inst. 339. But from the prize court (see 59/260) appeal lies to commissioners confining of the privy council. Doug. 614. Appeals may be brought from the interior admiralty courts to the lord high admiral's, but the lord warden of the cinque ports hath jurisdiction of admiralty exempt from the admiralty of England. A writ of error doth not lie upon a sentence in the admiralty, but an appeal. 4 Inst. 413; 339. There are also vice-admiralty courts in the king's dominions, from which (except in case of prizes) appeals may be brought before the courts of admiralty in England, as well as to the king in council. 3 Comm. 63.

The Admiral, of right, had annually a tenth part of all prize goods, but which is taken away by flat. 13 Edw. c. 2, which vests the property of all ships taken, and condemned as prize in the admiralty courts, in the admirals, captains, failers, &c. being the captors, according to proportions to be settled by the king's proclamation. This statute also enables the admiral to grant letters of marque. (See tit. Privyers.) For the mode of proceeding in condemning prizes, see the f. & Doug. 614: 4 Ten. Rep. 382, as to the commissioners of Appeal.

By the flat. 22 Geo. 2. c. 3, his majesty's commission to all the privy councillors then and for the time being, and to the lord chief baron of the court of exchequer, the justices of the king's beach and common pleas, and barons of the said court of exchequer, then and for the time being, for hearing and determining appeals from sentences in causes of prizes pronounced in the courts of admiralty, in any of his majesty's dominions, declared valid, although such chief baron, justices and barons are not of the privy council. But no sentence shall be valid, unless the major part of the commissioners present be of the privy council. See Kyd's Com. Dig. tit. Admiralty.

ADMISSION, admission.] Is properly the ordinary declaration that he approves of the pardon presented to Vol. I.

AD QUOD, &c.

serve the cure of any church. Ca. Lit. 344. a. When a patron of a church has presented to it, the bishop upon examination admits the clerk by saying admittis te habi­kem. Ca. L. 344. a. Action on the case will not lie against the bishop, if he refuse to admit a clerk to be qualified according to the canons (as for any crime or impudence, illiterature, &c.) but the remedy is by writ quare non admitteris, or admitteris clericum brought in that county where the refusal was. 7 Rep. 3. As to the causes of refusal by the ordinary to admit to a benefice, see tit. Parson; Quare impedit.

ADMITTANCE. See Copyhold.

ADMITTENDO CLERICO. Upon the right of presentation to a benefice recovered in quare impedit, or on a shift of darrin prejentment, the execution is by this writ: directed, not to the sherif, but to the bishop or his metropolitan, requiring them to admit and institute the clerk of the plaintiff. 3 Comm. 412: Reg. Orig. 31, 33.

See tit. Parson & Quare impedit.

If a person recovers an advowson, and six months pass; yet, if the church be void, the patron may have a writ to the bishop; and if the church be void when the writ comes to the bishop, the bishop is bound to admit his clerk. Vide Hat. 21: Hob. 152, 4: 2 Inst. 273, and 3 Com. Dig. Where a man recovers against another than the bishop, this writ shall go to the bishop; and the party may have an alias and a pluralis, if the bishop do not execute the writ, and an attachment against the bishop, if need be. New Nat. Br. 84. In a quare impedit between two strangers, if there appears to the court a title for the king, they shall award a writ unto the bishop, for the king.

ADMITTENDO IN SOCIUM. A writ for associating certain persons to juries of assize. Reg. Orig. 205. Knights and other gentlemen of the county are usually associated with judges, in holding their assizes on the circuits.

ADNICHLED, from the Latin nihil, or non nihil.] Annullated, cancelled, or made void. Stat. 28 H. 8. AD QUOD DAMNUM. A writ to enquire whether a grant intended to be made by the king will be to the damage of him or others. F. N. B. 221. It is bought to be issued before the king grants certain liberties; as a fair market, &c. which may be prejudicial to others: it is directed to the sherif, Terms de Ley 25.

Stat. 27 Ed. 1. f. 32. § 1, ordains, that such as would purchase new parks shall have writs out of chancery to enquire concerning the same. In like manner they shall do that will purchase any fair, market, warren, or other liberties. § 4.

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

The writ of ad good damnum is also had for the turning and changing of ancient highways; which may not be done without the king's licence obtained by this writ, on inquiry found that such a change will not be detrimental to the public. Terms de Ley 26: Parg. Rep. 341. Wayturned without this authority are not enrolled highways, so as to oblige the inhabitants of the hundred E.
to make amends for robberies; nor have the subjects an interest therein to justify going there. 3 Cor. 6. 53. If any one change an highway without this authority, he may stop the way at his pleasure. See tit. Highway.

The river Thames is an highway, and cannot be diverted without an ad quod damnum; and to do such a thing ought to be by patent of the king. N 2.

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

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

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

ADRECTARE, adire, i. e. ad retinum ire, rei stare.] To do right, satisfy, or make amends. Carp. Draver. anno 1750.

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

Now by tit. 4 Geo. 2. c. 28, tenants wilfully holding over, after demand and notice in writing for delivering possession, shall pay double the yearly value. See tit. Ejectment.

ADVENT, adventus.] A time containing about a month preceding the feast of the nativity (the advent or arrival) of our Saviour. It begins from the Sunday that falls either upon St. Andrew's day, being the 30th of November, or next to it, and continues to the feast of the Epiphany, commonly called Christmas. Our ancestors showed great reverence and devotion to this time, in regard to the approach of the solemn festival: for in adventum domini nulla adfecta debit capit. But the statute 3 E. 1. c. 51, ordained that, notwithstanding the usual solemnity and times of resort, it should be lawful (in respect of justice and charity, which ought at all times to be regarded) to take adles of novicii diffinere, more d'assentir, &c. in the time of Advent, Septuagesima, and Lent. This is also one of the feast of, from the beginning of which to the end of the octaves of the Epiphany, the solemnizing of marriages is forbidden, without special licence, as we may find from these old verses,

Conjungam adventus probohet, Hilarique relaxet;
Septuagesima certat, sed Patrice oclava reducit;
Rogatione velat, excipiet Trina postos.

AD VENTREM INSPICIENDUM. See Venter Insipientis.
in the Civil and Ecclesiastical law, as a counsellor at the common law. The ecclesiastical, or church
advocate, was originally of two sorts; either an advocate of the
causes and interpell of the church, retained as a counsellor
and pleader of its rights; or an advocate, advocatus, an
29. Both these offices at first belonged to the founders of
churches and convents, and their heirs, who were bound to
protect and defend their churches, as well as to nominate
or preent to them.—But when the patrons grew neglibent in
their duty, or were not of ability or interest in
the courts of justice, then the religious began to retain
law advocate, to solicit and prosecute their causes. Vide
Speiman.

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

ADVOW, or Advow, advocatus.] To justify or maintain
an act formerly done, see Advocatus; it also signifies to call
upon or produce; antiently when stolen goods were bought
by one, and sold to another, was lawful for the right
owner to take them wherever they were found, and he in
whole possession they were found, was bound advocates, i.e.
to produce the seller to justify the sale; and so on till
they found the thing with which a man acknowledged to be his own,
or done by him, and in this sense it is mentioned in Fleta,
lib. 1. cap. 5. par. 4.

ADVOWSON, Advocatus.] The right of presentation
to a church or benefice; and he who hath this right to
present is called patron; because they that originally
obtained the right of presentation to any church, were
maintainers of, or benefactors to, the same church: it being
presumed that he who founded the church will assert and
take it into his protection, and be a patron to defend it
in its just rights. When the Christian religion was first stablilised
in England, kings began to build cathedral churches,
and to make bishops; and afterwards, in imitation of
them, several lords of manors founded particular churches
on some part of their own lands, and endowed them with
benefice; referring to themselves and their heirs a right
to present a fit person to the bishop, when the same should
become void. See 2 Com. 21. 3.

Under this head shall be considered,
I. The several kinds of advowson.
II. How advowsons may lapse.
III. How they may be gained by appropriation.
IV. Of the right of presentation.
For the laws relating to appropriations and appropriations of
benefices, see Tit. Appropriation.

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

If he that is seised of a manor, to which an advowson
is appellant, grants one or two acres of the manor, together
with the advowson; the advowson is appellant to
such acre; especially after the grantee hath presented.
Watson: Compl. Incumbr. c. 7.
But this appellant of the acre with the advowson ought
to be by deed, to make the advowson appellant; and the
acre of land and the advowson ought to be granted by
the same clause in the deed; for if one, having a manor
with an advowson appellant, grant an acre parcel of the
said manor, and by another clause in the same deed grants
the advowson; the advowson in such case shall not pass
as appellant to the acre; but if the grant had been of the
intire manor, the advowson would have passed as appen tant.
So if a husband, seised in right of his wife of a
manor to which an advowson is appellant, doth alien the
manor by acres to divers persons, having one acre; the
advowson shall be appellant to that acre. Or if a leasee
for life of a manor to which an advowson belongs, alien
one acre, with the advowson appendant, the advowson is
thereby appellant to that acre. Wat. 7.
The right of advowson, tho' appenant to a manor, castle
or the like, may be severed from it in other ways, and
being severed, becomes an advowson in grosi.; and this may
be effected divers ways: as, 1. If a manor or other thing
to which it is appellant is granted, and the advowson
excepted. 2. If the advowson is granted alone, without
the thing to which it was appellant. 3. If an advowson
appellant is precented to by the patron, as an advowson
in grosi. Gibb. 757.
A disappellation may also be temporary; that is, the,
appellant, tho' turned into grosi., may return; as, 1.
If the advowson is excepted in a lease of a manor for life;
during the lease, it is in grosi., but when the lease expires
it is appellant again. 2. If the advowson is granted for
life, and another enfeoffed of the manor with the appur ences;
in such case at the expiration of the grant it shall be appellant;
and so in other cases.

But with respect to the king, by the statute of prerogativa regis, 17 Ed. 2. c. 15. When the king grants or
grants land to a manor with appurtenances; without be
make express mention in his deed or writing, of advowson,
the king reference to himself such advowson, albeit that among
other purpsoes it has been observed otherwise.
Yet when he seizes, as in case of the restitution of a
bishop's temporalities; then advowsons pass without
express mention, or any words equivalent thereto. 10 Ed.
64.
The law, in the case of a common person, is thus set
down by Rolle, out of the ancient books: If a man seised
of a manor to which an advowson is appellant, alien
that manor, without paying with the appurtenances (and
even without naming the advowson) yet the advowson
shall pass; for his parcel of the manor. 2 Rol. Abr. 60.
An advowson being an inheritance incorporeal, and not
lying in manual occupation, cannot pass by nesso; but
may be granted by deed, or by will, either for the inher-
tance, or for the right of one or more turns, or for as
many as shall happen within a time limited.
But this general rule, with regard to advowsons in
grosi., next avadonnces, and the like, is to be understood
with two limitations.
First, That it extends not to ecclesiastical perfections of
any kind or degree, who are seised of advowsons in the
right of their churches; nor to masters and fellows of
E. 3.
colleges.
colleges, nor to guardians of hospitals, who are seised in right of their houses; all these being restrained (the bishops by the 1 Eliz. cap. 13, and the reft by the 13 Eliz. cap. 10,) from making any grants but of things corporeal, of which a rent or annual profit may be reserved, and advowsons and next avoidances, which are incorporeal and lie in grant, cannot be of that ffort; and therefore if such grants, however confirmed, are void against the successor; though they have been adjudged to be good against the granter (as bishop, dean, master, or guardian) during their own times.

Secondly, A grant of the next avoidance may be affigned before the avoidance happens. 2 Red. Ab. 45, &c. But an avoidance cannot be granted by a common patron after it is fallen; while the church is absolutely void. Mr. 89; Dy. 129 b. 26 a. 283 a. & see a Wiff. 197; and a grant of the advowfon made after the church is actually fallen vacant is equally void; not as is said in the old books, because it is a choice in action; but because such grants might (indeed inevitably would) encourage simony.

If two have a grant of the next avoidance, and one releafeth all right and title to the other while the church is void: such releafe is void. But the king's grant of a void turn hath been adjudged to be good. 3 Lact. 196; Dy. 283 a. Hobb. 140.

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

But if the incumbent of a church be also releafed in fee of the advowfon of the fame church, and die; his heir, and not his executors, shall prefent; for alfo' the advowfon doth not defcend to the heir at the death of the ancestor, and by his death the church become void, fo that the avoidance may be faid in this cafe to be fevered from the advowfon before it defcend to the heir, and veiled in the executor; yet both the avoidance and defcent to the heir happening at the fame time, the title of the heir shall be preferred as the more antient and worthy. Wiff. p. 9. fe. 72. See Watfins on Defeotive, p. 62. 3 Lec. 47.

Tenant by the curtesy may be of an advowfon, when the wife dies before avoidance. 1 Inf. 29 a.

By laft will and testament, the right of prefenting to the next avoidance, or the inheritance of an advowfon, may be devided to any perfon; and if fuch devise be made by the incumbent of the church, the inheritance of the advowfon being in him, it is good, tho' he die incumbent; for alfo' the incumdenz hath no effect but by the death of the tellator, yet it hath an inception in his lifetime. And fo it is, tho' he appoint by his will who fhall be prefented by the executors, or that one executor fhall prefent the other, or doth devise that his executors fhall grant the advowfon to fuch a man. Wiff. c. 10.

Advowfon are either prefeotive, collative, or donative.

An advowfon prefeotive is, where the patron does prefent or offer his clerk to the bishop of the diocafe, to be initiated in his church.

This may be done either by word or writing. The king may prefent by word, or in writing under any feal; who otherwise cannot do any legal act, but by matter of record; or by letters patent under the great feal. But where a corporation aggregate doth prefent, it muft be under feal. The prefentation to a vicarage doth of common right belong to the parfon. If a vicar vicar doth have title to prefent, the prefentation muft be by husband and wife in both their names, except in cafe of the queen comfort. Wiff. 1 Inf. 155, 156.

A guardian by facce or by nurture cannot prefent to a vacant living in right of the infant heir, or in his name, because he can make no benefit of it, or account for it, though it is sometimes practiced, and made good by time. Therefore the infant shall prefent of whatsoever age. Vide Co. Litt. 17 b. If a common patron prefents firft one clerk, and then another, the bishop may infitute which he pleafeth; unlefs he revokes the prefentation of one of them before he is admitted by the bishop. If there is a right of nomination in one, and a right of prefentation in another, to the fame benefice; he that has the right of nomination is the true patron, and the other is obliged to prefent the clerk which is nominated. 1 Inf. 156.

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

Collation differs from infitution in this; that infitution is perfomed by the bishop upon the prefentation of another, and collation is his own act of prefentation; and it differs from a common prefentation, as it is the giving of the church to the parfon; and prefentation is the giving or offering the parfon to the church. But collation supplies the place of prefentation and infitution, and amounts to the fame as infitution, where the bishop is both patron and ordinary. 1 Litt. 267. 73.

A bishop may either neglect to collate, or he may make his collation without title; but fuch a wrongfull collation doth not put the true patron out of possession; for after the collation of the bishop is infituted and inducled, the patron may prefent his clerk; collation in this cafe being to be intended only as a provifional incumdenz to leave the Whurch. 1 Inf. 344.

Where a bishop gives a benefice as patron, he collates by writing, when by lafe, pure donation. The collation by lafe is in right of the patron. P. N. B. 51. See p. 26, Lafe II.

An advowfon donative is, when the king or other patron (in whom the advowfon of the church is lodged) does, by a fingle donation in writing, put the clerk into pofeffion, without prefentation, infitution, or induction. Donatives are either of churches parochial, chapels, prebends, &c. and may be exempt from all ordinary jurifdictions, fo that the ordinary cannot visit them, and consequently cannot demand procurations. If the true patron of a church or chapel donative doth once prefent to the ordinary, and his clerk is admitted and inducled, it becomes a church prefentative, and shall never have the privilege of a donative afterwards. Yet if a stranger prefents to fuch a donative, and infitution is given, all is void. 1 Inf. 158.

The right of donation descends to the heir (the ancestor dying feised, where the church became void in his lifetime) and not to the executor; which it would had it been a prefentative benefice. 2 Wiffon 150 b.

There is not any cafe in the books to exclude the heir of a donative from his turn in this cafe. And a patron of a donative can never be put out of pofeffion by an infitution. Id. ibid.

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

Where a patron presents his clerk before the bishop hath collated, the presentation is good, notwithstanding the six months are past, and shall bar the bishop, who cannot take any advantage of the lane: and if the patron makes his presentation before the archbishop hath collated, although twelve months are past; but if the bishop collates after twelve months, this bars not the archbishop. 2 Rol. 309; 2 Inst. 273. If a bishop doth not collate to benefices of his own gift, they lane at the end of six months to the archbishop; and if the archbishop neglects to collate within six months to a benefice of his gift, the king shall have it by lane. Dr. & Stud. c. 36. And if a church continues void several years by lane, the successor of the king may present. Cro. Car. 258. But if the king hath a title to present by lane, and he suffers the patron to present, and the preference dies, or resigns before the king hath presented, if the presentation is real, and not by covin, he hath lost his presentation; for lane is but for the first and next turn, and by the death of the incumbent, a new title is given to the patron; though it hath been adjudged that the king in such case may present at any time as long as that pretence is incumbent. 2 Cro. 216: Mor. 244. When the patronage of the church is litigious, and one party doth recover against the other in a quaer impedit, if the bishop be not named in the writ, and six months pass while the suit is depending, lane shall accrue to the bishop; if the bishop be named in the writ, then neither the bishop, archbishop, nor king can take the benefice by lane: and yet it is said, if the patron within the six months brings a quaer impedit against the bishop, and then the six months pass without any presentation by the patron, lane shall accrue to the bishop. 2 Rol. 305; 6 Rep. 52; 1 Inst. 344; Hob. 270.

Where the bishop is a dilatuer, or the church remains void above six months by his fault, there shall be no lane. 1 Inst. 344. A clerk presented being refuted by the bishop for any sufficient cause, as illiterate, ill life, &c., he is to give the patron notice of it, that another may be presented in due time; otherwise the bishop shall not collate by lane; because he shall not take advantage of his own wrong, in not giving notice to the patron as he ought to do by law. Dyer 292. And if an avoidance is by resignation, which must necessarily be to the bishop, by the act of the incumbent, or by deprivation, which is the act of the law; lane shall not accrue to the bishop, till six months after notice given by him to the patron: When the church becomes void by the death of the incumbent, &c., the patron must present in six months without notice from the bishop, or shall lose his presentation by lane. Dyer 293, 327; 1 Inst. 133; 4 Rep. 75. And it is expressly provided, by flat. 13 Eliz. c. 12, that no title conferred by lane shall accrue upon any deprivation, &c., but after six months' notice of such deprivation, given by the ordinary to the patron.

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

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

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

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

In cases where there ought to be notice, if none is given by the bishop or archbishop in a year and a half, whereby lane would come to the king, if it had been given: here the lane arises not to the king, where no title arose to the inferior ordinary. Dyer 340. And it has been adjudged, that lane is not an interest, like the patronage, but an office of trust required by law in the ordinary; and the end of it is, to provide the church a rector, in default of the patron: and it cannot be granted over; for the grant of the next lane of a church, either before it falls, or after, is void. F. N. B. 134. Also if lane incurs, and then the ordinary dies, the king shall present, and not the ordinary's executor, because it is rather an administration, than an interest. 25 Eliz. 3. 4. A lane may incur against an infant or female covert, if they do not present within six months. 1 Inst. 246. But there is no lane against the king, who may take his own time; and pleurisy shall be no bar against the king's title, because
ADVOWSON III. IV.

because nullum tempus occurrat regis. 2 Inst. 273: Dyer 351. By presentation and institution, a nonce is prevented; though the clerk is never induced: and a donative cannot lapse either to the ordinary or the king. 2 Inst. 273: See 2 Comm. 276, and 4 Comm. 165.

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

No one can usurp upon the king; but an usurpation may dispossess him of his presentation, so as he shall be obliged to bring a quare impedit. 3 Salk. 589. One coparcener or joint-tenant cannot usurp upon the other; but where there are two patrons of churches united, if one presents in the other's turn, it is an usurer: Dyer 289.

In this case of usurpation the patron upon the common law, not only his turn of presentation, but also the perpetual inheritance of the advowson; so that he could not present again upon the next avoidance, unless in the mean time he recovered his right, by a real action, viz., a writ of right of advowson. 3 Comm. 243. See further, The Usufract of Presentation: 2 quaer. impedit.

But bishops in ancient times, either by carelessness or collusion, frequently instituting clerks upon the presentation of usurpers, and thereby defrauding the real patrons of their right of possession, it was in substance enacted by Stat. 3 Wm. 2. (15 E. 1.) c. 5, § 2, "that if a possessory action be brought within six months after the avoidance, the patron shall (notwithstanding such usurpation and institution) recover that very presentation;" which gives back to him the fein of the advowson. Yet still if the true patron omitted to bring his action within six months, the fein was gained by the usurper, and the patron, to recover it, was driven to the long and hazardous process of a writ of right. To remedy which it was further enacted by Statute 7 Ann. c. 18, "that no usurpation shall displace the estate or interest of the patron, or turn it to a mere right; but that the true patron may present upon the next avoidance, as if no such usurpation had happened." So that the title of usurpation is now much narrowed, and the law stands upon this reasonable foundation: that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church; and as a punishment for my own negligence; but that turn is the only one I shall lose thereby. Usurpation now gains no right to the usurper, with regard to any future avoidance, but only to the present vacancy: it cannot indeed be remedied after six months are past; but during those six months, it is only a species of disturbance. 3 Comm. 244.

IV. Advowsons were formerly most of them appendant to manors, and the patrons parochial barons; the lordship of the manor, and patronage of the church were seldom in different hands; till advowsons were given to religious houses; but of late times the lordship of the manor and the advowson of the church have been divided; and now not only lords of manors, but mean persons have, by purchase, the dignity of patrons of churches, to the great prejudice thereof. By the common law the right of patronage is a real right fixed in the patrons or founders, and their heirs, wherein they have as absolute a property as any other man hath in his lands and tenements: for advowsons are a temporal inheritance, and lay fee; they may be granted by deed or will, and are affixed in the hands of heirs or executors. Co. Litt. 119. A recovery may be suffered of an advowson; a wife may be endowed of it; a husband tenant by the curtesy, and it may be forfeited by treason or felony. 1 Rep. 56: 10 Rep. 55.

If an advowson depends to coparceners, and the church after the death of their ancestor becomes void, (by Stat. 2 Wm. 2. (13 E. 1. 1st. 1, c. 5) the eldest sifter shall first present. And when coparceners, joint-tenants, &c., are feized of an advowson, and partition is made, to present by turns; by Stat. 7 Ann. c. 18, each shall be feized of their separate estate.

Presentations is properly the act of a patron offering his clerk to the bishop of the diocese, to be instituted in a church or benefice of his gift, which is void. 1 Lid. Abs. 351.

An after-born cannot present to a benefice in his own right; for if he purchases an advowson, and the church becomes void, the king shall present after office found that the patron is an alien. 2 Nels. 12: 19. And by Stat. 7 R. 2, c. 12, no alien shall purchase a benefice in this realm, nor occupy the same, without the king's licence, on penalty of a praemunire.

Papists are disabled to present to benefices, and the Universities are to present, &c. But a Popish recusant may grant away his patronage to another, who may make presentation, where there is no fraud: See Stat. 3 Jac. 1. c. 5. § 18, 19: 1 W. & M. c. 20: 12 Ann. c. 14: & 1 Geo. 19. But by Stat. 11 Geo. 2. c. 17. § 5, Grants of advowsons by papists are void, unless made for a valuable consideration to a protestant purchaser, and only for the benefit of protestants; and devises of advowsons, by papists are also void.

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

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

If a rector is made bishop, the king shall present to the rectory unless he grant to the bishop, before he is consecrated, a dispensation to hold it with his bishoprick; but if an incumbent of a church is made a bishop, and the king presents or grants that he should hold the church in commendam which is quafi a presentation, a grantee of the next avoidance or presentation hath lost it, the king having the next presentation. See 2 Stra. 841, that this presentation is not conformed to the life-time of the bishop promoted.
promised. If the king present to a church by lapse, where
he ought to present plego jure, and as patron of the
church, such a presentation is not good; for the king
is deceived in his grant, by misliking his title, which may
be prejudicial to him; the presenting by lapse entitling
only that presentation: The lord chancellor presents to
the king’s benefices under 20 El. &c. 2 Rol. Ab. 354: 3 Inf.
The king may repeal a presentation before his clerk is
inducted; and this he may do by granting the presenta-
tion to another, which, without any further signification
of his mind, is a revocation of the first presentation.
Deer 290, 360.
If two patrons present their clerks to a church, the
bishop is to determine who shall be admitted by a jus pa-
tronum, &c. Mor. Mor. 699.
A clerk may be refused by the bishop, if the patron is
excommunicate, and remains in contempt 40 days. 2 Ro.
Ab. 355. As to refusal for the insufficiency of the clerk
presented, see tit. Parjum.
If the bishop refuses to admit the clerk presented, he
may give notice of his refusal, with the cause of it, forth-
with; and on such notice the patron must present an-
other clerk, within six months from the avoidance, if he
thinks the objection against his first clerk contains suffi-
cient cause of refusal; but if not, he may bring his quar-
re impedit, against the bishop. 2 Rol. Ab. 364. See ante,
Laps. 1.
If a defendant, or any stranger, presents a clerk pend-
ing a quarre impedit, and afterwards the plaintiff obtains
judgment, he cannot, by virtue of that judgment,
remove him, who was thus presented; and yet he is to bring a
scire facias against him to shew cause quoque executionem
non habeat; and then, if it be found that he had no title,
he shall be amoved. The way to prevent such a presenta-
tion, is to take out a ne admissus to the bishop; and
then the writ quoQUE incumbrant lies, by virtue whereof
the incumbent shall be amoved, and put to his quarre
impedit, let his title be what it will; but if a ne admissus be
not taken out, and another incumbent should come in
by good title pendente lite, he shall hold it. Sid. 95: Co.
Fac. 359.
When a bishop hath a presentation in right of his bi-
shoprick, and dies, neither his executor, nor heir, shall
have the void turn, but the king in whose hands are the
temporalties; and he hath a right to present on an avoid-
ance after the decease, on death of the bishop.
Tenant in tail of an advowson, and his son, and heir
joined in the grant of the next presentation, tenant in
tail died; this grant was held void as to the son and
heir, because he had nothing in the advowson at the time
he joined with his father in the grant. Hob. 45.
If a presentation itself bears date while the church
is full of another clerk, it is void; and where two or more
have a title to present by turn, one of them presents,
his clerk is admitted, instituted and inducted, and after-
wards deprived, he shall not present again, but that pre-
sentation shall serve his turn; though where the admis-
sion and institution of his clerk is void, there the turn
shall not be feved; as if after induction he neglects to
read the thirty-nine articles, &c. his institution is void
by the flat. 15 Eliz. and the patron may present again,
P. N. B. 33: 5 Rep. 102.

The right of presenting to a church, may pass from
one feled of the same by the patron’s acknowledging of
a statute, &c. which being extended, if the church be-
comes void, during the convey’s estate, the conyfee may
present. Owen 49.

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

Right of presentation may be forfeited in several cases;
at attainted of the patron, or by nullity, and then
the king shall present; and if the outlawry be reversed
where the advowson is forfeited by the outlawry, and
the church becomes void after, the presentation is held
in the crown; but if at the time of the outlawry, the
church was void, then the presentation was forfeited as a chattel,
and on reversing the same, the party shall be restored to it.
By appropriation without licence from the crown,
right of presentation may be forfeited; tho’ the inher-
tance in this case is not forfeited, only the king shall have
the presentation in nature of a dextra, till the party hath
paid a fine for his contempt. By alienation in fee of
the advowson by a grantee for life of the next avoidance,
a presentation is forfeited; and after such alienation
the grantor may present, but then he must enter for the for-
feiture of the grantee, in the life-time of the incumbent,
to determine his estate before the presentation veils
him on the incumbent’s death. And by simony it may be
likewise forfeited and lost. Mor. 269: Plo-x 1095.
2 Rol. Ab. 352: flat. 31 Eliz. c. 0. 6. 5: See Simen, &c.
ADVOWSON OF THE MOIETY OF THE
CHURCH, advocatio medietatis ecclesie.] Is where there
are two several patrons and two several incumbents in
one and the same church, the one of the one moiety,
the other of the other moiety thereof. Co. Lit. 17 b.
Medieiria advecautiwm, a moiety of the advowson, is where
two mu$ join in the presentation, and there is but one in-
cumbent: But see flat. 3 Anne, c. 18, mentioned in tit.
Advowson IV.

ADVOWSON OF RELIGIOUS HOUSES. Where
any person(s) founded any basis of religion, they had ther-
by the advowson or patronage thereof, like unto those
who built and endowed parish churches. And sometimes
these patrons had the sole nomination of the abbot, or
prior, &c. either by inve$ture or delivery of a pastoral
staff: or by direct presentation to the diocesan; or if a free
election were left to the religious, a congé d’élire, or licence
for election, was first to be obtained of the patron, and the
clerk confirmed by him. Kennett’s Paroch. Antq. 147, 163.

AERIE, aeria scriptum.] An airy of goshawks, is the
proper term for hawks, for that which of other birds we
3 call a neilk. And it is generally said to come from the
French word aere, a hawk’s neck. Spenfield derives it
from Sax. aere, an egg, softened into yoe, used to express
a brood of пheasants,) and thence yere, or as above aere, a
place
ÆSTIMATIO CAPITIS, pretium hominis.] King Arthur ordained that fines should be paid for offences committed against several persons according to their degrees and quality, by estimation of their heads. *Coff. Ch. Htg. 814: 1 Leg. Hen. 1.

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

AFFEERERS, affectare, from the Fr. affier, to affirm.] Are those who in courts-leet upon oath, settle and moderate the fines and amercements; and they are also appointed for moderating amercements, in courts-baron. See *cit. Lect.

AFFIDANCE, from the Latin affidare, i.e. fidem dare.] The plaintiff of treachery between a man and a woman, upon agreement of marriage. *Lit. fed. 39.

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


AFFIDATUS, A tenant by fealty.

AFFIDAVIT, An oath in writing; and to make affidavit of a thing, is to testify it upon oath. An affidavit, generally speaking, is an oath in writing, sworn before some person who hath authority to administer such oath; and the true place of habitation and true addition of every person who shall make an affidavit, is to be inserted in his affidavit. *1 Liit. Abr. 44, 45. Affidavits ought to set forth the matter of fact only, which the party intends to prove by his affidavit; and not to declare the merits of the cause, of which the court is to judge. *21 Car. I. B. R. The plaintiff or defendant (having authority to take affidavit) may take affidavit in a cause depending; yet it will not be admitted in evidence at the trial, but only upon motions. *1 Liit. 44. When an affidavit has been read in court, it ought to be filed, that the adverse party may see it, and take a copy. *Posb. 1655. An affidavit taken before a master in Chancery will not be of any force in the court of King's Bench, or other courts, nor ought to be read there, for it ought to be made before one of the judges of the court wherein the cause is depending, or a commissioner in the country, appointed for taking affidavits. *Sty. 455. By *Stnt. 29 Car. II. c. 5. The judges, &c. of the courts at Westminster by commission may impoverish persons in the several counties of England to take affidavits concerning matters depending in their several courts, as matters in Chancery extraordinary used to do. Where affidavits are taken by commissioners in the country according to the statute 29 Car. II. and 'tis expressed to be in a cause depending between two or more certain persons, and there is no such depending, those affidavits cannot be read, because the commissioners have no authority to take them; (and for that reason the party cannot be convicted of perjury upon them) but if there is such a cause in court and affidavits taken concerning some collateral matter, they may be read. *Salk. 461.

AFFIDAVIT.

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

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

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

In cases of interpleader, the party who prefers it must make affidavit that he does not collude with either of the other parties. *1 New Abr. 65.

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

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

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

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

The *Stat. 12 Geo. I. c. 29, requires the cause of action to be 10d. to hold to special bail; and both the statute and the established rules of the court require a positive affidavit to be made of the debt; and not couched in words of reference, except in the case of executors, assignees, &c. *1 Term. Rep. 83; *4 Term. Rep. 170. and they must swear to their belief of the debt.

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

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

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

See further: *tit. Abatement; Bail; & Journeys Instrutor. *Cler. in K. B. & C. P.
AFFINAGE. Fr. affinage. [Refining of metal, judicato metali; hence, fine and refine.]

To AFFIRM, affirmare. [To ratify or confirm a former law or judgment: so is the substantive affirmation used in the 8 Hen. 6. c. 12. And the verb itself by W. B. Symbol, art. 2, tit. Finis, sect. 152. 19 H. 7. cap. 20.

See also the next word.

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

AFFORARE, To suffer (which fec) to let a value or price on a thing. D[av. Can].

AFFORATUS, Appointed or valued, as things vendible in a fair or market. Curt. Cl. 15. M. 3. fol. 58.

AFFORCIAMENTO, affectamentum. [Affects, strong, hold, or other fortification. Prum. Animad. on Cede. fol. 184.

AFFORCIARE, To add, to increase or make stronger. Baud. lib. 4. c. 19. vs. in case of disagreement of the jury, let the affio be increased.

AFFONEST, affectare. [To turn ground into a forest. Chart. & Sod. Eng. c. 1. When forest ground is turned from forest to other use, it is called affectation. Vide Forest.

AFFRAY, Is derived from the Pr. word effray, to affright, and it formerly meant none; as where persons appeared with armour or weapons not usually worn, to the terror of others. See stat. 2 Ed. 3. c. 3. But now it signifies a quarrel or fighting between two or more, and must be a stroke given, or offered, or a weapon drawn, otherwise it is not an affray. 3 Lev. 158. An affray is a public offense to the terror of the king's subjects; and for that reason, because it affrights and makes men afraid.

A WRF. 5 lev. 158. From this last definition it seems clearly to follow, that there may be an affront, which will not amount to an affray; as where it happens in a private place, out of the hearing or seeing of any, except the parties concerned; in which case it cannot be said to be to the terror of the people.

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

Also, it is certain, that it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge; or even barely to endeavour to provoke another to send a challenge, or to fight; as by differing letters to that purpose, full of reflections, and inframing a definite to fight. See on this subj. Leech's Handbook, 1 cap. 63. & n. cap. 10. § 171. c. 13. § 95 c. 14. § 89.

But admitting that letters do not, in the judgment of law, carry in them so much terror as to amount to an affray, yet there seems certain, that in some cases there may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people; which is laid to have been always an offense at the common law, and is strictly prohibited by statute 2 Ed. 1.
trade, that the forts, settlements and factories between those ports which, by Stat. 5 Geo. 3. c. 44. (repealing the above act of 4 Geo. 3. c. 20) had been in the King, should be revell'd in the company; this was accordingly done by Stat. 27 Geo. 3. c. 65. The same freedom of trading there was, notwithstanding, continued to all the King's subjects.

By Stat. 27 Geo. 3. c. 19. § 11, 12, which regards this trade, some regulations were made as to importing from Gibraltar, merchandize the produce of the Emperor of Morocco's dominions.

AFRICAN SLAVE-TRADE. See this Dict tit. Slaver.


AGE, etc., Fr. age.] In common acceptance signifies a man's life from his birth to any certain time, or the day of his death; it also hath relation to that part of time wherein men live. But in law it is particularly used for those special times which enable persons of both sexes to do certain acts, which before through want of years are judged by law to be prohibited to do. As for example: a man at twelve years of age ought to take the oath of allegiance to the King; at fourteen, which is his age of discretion, he may consent to marriage, and chuse his guardian; and at twenty-one he may alien his lands, goods and chattels; a woman at nine years of age is durable; at twelve the may consent to marriage; at fourteen she is at years of discretion, and may chuse a guardian; and at twenty the may alienate her lands, &c. Co. Lit. 78.

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

Fourteen is the age by law to be a witness; and in some cases a person of nine years of age hath been allowed to give evidence. 2 H Hawk. F. C. c. 76. § 27. None may be a member of parliament under the age of twenty-one years; and no man can be ordained priest till twenty-four; nor be a bishop till thirty years of age. See tit. Infants; also tit. Barons & Finns: Donor: Plagiary.

AGE PRIEST, athena pretrei, or vatia pretari.] Is when an action being brought against a person under age for lands which he hath by default, he by petition or motion shews the matter to the court, and prays that the action may lay till his full age, which the court generally agrees to. Term. of Lex. 30. See Parol Diverser.

AGENFRA. The true lord or owner of any thing. Leg. Inst. c. 56. supd Breaff. c. 45.


AGENT AND PATIENT. When the same person is the devisor of a thing, and the party to whom done: as where a woman alienates herself of the rest part of her husband's possessions, this being the sole act of herself to herself, makes her agent and patient. Also if a man be indebted unto another, and afterwards he makes the creditor his executor, and dies, the executor may retake so much of the goods of the deceased as will satisfy his debt; and by this retainer he is agent and patient, that is, the party to whom the debt is due, and the person that pays the same. But a man shall not be judge in his own case, quia iniquum est eligere suum rei ejus judicium. 8 Rep. 1, 18, 138.

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

AGILLARIUS, Anciently an hey-ward, herd-ward or keeper of cattle in a common field, twora at the lord's court by solemn oath — There were two forts, one of the town or village, the other of the lord of the manor. See Kent's Parl. Antq. 534. 576.

AGIST, (from the Fr. gisir, a bed or resting-place.) Signifies to take in and feed the cattle of strangers in the King's forest, and to gather up the money due for the same. Charit. de Forja. 9 H. 3. c. 9. The officers appointed for this purpose were called agristors, or gifttakers, and are made by the King's letters patent: there are four or more in every forest wherein the King hath any pannage. Manc. Foss. L. 15. 51 to 50. They are also called agristors, to take account of the cattle agisted.

AGISTMENT, agristament.] Is where other men's cattle are taken into any ground, at a certain rate per week; it is so called, because the cattle are suffered agrist, that is, to be levant and couched there: and many great farms are employed to this purpose. 2 Inrg. 243. Our graziers call cattle which they thus take into keep, gisters: and to gisir or jisse the ground, is when the occupier thereof feeds it not with his own flock, but takes in the cattle of others to gisir or pasture it. Agistment is likewise the profit of such feeding in a ground or field; and extends to the depauperating of barren cattle of the owner, for which tithes shall be paid to the parson. There is agristament of sea-banks, where lands are charged with a tribute to keep out the sea. Terra agristata are lands where owners are bound to keep up the sea-banks. Spelun. in Ronnum. Marti. See tit. Tribun.

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


AGIUS DEI. A piece of white wax in a flat oval form, like a small cake, scented with the figure of the lamb, and consecrated by the pope. By Stat. 17 Edw. c. 2, Agius Dei, croftes, &c. are not permitted to be brought into this kingdom, on pain of praemunia.

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

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

I. Who may be parties to, or bound by an agreement.

II. The various kinds of agreements; and of the absent and disagreement of parties.
AGREEMENT I—III.

III. Of the operation of the statute of frauds; and herein of evidence to explain agreements.

IV. Of compelling the performance of agreements; and herein of fraud in making them.

I. A person now coming is not capable of entering into any agreement. See tit. Heats and Luminaries.

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

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

The ancestor settled in fee may by his agreement bind his heir; therefore if A. agrees to sell lands, and receives part of the purchase money, but dies before a conveyance is executed, and a bill is brought against the heir, he will be decreed to convey, and the money shall go to the executor; especially if there are more debts due than the testator's personal estate is sufficient to pay. 2 Vern. 215; 5 Rep. 254.

When an infant agrees to convey, or bargain and sells the lands for valuable considerations, without fine or recovery, and dies before the fine or recovery be levied or suffered, the issue is not bound either in law or equity; for equity cannot set aside the statute de dotes, which says, That voluntas donatoris observatae, non can be the court set up a new manner of conveyancing, and thereby interfere fines and recoveries; for thereby the king would lose the forfeitures by fines, or the writs of entry and fines for alienation. 2 Hrn. 203.

Yet if there be tenant in tail in equity as of a truall, or under an equitable agreement, and he for valuable consideration bargains and sells the land without fine or recovery, this shall bind his issue, because the statute de dotes doth not extend to, being an intail in equity and a creature of the court. 1 Chan. 234; 2 Chan. Ca. 4; 1 Vern. 13 440; 2 Vern. 33 585, 72.

II. On this head shall be considered,

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

Every agreement ought to be perfect, full and complete, being the mutual consent of the parties; and should be executed with a recompence, or be so certain as to give an action or other remedy thereon. Plead. 5. Any thing under hand and seal which imports an agreement will amount to a covenant; and a promise, by way of agreement, amounts likewise to a covenant; and a covenant may be brought upon them. 1 Lev. 159.

If any estate in possession or reversion be made to me, I must agree to it, before it will be settled; for I may refuse, and forbid it; a release, deed, or bond, is made and delivered to another to my use, this will vest in me

without any agreement of mine: but, if I do agree to it, I make the deed void. Dyer 167. And regularly where a man hath once agreed to the party himself, he can never after agree, and obligation being made to my use, and tendered to me, if I refuse it, and after agree again and will accept it; now this agreement afterwards will not make the obligation good, that was void by the refusal. Co. Lit. 795; 3 Rep. 119.

An agreement may be as well in the party's presence, as in his absence; but a disaffirmation must be to the person himself to whom made. 2 Rep. 69. When an estate is made to a four years, it is good, till disaffirmation, without any agreement of the husband: though a new estate granted to the wife where the husband an estate before, as by the taking of a new lease, and making a surrender in law, will not vest till the husband agree to it. H. 264.

That an assent on the part of the person who takes, is also essential to all conveyances and contracts; for whereas a man is to be vouched with an interest, his acceptance is necessary; see 2 Vern. 198; 2 Sect. 613; 2 Litt. p. 72. p. 97; 5 Vern. 528, pl. 1. See Thompson v. Lock, 1 Vern. 298, in which this subject is very elaborately discussed by Fournet, J. See also Burnet and Baker's case, 3 H. 26.

III. Besides the bare words of an agreement, the common law, to prevent imposition, ordained certain ceremonies where an interest was to pass; and therefore appointed livery for things corporeal, and a deed for things incorporeal. Yet in equity where there was a consideration, the want of ceremonies was not regarded. However, in former times, courts of equity were very cautious of relieving bare parole agreements for lands, not signed by the parties nor any money paid; (2 Vern. 216) although they would sometimes give the party satisfaction for the loss he had sustained. And now by the statute of 29 Car. 2. cap. 3, commonly called the Statute of Frauds, if an agreement be by parol, and not signed by the parties, or somebody honestly authorized by them, (Pr. Cham. 422) if such agreement be not confined in the answer, it cannot be carried into execution. But where, in his answer, the defendant allows the bargain to be complete, and does not insist on any fraud, there can be no danger of perjury; because he himself has taken away the necessity of proving it. (Pre. Ch. 208, 374: 1 Vern. 221, 448: Amb. 586.) So if it be carried into execution by one of the parties, (2 Vern. 215: 2 Pre. Ch. 519: 2 Vern. 524; Amb. 586; 2 Ser. 783; Bunts. 65, 94: 9 Mod. 37: 1 Vern. 82, 221, 297, 441: 3 Ans. 40: 7 Rep. 493: 2 Bro. Rep. 563. MSS. 40 July, 1768.) as by delivering possession, and such execution be accepted by the other, he that accepts it must perform his part; for where there is a performance, the evidence of the bargain does not lie merely upon the words, but upon the fact performed: See 2 Bro. Rep. 565. And it is unconformable, that the party that has received the advantage, should be admitted to say, that such contract was never made. So, if the signing by the other party, or reducing the agreement into writing, be prevented by fraud, it may be good, Pre. Ch. 526: 5 Vern. 487. pl. 31: 1 Vern. 256. And although parol agreements are bound by the statute, and agreements are not to be parol parol, and part in writing;
yet a deposit, or collateral security for the performance of the written agreement, is not within the purview of the statute. 2 Vern. 61; 1 Bro. Rep. 269; 14th April, 1753, MSS. See Treatise of Equity, i. 162—175.

It was determined, very soon after the passing of the statute of frauds, that an agreement signed by one of the parties, should be binding on the party signing it. 2 Ch. Ca. 164; And in Sir James Lowther v. Currid, 1 Vern. 221, the court appears to have thought, that one of the parties making alterations in the draft, and sending it to the other to execute, who did execute it, would bring the case out of the statute. But the authority of this latter decision seems to be done away by Lord Macclesfield's decree in Hawkins v. Holmes, 1 P. Wms. 770, by which his lordship held, that unless in some particular cases, where there has been an execution of the contract, by entering upon and improving the premises, the party's signing the agreement is absolutely necessary for completing it; and that to put a different construction upon it would be to repeal it; and his lordship therefore held, that the defendant having altered the draft with his own hand, was not a signing to take it out of the statute; though the vendor afterwards executed the conveyance, and caused it to be registered. But this question received more particular consideration in the case of Stokes v. Moore, at Serjeant's Inn Hall, March 5, 1786, in which the court delivered their opinion that the signature required by the statute is to have the effect of giving authenticity to the whole of the instrument; and where the name is inserted in such a manner as to have that effect, it did not much signify in what part of the instrument it was to be found; as in the normal introduction to a will. [Thus, "This is the last will and testament of me A."—written with the testator's own hand has been deemed a sufficient signing.] But it could not be imagined, that a name inserted in the body of an instrument, and applicable to particular purposes, could amount to such an authentication as the statute required; [Thus, in notes of an agreement, "Mr. A. to do so and so," tho' written by a hireling, not a sufficient signing] upon which, as well as upon another ground, the bill was dismissed. See Mr. Coo's note (1) to Hawkins v. Holmes, 1 P. Wms. 770.

If a defendant confesses the agreement charged in the bill, there is certainly no danger of fraud or perjury in deceiving the performance of such agreement. But it is of considerable importance to determine whether the defendant be bound to confess or deny a merely parol agreement not alleged to be in any part executed; or if he do confess it, whether he may not insist on the statute, in bar of the performance of it? See Treatise of Equity, p. 168. note (d) where this subject is very accurately and ably discussed. To allow a statute, having the prevention of frauds for its object, to be interpreted in bar of the performance of a parol agreement, in part performed, were evidently to encourage one of the mischief which the legislature intended to prevent. It is therefore an established rule, that a parol agreement, in part performed, is not within the provisions of the statute. See Whitchurch v. Bristol, 2 Bro. Rep. 459.

As to what acts amount to a part performance, the general rule is, that the acts must be such as could be done with no other view or design than to perform the agreement, and not such as are merely introductory, or ancillary to it. Guiter v. Hassall, 1 Ch. 486; Whitebread v. Brackley, 1 Bro. Rep. 412. The giving of possession is therefore to be considered as an act of part performance. Stewart v. Denton, MSS. 4th Feb., 1756; but giving directions for conveyances, and going to view the estate, are not. Clark v. Wright, 1 Ack. 126: Whaley v. Bagnall, 6 Bro. P. C. 43. Payment of money is also said to be an act of part performance. Lucas v. Marthins, 3 Ack. 4. But it seems that payment of a sum, by way of earnest, is not; Seagood v. Muley, 2 Rev. Ca. 460; Lord Peigal v. Rolls, 2 Eq. Ca. Al. 46; pl. 12: Summerson v. Cowles, 1 Ch. Rep. 158; Bat v. Fuller v. Smith, 3 Ch. Rep. 16, and Ann. 2 Frenc. 128.

In the case of Seagood v. Muley, 2 Rev. Ca. 460, it is said, that "where a man omits on promise of a lease to be made to him, lays out money in improvements, he shall oblige the lessee afterwards to execute the lease; because it was executed on the part of the lessor." This doctrine is supported by the spirit of equity, and seems to do away the decisions which require, under the circumstances of premises being improved, an averment of it being part of the parol agreement that it should be reduced into writing.

A letter not only takes an agreement in consideration of marriage out of the statute, but also, agreements respecting lands, &c. Ford v. Comptes, 2 Bro. Rep. 32: Tawney v. Crowther, 2 Bro. Rep. 318. But whenever a letter is relied on as evidence of an agreement, it must be stamped before it can be read. Ford v. Comptes. It must also distinctly furnish the terms of the agreement. Seagood v. Muley, 2 Rev. Ca. 460; Summerson v. Cowles, 1 Ch. Rep. 158; Clark v. Wright, 1 Ack. 126; or it must at least refer to some written instrument, in which the terms are set forth; Tawney v. Crowther. It must likewise appear, that the other party accepted such terms, and acted in contemplation of them.

Where an agreement in writing is executed, it were not only against the express provisions of the statute of frauds, but also against the policy of the common law, to allow of parol evidence, for the purpose of adding to, or varying the terms of the agreement. 2 Ack. 323; 2 Vern. 38; 2 Vern. 457: 2 Ch. Ca. 180: a sanguine, such evidence will be admissible where the agreement is executory. 3 Ack. 388: 1 Vern. 456. It may be material to observe, where evidence admits the deed is admitted to shew what was the consideration of the agreement, that the consideration to be proved must be consistent with the consideration stated. 3 Term. Rep. 474: Fullbeck's Parallel, p. 6. And if the deed specify the consideration to have been a sum of money, evidence is not admissible, in order to superadd another consideration, as natural love and affection, &c. 2 P. Wms. 204: 1 Vern. 456: Nor, if the consideration fail, can evidence be admitted to support the conveyance as a gift. 2 Vern. 456: 1 Ack. 494: 3 Bro. Rep. 156; and though the deed specify a particular consideration and other considerations, generally, no consideration but that expressed shall be intended. Co. Eliz. 347: but qu. whether other considerations might not be proved.

IV.
AGREEMENT IV.

IV. It has been said that where the contract is good at law, equity will carry it into execution; but this proposition is too generally stated; for though equity will enforce the specific performance of fair and reasonable contracts, where the party wants the thing in specie, and cannot have it in any other way; yet, if the breach of the contract can be, or was intended to be, compensated in damages, courts of equity will not interfere.

See 2 Bou. Eq. 357; 2 Id. 343; 1 Bro. 75; Cooper v. Harris, 125.

It is a rule generally a general rule, that courts of equity will, under certain circumstances, enforce the specific performance of agreements, for the non performance of which the party would be entitled to damages at law; but as the decreeing of damages by equity is in the discretion of the court, it must not be considered as an absolute rule; for if the plaintiff's title be involved in difficulties which cannot be immediately removed, equity will not compel the defendant to take a conveyance; though perhaps, he might lawfully subject to damages for not completing his purchase. See Marlow v. Smith, 2 P. Wms. 510; Cooper v. Smith, 1 Bro. 75; Cooper v. Dunn 218 July 1792 MSS.

Q. Whether courts of equity will decree an agreement entered into by letter, if a deed appear to have been afterwards framed: (but not executed), varying the terms expressed in the letter? See Cade v. Moseley, 2 Term 34. Or if the terms be varied by parole. See Jordan v. Sackman, 3 Bro. 388. And as a letter setting forth the terms of an agreement, takes the agreement out of the statute, it being a sufficient signing; 3 so, it seems, is a sufficient signing, if a person, knowing the contents, subscribes the deed as a witness only. Welford v. Beazley 3 Alb. 503.

In the civil law, counter-letters, and all secret acts which make any change in agreements, are of no manner of effect with respect to the interest of a third person. 1 P. Wms. 429, 348, 475: 2 Term 460: 1 P. Wms. 762: 2 Term 375: 1 Bla. Rep. 363: for this would be an injury contrary to good manners and the public interest. In cases of this nature it is not necessary that the fraud respect an article expressly committed for; but any representation, misleading the parties contracting, on the subject of the contract, is within the principle which governs this class of cases. See 1 Bro. Rep. 543: and noted in Mr. Coke's note to Roberts v. Roberts 3 P. Wms. 74.

The principle of the rule there laid down, though it has been most frequently applied to agreements in fraud of marriage, extends to every other species of agreements; therefore, where a tradesman compounding his debts, privately agreed with some of his creditors to pay them the whole of their debts, by which they were induced to appear to consent to the completion; such private agreement was held to be a fraud on the other creditors, 2 Term 71, 602: 1 Alb. 103: and it seems that such fraud is now receivable at law. 2 Term Rep. 705; The case of Lewis v. Cocks, 1 P. Wms. 620, is however irreconcilable with this principle; it may therefore be material to observe, that it is very much shaken, if not utterly ruled, by several subsequent cases, particularly Smith v. Barnet, Doug. 679. But though private agreements in fraud of third persons, be void, yet, if a bond or note be given by A, the more effectually to enable B, to bring about a match, i.e. such bond or note may be recovered upon at law, Morris v. Morris, 1 Bla. Rep. 353. And a conveyance of land for such purpose, notwithstanding a defect, which would be held to be ineffectual in equity, 11 Ves. Ab. 545: 2 Bro. P. C. 68.

AGRI, Arable lands in the common fields. Fortesc. ALD. See tit. Taxes; Tenure, I, 82, 83.

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

Aid shall be granted to the defendant in ejectment for, when the title of the land is in question; leasing for years shall have aid in trespass; and tenants at will: but tenant in tail shall not have aid of him in remainder in fee; for he himself hath the inheritance. Danw. Abr. 292. In a writ of replevin, the averment being for a real service, aid is granted before issue; and in action of trespass after issue joined, if there be cause, it shall be had for the defendant, tho' never for the plaintiff. 1 St. 1, 2, 3f. 74.

There is a prayer in aid of parties, by parties, widows, &c. And between coparceners, where one coparcener shall have aid of the other to recover pro rea. Co. Lit. 341. 6. And alsoverants, having done any thing lawfully in right of their rights, shall have aid of them. Term. de Ley 74.

AID OF THE KING, annulling regem.] Is where the king's tenant prays aid of the king, on account of rent demanded of him by others. A city or borough, that hold a free farm of the king, if any thing be demanded against them which belongs thereto, may pray in aid of the king: and the king's bailiff, collectors, or agents shall have aid of the king. In these cases the proceedings are stayed till the king's counsel are heard to say what they think fit, for avoiding the king's prejudice; and this aid shall not in any case be granted after issue; because the king ought not to rely upon the defence made by another, Jek. 1, 1, c. 8, 14, 14, III. 1, 2, c. 14; 1 H. 4, c. 8, 3, and see also, Ann. Dep. tit. Aid.

ALLE, or aid of the French alien, asum.] A writ which lies where a man's grandfather being dead of lands and tenements in the sole proprietorship of the day that he died, and a stranger enfeoffed or entailed the same, and dispossesses the heir of his inheritance. F. N. B. 279. See tit. Annulment, etc.

AL, or ALD; from Sax. aid, age.] This syllable in the beginning of the names of places denotes antiquity: as Althorpe, Altworthe, &c.—Alenmut.

ALANER ARIUS, A manager and keeper of dogs for the sport of hunting, from alnus, a dog, known to the ancients. Da Freya. But Mr. Blount renders it a Hawkinsian.

ALBA, the AL.] A furze or white (acacia or nectar) used by viticulture'.
ALBA Firma. When quit rents, payable to the Crown by freeholders of manors, were reserved in silver, or white money, they were anciently called "table rents," or "black fawne," {
redius alies}; in contradistinction to rents reserved in gold, grain, &c. which were called "redius niger," or "black mark," 2 & fin. 17, & c. 2 & fin. 19, where it seems used for a species of tenure. See tit. Black faws.

In Scotland this kind of small payment is called "black-holding," or "redius alia," &c., 2 & c. 43.


ALBINA [l. jus]. Is the droit d'ainhance in France, whereby the king at the death of an alien, is entitled to all he is worth, unless he has peculiar exemption. Com. v. 372. Albenus is derived from alba nationem. Spelm. Gloss. 24.

This was repealed by the laws of France in June 1791.

ALBUM, see Album Firm.

ALER, the first; as alder leaf, is the bed of all; alder bough, the most dear.

ALERMAN, Sax. edlerman, Lat. aldermannus.] Hath the same signification in general as senator, or senior: but at this day, and long since, those are called aldermen who are associates to the civil magistrates of a city or town corporate. See Spelm. Gloss. 25. An alderman ought to be an inhabitant of the place, and resident where he is chosen; and if he removes, he is incapable of doing his duty in the government of the city or place, for which he may be disenfranchised. Mod. Rep. 59. Alderman Langbass was a freeman of the city of London, and chosen alderman of a ward, and being summoned to the court of alderman he appeared, and the oath to serve the office was tendered to him, but he refused to take it, in contempt of the court, &c. whereupon he was committed to Newgate; and it was held good. March. Rep. 179.

The aldermen of London, &c. are exempted from serving inferior offices; nor shall they be put upon affrays, or serve on juries, so long as they continue to be aldermen. 2 & fin. 535. See tit. London.

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

There was likewise aldermannus hundred, (the alderman of the hundred,) which dignity was first introduced in the reign of Hen. 1. Du Prêtre. Covel.

ALE ECLESCIE. The wings or side-iles of the church; from the French, Les ailes de l'Esclise.

ALECINARIUM, A sort of hawk called a lanner. See Futaun.

ALEHOUSES, Are to be licensed by justices of peace, who take recognizances of alderhouse-keepers not to suffer disorders in their houses, and they have power to put down alderhousers. &c. But the act is not to restrain selling of ale in fairs. Stat. 5 & fin. 17, &c. 25. Alderhouse keepers are liable to a penalty of 20l. for keeping alderhouse without license; not exceeding 40l. nor under 10l. for selling ale in three measures; and 10l. for permitting

ALIEN.

Tipping, &c. and persons retailing ale or beer, alderhouse keepers, &c. shall sell their ale by a full ale quart or pint, according to the said standard in the Leechhouse, marked from the said standard, and sub-commissioners, or collectors of excite, are to provide substantial ale quarts and pints in every town in their divisions, and mayors and chief officers to mark measures, or forfeit 5l. by statute 1 fin. c. 15; and see Stat. 5 & fin. 8, 7: 1 fin. c. 14: 3 fin. c. 2: 1 & 2 W. c. 3: 5 & c. 4. See tit. Jus &c. Dow.
tied to them. 1 Inst. 2. and the notes there. But under
the Stat. 13 Geo. 3. c. 14. aliens are enabled to lend money
on the security of mortgages of estates in the West India
Colonies, and may have every remedy to recover the
money lent, except foreclosing the mortgage and obtaining
possession of the land, which is positively prohibited
by the statute. Nor shall a woman alien, wife of a natu­
ral born subjekt, be endowed. 7 Rep. 25. at 1 Inst. 31. b.
but see the note there contra. Nor a Jewish wife of a
husband converted to the Christian religion. 11 Id. 9. See
this Dict. tit. Dever. An alien may however acquire a
property in goods, money, and other personal estate, or
may hire a house for his habitation. 7 Rep. 17. For per­
sonal estate is of a transitory or movable nature, and this
indulgence is necessary for the advancement of trade.
Aliens also may trade as freely as other people, only
they are subject to certain higher duties at the Custom
Houses; and there also some obnoxious statutes, (1 Rea.
c. 9. 14 Hen. 8. c. 21. 21 Hen. 8. c. 16. 22 Hen. 8. c. 13. 32
Hen. 8. c. 16.) prohibiting alien artificers to work for
themselves in this kingdom, and making void all leases
of houses or shops to aliens. See tti. aliens : but it is
generally held that these were virtually repealed by Stat.
5 Eliz. c. 7. prohibiting the importing of some foreign
manufactures; see however 1 Inst. 2. in note. Also an
alien may bring an action concerning personal property;
and may make a will and dispose of his personal estate.

Law 32. These rights of aliens must be understood of
alien friends only; for alien enemies have no rights,
no privileges, unless by the king’s special favour during
the time of war. 1 Com. 372. And see 15 Eliz. 683:
Skm. 370.

Where it is said that an alien is one born out of
the king’s dominions or allegiance, this must be understood
with some restrictions. The common law was absolutely
so, with only a very few exceptions; so that a particular
act of parliament, (Stat. 20 Car. II. c. 6.) was necessary
after the restorations to naturalize children of English
subjects born in foreign parts during the troubles. This
maxim of law proceeded on a general principle that every
man owes natural allegiance where he is born, and cannot
owe two such alienages at once. Yet the children of the
king’s ambassadors born abroad were always held to be
natural born subjects. 7 Rep. 11. § 18. the father owing
no local allegiance to the foreign prince; and representing
the king of England; and by the Stat. 25 Eliz. 3. c. 2. it is
declared to be the law of the crown of England, that
the king’s children under or born on sea of ability to inherit
the crown; and to encourage foreign commerce it is enabled
by the same statute, that all children born abroad, provid­
ed they were born at the time of the child’s birth in
allegiance to the king, and the mother had passed the seas
by her husband’s consent, might inherit as if born in
England. See 1 Com. 601. &c.

By several more modern statutes 17 Ann. c. 5 : 10 Ann.
c. 5 : 4 Geo. 2. c. 117. and 13 Geo. 3. c. 21.) these restric­
tions are still further taken off; so that all children born
out of the king’s allegiance, whose fathers (or grand­
fathers by the father’s side) were natural born subjects,
though their mothers were aliens, are now deemed to be natural
born subjects themselves to all intents and purposes, un­
less their said ancestor or ancestors were attainted, or banished beyond
sea for high treason; or were at the birth of such
children in the service of a prince at enmity with Great

Britain. See Stat. 4 Geo. 2. c. 21. [The issue of an English
woman by an alien, born abroad is an alien. 1 Vent. 222.
4 Term Rep. 400. solemnly decided.] But grand­children
of such ancestors shall not be privileged in respect of the
aliens duty, except they be procu tests and actually reside
within the realm; nor shall be enabled to claim any
estate or interest, unless the claim be made within five
years after the same shall accrue.

The children of aliens born here in England, are, ge­
erally speaking, natural-born subjects, and entitled to
all the privileges of such. 1 Comm. 373.

II. A Denizen is an alien born, but who has obtained,
ex donatione regis, letters patent to make him an Engli­
lish subject; a high and incommunicable branch of the royal
prerogative. 7 Rep. 25. A denizen is in a kind of mid­
dle state between an alien and natural-born subjekt, and
partakes of both of them. He may take lands by pur­
chase or devise, which an alien may not; but cannot
have the same enjoyment of the crown. 1 Rep. 673; for his parent through
whose whom he must claim, being an alien had no inalienable
blood; and therefore could convey none to the son.
And upon a like defect of hereditary blood the issue of a
denizen born before denization cannot inherit to him;
but his issue born after may, to the exclusion of that born
before. 1 Inst. 3. § 7. &c. 373. But by Stat. 11 & 12
Wil. 3. c. 6, all persons being natural-born subjects may
inherit as heirs to their ancestors, though those ancestors
were aliens. See also Stat. 25 Geo. 2. c. 59. by which this
natural of Wil. 3. is restrained to persons being at the
death of the ancestor; and directs the estate from daughters
in favour of after-born sons. Both these acts are extended
by Stat. 16 Geo. 3. c. 52. to Scotland.

A Denizen is not excluded from paying the alien’s
duty and some other mercantile burthens. See Stat.
22 Eliz. c. 8. And no denizen can be of the privy coun­
cil, or either house of parliament, or have any office of
trust civil or military, or be capable of any grant of
lands, &c. from the crown. Stat. 12 W. 3. c. 2.

III. Naturalization cannot be performed but by
act of parliament; for this an alien is put in the same
state as if he had been born in the king’s allegiance; ex­
cept only that he is (by the Stat. 12 W. 3.) incapable, as
well as a denizen, of being a member of the privy coun­
cil or parliament, holding offices, grants, &c. No bill
for naturalization can be received without such disabling clause
in it; (Stat. 1 Geo. 1. c. 4.) nor without a clause disabling
the person from obtaining any immunity in trade thereby,
in any foreign country; unless he shall have resided in
Great Britain for seven years next after the commencement
of the session in which he is naturalized; (Stat. 14 Geo. 3.
c. 84.) neither can any person be naturalized or resided
in blood unless he has received the sacrament of the Lord’s
Supper within one month before the bringing in of the
bill; and unless he also takes the oaths of allegiance and
sacrament of the queen, in the presence of the parliament. (Stat.
7 Stat. 1. c. 2.) But these provisions have been usually dispensied with by special acts of parliament previous to
bills of naturalization of any foreign prince or princelet.
See statutes 4 Ann. c. 1. 7 Geo. 2. c. 33. 9 Geo. 2. c. 24.
4 Geo. 3. c. 4. &c.

These are the principal distinctions between Alien,
Denizen, and Natural: distinctions which it hath been
frequently endeavoured within the present century to lay
alms R
almost totally aside by one general naturalization act for all foreign protestants. an attempt which was once carried into execution by ord. 7 ann. c. 5; but this after three years' experience was repealed by ord. 10 ann. c. 5; except the clause for naturalizing the children of English parents born abroad. however, every foreign tenant who in time of war serves two years on board an English ship by virtue of the king's proclamation, is by ord. 13 ge. 2. c. 3, 1793. for naturalized, under the like restrictions as in ord. 12 wh. 3. c. 2. and all foreign protestants and jews, upon their rendering seven years in any of the American colonies, without being absent above two months at a time, and all foreign protestants serving two years in a military capacity there, or being three years employed in the whale fisheries, without afterwards affording themselves from the king's dominions for more than one year, and none of these falling within the incapacity declared by ord. 4 ge. 2. c. 21, (for attain'd, &c.) shall, on taking the oath of allegiance and abjuration, or in some cases an affirmation to the same effect, be naturalized to all intents and purposes as if they had been born in this kingdom; except as to sitting in parliament or the privy council, and holding offices or grants of land, from the crown, in great britain or ireland. see statutes 15 ge. 2. c. 7: 20 ge. 2. c. 44: 22 ge. 2. c. 45: 2 ge. 3. c. 25: 15 ge. 3. c. 25: 20 ge. 3. c. 20. they therefore are admissible to all other privileges, which protestants or jews born in this kingdom are entitled to.

what those privileges are with respect to jews in particular was the subject of very high debate about the time of the famous jacob bill, atord. 20 ge. 2. c. 26; which enabled all jews to prefer bills of naturalization in parliament without receiving the sacrament as ordained by ord. 7 jan. 1. c. 21: but this act continued only a few months, and was then repealed by ord. 27 ge. 2. c. 1.

iv. an alien enemy coming into this kingdom, and taken in war, shall suffer death by the martial law; and not be indicted at the common law, for the indictment must conclude contra legem suam, and such was never in the protection of the king. moby de for. mart. 477. aliens living under the protection of the king, may have the benefit of a general pardon. hib. 771. no alien shall be returned on any jury, nor be sworn for trial of issues between subject and subject, &c. but where an alien is party in a cause depending, the implead of jurors are to be half denominizii, and half alienis: but in cases of high treason, this is not allowed. 2 liff. 17. see stat. 27 e. 3. c. 8, that where both parties are aliens the implead shall be all aliens, and stat. 28 e. 3. c. 13, 14 trials between denominizii and alienis; see also 1 con. dig. tit. alien. (c. 8.)

the aliens are subject to the laws, and in enormous offences (as murder, &c.) are liable in the ordinary course of justice, yet it may be too hard to punish them on a local statute. thus, a french prisoner indicted for privately killing from a sheep was acquitted of that by the direction of the judge, and found guilty of the larceny only. forf. 183.

a very great influx of frenchmen into england has been caused in the years 1792 and 1793 by the troubles in france, and there being cause to suspect that some of them were sent here for dangerous and unjustifiable purposes, an act was passed, ord. 33 ge. 3. c. 4, commonly called the alien-bill, compelling the masters of ships arriving from foreign parts, under certain penalties, to give an account at every port of the number and names of every foreigner on board to the customs-house officers, appointing justices and others to grant passports to such aliens; and giving the king power to restrain and to send them out of the kingdom on pain of imprisonment, and on their return, of death. the same act also directs an account to be delivered of the arms of aliens, which, if required, are to be delivered up, and aliens were not to go from one place to another in the kingdom without passports. this act was in the first instance temporary; and the opposition in both houses, was proved by circumstances of a very serious nature, to have been absolutely necessary.

by the various acts of parliament above mentioned, men, if not all of the niceties of the old law relative to aliens are obviated and reduced to plain and intelligible rules. see 1 corin. 560–175: 1 liff. 2 and 8, and the notes there; and 7 rep. calvin's case. as to defects between aliens collaterals, collingwood v. pace, 1 vent. 413: 3 st. 103. as to pleading alienage, see tit. aliman. and for further matter on the whole of the subject, con. dig. tit. alien.

alienation, from alienage, to alien.] A transferring the property of a thing to another: it chiefly relates to lands and tenements; as to alien land in fee, is to sell the fee-simple thereof, &c. and to alien in mortmain, is to make over lands or tenements to a religious house or body politic. fines for alienations are taken away by ord. 12 car. 2. c. 24; except fines due by particular customs of manors. all persons who have a right to lands may generally alien them to others; but some alienations are forbidden: as an alienation by a particular tenant, such as tenant for life, &c. which incurs a forfeiture of the estate. ca. liff. 118. for 1 fee in fee, by livery, alien in fee, or make a lease for the life of another, or gift in tail, it is a forfeiture of his estate; so if tenant in dower, tenant for another's life, tenant for years, &c. do alien for a greater estate than they lawfully may make. ca. liff. 237, 251. condition in tenements, &c. that the tenant shall not alien, are void. ca. liff. noted hib. 261. and in the same where a man poissessed of a lease for years, or other thing, gives and sells his whole property therein, upon such condition: but one may grant an estate in fee, on condition that the grantee shall not alien to a particular person, &c. and where a reversion is in the owner of an estate, he may retain an alienation by condition. tit. 301: wood's liff. 141. estates in tail, for life, or years, where the whole interest is not parted with, may be made with condition not to alien to others, for the preservation of the lands granted in the hands of the first grantee.

alimony, aliment, nourishment or maintenance.] in a legal sense, it is taken for that allowance which a married woman fuses for and is entitled to, upon separation from her husband. terr. de ley 38. see tit. borons and fees.

allaunds, ab alienis, sepharic gentis, heare-hounds. allay, lat. alligare.] the mixture of other metals with silver or gold. this alloy is to augment the weight of the silver or gold, so as it may defray the charge of coinage, and to make it the more salable. a pound weight of standard gold, by the present standard in the mint, is twenty-
twenty-two carats fine, and two carats alloy: and a pound weight of eight standard silver consists of twelve ounces two-penny weight of fine silver, and eighteen penny weight of alloy. Lomand's Essay upon Coins, pag. 19, 20, 9.

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

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

And there are several statutes requiring the oath of allegiance and supremacy. To be taken in penalties: justices of peace may summon persons above the age of eighteen years to take their oaths. 1 Eliz. cap. 1: 1 W. & M. c. 1, 8, 1 Ann. stat. 1, r. 32. For the other statutes respecting allegiance see 5 Eliz. c. 1, 17, 3, 5, 11, 14, 15, 16, 19, 24, 31, 35, 37, 39, 40. 3 Ann. c. 21. 6 Ann. c. 14, 8. 45, 15; 1 Geo. c. 1: 13, 2 Geo. c. 2, 3; 1 Geo. c. 3 & 5, 12, 13, 14, 15 Geo. c. 2, 3.

And the same oath may be taken by them, as well as by their children and issue under their age. 1 W. & M. c. 1; 1 Ann. stat. 1, r. 8. 1 Geo. c. 1. 2 Geo. c. 1. 3 Geo. c. 5, 53.

And the same oath may be taken by their children and issue under their age. 1 W. & M. c. 1; 1 Ann. stat. 1, r. 8. 1 Geo. c. 1. 2 Geo. c. 1. 3 Geo. c. 5, 53.

All men alike are bound in like manner. 1 Geo. c. 1, r. 3. 4. If any natural born subject be withdrawn from his allegiance and reconciled to the pope or to the emperor, or shall promise obedience to any other Prince or State, he, his procurers, counselors, aids and maintainers, shall incur the guilt of High Treason.

ALLEGIARE, to defend or justify by due course of law. &.c. 1 Eliz. cap. 4. Specia.

ALLEER. This word is used to make what is added to signify superlatively; as alter ego is the greatest good. See Alter. After. Alter fetos, feet alter.

ALLEVIARE, to levy or pay an accustomed fine. Conv. 2.

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

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

ALLOCOTO COMITATU, A new writ of exequi allowed, before any other court, county, holden, on the former not being fully served, or compiled with, &c. Fitz. Esqir. 14.

ALLODIAL, This is where an inheritance is held without any acknowledgement to any lord or superior; and therefore is of another nature from that which is feuodal. Allodial lands are free lands, which a man enjoys without paying any fine, rent, or service to any other. Allodial. In Danelaw, it signifies a free manor, and allodial Lords Paramount. Kent: Co. Litt. 1, 5 & see 2 Comm. 45, 6. And this Dict. tit. Tenure. Vol. 1.

ALMENA, or ALMONE, eleemosynaria. An officer of the king's house, whose business is to distribute the king's alms every day. He ought to admonish the king to bestow his alms, especially upon fairs' days and holidays; and he is likewise to visit the sick, widows that are poor, prisoners and other necessitous people, and to relieve them under their wants; for which purpose he hath the fortresses of counties, and the goods of felos de fos, allowed him by the king. Fitz. Ib. 2, cap. 22.

The lord almoner has the disposition of the king's dish of meat, after it comes from the table, which he may give to whom he pleases; and he distributes four pence in money, a two-penny loaf of bread, and a gallon of beer; or instead thereof three pence daily at the court gate to twenty-four poor persons of the king's parish, to each of them that allowance. This officer is usually some bishop.

ALMSFEOH, or almsteb, Saxon for alms money: It has been taken for what we call Pater-Penit, first given by Ins, king of the West Saxons, and anxiously paid in England on the first of August. It was likewise call'd vamefoh, romeco, and hearbening. Schede's Hist. Tithe 217. A MUTIUM, A cap made with goats' or lambs' skins, the part covering the head being square, and the other part hanging behind to cover the neck and shoulders. Menelston tom. 3, p. 36: W. Thor. 1330.

ALNAGE. Fr. alnage: A measure, particularly the measuring with an ell.

G. ALNAGER.
ALNAGER, or ambusager, Fr. alner, Lat. ambiger.] is properly a measure by the ell; and the word ambiger in French signifies an ell. An ambusager was heretofore a public sworn officer of the king’s, whose place it was to examine into the affairs of cloths made throughout the land, and to fix fees upon them; and another branch of his office was to collect a subsidy or ambusage duty granted to the king. He had his power by Stat. 3 Ed. 3. Stat. 4. c. 1. and several other ancient statutes; which appointed his fees, and inflicted a punishment for putting his seal to deceitful cloth, &c. viz. a forfeiture of his office, and the value. 27 Ed. 3. Stat. 2. c. 4; 3 R. 2. c. 2. There were afterwards three officers belonging to the regulation of cloathing, who bear the distinct names of searchor, measureor, and ambusager; all which were formerly comprised in one person. 4 Inst. 51. Conc. By Stat. 11 & 12 W. 3. c. 20. Alnage duties are taken away.

ALNETUM, A place where alders grow; or a grove of alder in. Domesday-Book.

ALNUIUM, See Allium.

ALOVERIUM, A place where lavender is. Ficta, lib. 21. c. 82. par. 2.

ALTARAGE, altaragium. The offerings made upon the altar, and also the profit that arises to the priest by reason of the altar, oblationes altarii. Mab. 21 Eliz. It was declared that by altarage is meant tithes of wool, lamb, cloths, calves, pigs, chickens, butter, cheese, fruits, herbs, and other small tithes with the offerings due: the case of the vicar of Wob-Haddon in Northumberland. But the word altarage at first is thought to signify no more than the casual profits arising to the priest, from the people’s voluntary oblations at the altar; out of which a portion was assigned by the parson to the vicar: since that, our parsons have generally contented themselves with the greater profits of glebe, and tenth of corn and hay; and have left the small tithes to the officiating priests; and hence it is that vicarages are endowed with them. Terms de Ley 30. 2 Cris. 516.

It seems to be certain, that the religious, when they allotted the altarage in part, or in whole to the vicar or chaplain, did mean only the customary and voluntary offerings at the altar, for some divine office or service of the priest, and not any share of the standing tithes, whether peculial or mixed. Kem. Paroch. Antiq. Goff. In the case of Franklyn and the master and brethren of St. Croft, T. 1721, it was decreed, that where altaragium is mentioned in old endowments, and supported by usage, it will extend to small tithes, but not otherwise. Bubb. 79.

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

ALTO & BASSO. Power is in ambitio in alto & basso, means the absolute sublimation of all differences.

AMARYVR, vel AMABVR. A custom in the honour of Clun, belonging to the earls of Arundel. Priorium singulatissimis domino ibervendum. LL. ecol. Gal. Howeli Dha, regis Wallis. This custom Henry earl of Arundel releaved to his tenants. Anw. 3 & 4 P. & M.

AMBACTUS. A servant or client. Conc. 1. 2

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

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

Ambassadors may, by a precaution, be warned not to come to the place where sent; and if they then do it, they shall be taken forenemies; but beingonce admitted, even with enemies in arms, they shall have the protection of the laws of nations, and be preferred as princes. Mol. 146. If a banished man be sent as an ambassador to the place from whence he is banished, he may not be detained or molested there. 4 Inst. 153. But if he be not received or admitted as ambassador, he has no privilege as such; and an ambassador may be refused in respect of him by whom sent; or in respect of the person sent; as if he is notoriously flagitious; or if he be disagreeable to the state to which he is sent. An ambassador ought not however to be refused without cause. — See Gratius and Mol. cited Com. Dig. tit. Ambassador. The killing of an ambassador has been adjudged high treason. 3 Inst. 8. Some ambassadors are allowed, by concession, to have jurisdiction over their own families, and their houses permitted to be sanctuaries; but where persons who have offended fly to their houses, after demand and refusal to deliver them up, they may be taken from thence. Ambassador cannot be defended when they commit any thing against the state, or the person of the king with whom they reside. 4 Inst. 157. An ambassador, guilt of treason against the king’s life, may be condemned and executed; but for other treasons, he shall be sent home, with demand to publish him, or to lead him back to be punished. 4 Inst. 152. 1 Roll. Rep. 185.

If a foreign ambassador commits any crime here, which is contra jus gentium, as treason, felony, &c. or any other crime against the law of nations, he losteth the privilege of an ambassador, and is subject to punishment as a private alien; and he need not be remanded to his sovereign, but
AMENDMENT.

At common law there was little room for amendments, which appears by the several statutes of amendments and jo-
suits, and likewise by the constitution of the courts; for,
yays Britton, the judges are to record the parols [for pleas] deduced before them in judgment; also, says he, Ed. 1. granted to the juries to record the pleas pleaded before them, but they are not to erase their records, nor amend them, nor record against their involvement, nor any way utter their records to be a warrant to justify their own mif-
doings, nor erase their words, nor amend them, nor record against their involvement. This ordinance of Ed. 1. was to rigidly observed, that when justice Hengham, in his reign, moved with compassion for the circumstances of a poor man who was fined 13 s. 4 d. erased the record, and made it 6 s. 3 d. he was fined 800 marks, with which, it is said, a clock-house at Westminster was built, and furnished with a clock; but as to the clock, it has been denied by authors of credit, clocks not being in use till a century afterwards. Notwithstanding what is mentioned above, there were some cases that were amendable at com-
mon law.

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

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

Tho' misfavouring of proofs or the roll might be amended at Common law the same term, because it was the act of the court; yet if any clerk at common law issued out an armonous process on a right award of the court, that was never amended in any case at the common law. 1 Salk. 51. pl. 14.

Anciently all pleas were one term at the bar; and
then if any error was spied in them, it was presently amended. Since that custom is changed, the motion, to amend, because all in paper, succeeded in the room of it; and it is a motion that the court cannot refute: but they may refute if the party denying it refuse to pay costs, or the amendment desired should amount to a new plea. 1 Ed. 3. 83.

Mistakes are now efficiently helped by the statutes of amendment and jo-suits; the latter so called, because when a pleader perceived any slip in the form of his proceeding, and acknowledges such error, (jo faute or jo failles); he is at liberty by those statutes to amend it, which amendment is seldom actually made, but the benefit of the act is attained by the courts overlooking the exception, 2 Str. 1011. These statutes are in the whole 12 in number, and are here recapitulated chronologically, by which all trailing exceptions are so thoroughly guarded against, that writs of error cannot since be maintained, but for some material mistake assigned. 3 Com. 407,

which see, and Buller's N. Piai. (Ed. 1793) 320. and for a more extended view of the cases, in which amendments may or may not be made, See Cons. Dig. tit. Amendment.

By lat. 14 Ed. 3. c. 6. no process shall be annulled or discontinued, by the misprision of the clerk in misla-
m sion in writing one syllable or one letter too much or too little; but it shall be amended.

The judges afterwards confirmed this statute so favorably, that they extended it to a word; but they were not
AMENDMENT.

...to well agreed, whether they could make these amendments, as well after as before judgment; for they thought, their authority was determined by the judgment; therefore by art. 9 H. 5. c. 4. it is declared that the judges shall have the same power, as well after as before judgment, as long as the record in process is before them. 

This statute is confirmed by statute 4 Hen. 6. c. 3. with an exception, that it shall not extend to proces on outlawry, or to records or processes in Wales. But according to 2 Brandon, 40, the last exception, and the like exception in 8 Hen. 6. c. 15, seem to be annulled by the statute 27 Hen. 8. c. 25, by which it is enacted, that the laws of England shall be used, qualified and executed in Wales.

Though the foregoing statutes gave the judges greater power than they had before, yet it was found that they were too much cramped, having authority to amend nothing but process, which they did not continue in a large signification, so as to comprehend the whole proceedings in real and personal actions, as criminal and common pleas, but confined it to the misprision of their clerks in pleas, but confined it to the

Though the foregoing statutes gave the judges greater power than they had before, yet it was found that they were too much cramped, having authority to amend nothing but process, which they did not continue in a large signification, so as to comprehend the whole proceedings in real and personal actions, as criminal and common pleas, but confined it to the misprision of their clerks in pleas, but confined it to the

Further by art. 8 Hen. 6. c. 15. "The king's justices, before whom any misprision shall be found, be in any records and processes depending before them, as well by way of error as otherwise, in the returns of the same, by sheriffs, coroners, bailiffs of franchises, or any other, by misprision of the clerks of any of the said courts, or of the sheriffs, coroners, their clerks, or other officers, clerks, or other ministers whatever, in writing one letter or one syllable too much or too little, shall have power to amend the same."

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

By art. 32 H. 8. c. 30, it is enacted, "That if the jury have once passed upon the issue, though afterwards there be found a jeofail in the proceedings, yet judgment shall be given according to the verdict." The art. 13 Eliz.

14. ordains, "That after verdict given in any court of record, there shall be no day of judgment, or reversal, for want of form in a writ, count, plaint, &c., or for want of any writ original or judicial; or by reason of insufficient return of sheriffs, &c." By art. 21 Jac. 1. c. 13, "If a verdict shall be given in any court of record, the judgment shall not be stayed or reversed for variance in form between the original writ or bill and the declaration, &c., or for want of avornment of the party's being living, so as the person is proved to be in life; or for that the veridic facit is in part mislaid; for misnomer of jurors, if proved to be the persons returned; want of returns of writs, so as a panel of jurors be returned and annexed to the writ; or for that the return officer's name is not yet to the return, if proof be made that the writ was returned by such officer, &c.

The art. 16 and 17 Car. 2 c. 8. (called by Twisden J. an omnipotent act, 1 Fand. 108; and made perpetual by art. 22 and 23 Car. 2. c. 4.) enacts, "That judgment shall not be stayed or reversed after verdict in the courts of record at Westminster, &c., for default in form; or for that there are not pledges to execute upon the return of the original writ, or because the name of the sheriff is not returned upon it, for default of alleging and bringing into court of any bond, bill or deed, or of alleging or bringing in letters testamentary, or of administering; or for the omission of vi & vnum, or contra pacem, mistaking the Christian name or surname of either party, or the form of money, day, month or year, &c., in any declaration or pleading, being rightly named in any record, &c., preceding; nor for want of the averment of sue potestas de curia, or for not alleging great facts or recordum, for that there is no right veridic, if the cause was tried by a jury of the proper county or place; nor shall any judgment after verdict, by confession, cogent answer, &c., be reversed for want of misprision or capitulation, or by reason that either of them are entered, the one for the other, &c., but all such defects, not being against the right of the parties or the suit, or whereby the issue or trial are altered, shall be amended by the judges; though not in suits of appeal, of felony, indictment, and informations, on penal statutes, which are excepted out of the act.

By art. 4 and 5 An. c. 16, all the statutes of jeofails shall extend to judgments entered by confession, indignation, or non facit informes in any court of record, and no such judgment shall be reversed, nor any judgment or writ of inquiry of damages thereon shall be stayed for any defect which would have been aided by those statutes, if a verdict had been given, so as there be an original writ filed, &c. By art. 9 An. c. 20. § 7, this act and all other statutes of jeofails are extended to writs of mandamus and informations in the nature of a quo warranto. The statutes of amendment and jeofails not being confirmed to extend to criminal proceedings, or on penal statutes in general. Bull. N. P. 327. 2 Mod. 144. But a mandamus may not be amended after return. 4 Term Rep. 689. The art. 5 Geo. 1. c. 13, ordains, That after verdict given, judgment shall not be stayed or reversed for defect in form or substance in any bill or writ, or for variance therein from the declaration, or any other proceeding.

An action for a false return of a member of parliament on the art. 7 and 8 W. 3, for double damages, is remediable, tho' founded on a law that is penal, to within the statutes of jeofails. 1 Wilf. 125.
AMENDMENT.

By the foregoing statutes (from 14 E. 3. c. 6; to 8 H. 6. c. 15) the faults and mistakes of clerks are in many cases amendable; the misprision of a clerk in matter of fact is amendable; though not in matter of law. Palm. 258. If there be a mistake in the legal form of the writ, it is not amendable: there is a diversity between the negligence and ignorance of the clerk that makes out writs; for his negligence (as if he have the copy of a bond, and do not pursue it), this shall be amended; but his ignorance in the legal course of original writs is not amendable. 8 Rep. 159. A party's name was mistaken in an original writ; and it appearing to the court: that the curitor's instructions were right, the writ was amended in court; and they amended all the proceedings after 2 Vent. 152: Co. Car. 74. If a thing which the plaintiff ought to have entered himself, being a matter of substance, be totally omitted, this shall not be amended; but otherwise it is, if omitted only in part and milentered. Domo. Abr. 346. By the common law a writ of error, returned and filed, could not be amended; because it would alter the record; but now by Stat. 5 Geo. 1. the writs of error, wherein there shall be any variance from the original record, or other defect, may be amended by the court where returnable.

In an action, the defendant pleads Not Guilty, thereupon issue is joined, and found for the plaintiff, he shall have judgment; tho' it is an improper issue in this action; for as there is a declart alleged, Not Guilty is an answer thereto, and it is an issue mistaken, which is aided by statute Cro. Eliz. 407. If in debt upon a single bill, the defendant pleads payment, without an acquittance; and issue is joined and found for the plaintiff, tho' the payment without acquittance is no plea to a single bill, he shall have judgment, because the issue was joined upon an affirmative and a negative, and a verdict for the plaintiff Mid. 37 and 38 Eliz. 5 Rep. 43. An ill plea and issue may be aided by the statute of Jeofails, after a verdict: and if an issue joined be uncertain and confused, a verdict will help it. Cro. Car. 516: Hob. 113. The statutes likewise help when there is no original, and where there is no bill upon the file, it is aided after verdict by statute, but when there is an original, which is ill, that is not aided. Cro. Fac. 185, 480: Cro. Car. 482. The statute of Jeofails 16 and 17 Car. 2, helps a mistrial in a proper county, but not where the county is mistaken. 1 Mod. 24.

When the award of a writ of enquiry on the roll is good, the writ shall be amended by the roll. Campb. 70. The court cannot amend to make a new writ; or to alter a good writ; and adapt it to another purpose, &c. only when the writ is bad and vicious on the face of it. Mid. Car. 203, 516, Annoy. 567.

With respect to declaration, a declaration grounded on an original writ may not be amended, if the writ be erroneous; though if it be on a bill of Middlesex or a latifatum, it is amendable. 1 Litt. Abr. 67.

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

As to the amendments of records, &c. an issue entered upon record, with leave of the court may be amended; but not in a matter thing, or in that which will deface the record. 1 Litt. Abr. 61. A record may be amended by the court in a small matter, after issue joined, to as the plea be not altered Domo. Abr. 336. If on a writ of error a record is amended in another court in affirmation of the judgment, it must be amended in the court where judgment was given. Hardw. 555. Where the record of nisi prius does not agree with the original record, it may be amended after verdict, provided it do not change the issue: but a record shall not be amended to attain the jury, or prejudice the authority of the judge. A general or partial verdict may be amended by the notes of the clerk of issue in civil causes; but not in criminal actions. 1 Salk. 47. The issue roll shall be amended by the imprisonment roll, which is precedent; but a roll may not be amended after verdict, when there is nothing to amend it by; tho' surplusage may be rejected, and so made good. Cro. Car. 92: 1 Salk. 153.

In an action on the fullest of usury, a verdict was given for the plaintiff, and taken on one of the counts, in the declaration: the other counts being found for defendant.—Motion in arrest of judgment.—The principal cause was, the christian name of one of the persons mentioned in that count (rightly named, in that court, before) was mistaken in the issue roll, which had been carried in, whereby the court was rendered absurd, and bad. The court gave leave to file a right bill, (the proceedings being by bill,) and afterwards amended the issue roll, by the bill.—The nisi prius roll was right. —Gardiner v. Brown B. K. Trin. 7. 15 Geo. 3. This was done, as an amendment at common law.

A mistake of the clerk in entering a judgment; as where it was that the defendant recovered, instead of the plaintiff, &c. was ordered to be amended. Cro. Fac. 631: Hutt. 41. A judgment may be amended by the paper book signed by the matter. 1 Salk. 50. At common law, the judges may amend their judgments of the same term; and by statute of another term. 8 Rep. 156: 14 E. 3. If judgments are not well-ordered, on payment of costs: they will be ordered to be for: when judgments are entered, 'tis laid the defects therein being the act of the court, and not the misprision of the clerk, are not amendable. Gilb. 104. Mistakes in returns of writs, stays and recoveries, made by mutual consent of parties may be amended. 5 Rep. 45. Judgment shall not be laid after verdict, for that an original wants form, or varies from the record in point of form, which are amendable. 5 Rep. 45. After verdict given in any court of record, there shall be no flaw of judgment for want of form in any writ, or insufficient returns of sheriff's variance in form between
between the original writ and declaration, &c. flat. 32
H. 8. 18 Eliz. Vide 5 Co. r. c. 13. The plea may
be amended by the judge’s notes. 1 Wils. 33; 2 Ser.
1197. S. C. As to amendments in informations by the
attorney general, see 4 Term Rep. 457, 8.
Amendments are usually made in allowance of judgments;
and seldom or never to destroy them; and where amend-
ments were at common law, the party was to pay a fine
for leave to amend. 3 Sabd. 29.
AMERICANT. Americanum, (from the Fr.
merite) signifies the pecuniary punishment of an offender.
against the king or other lord in his court, that is found
to be in misfortunia, i.e. to have offended, and to
stand in mercy of the king or lord. The author of
Terms de Ley faith, that Americanum is properly a penalty
afflicted by the peers or equals of the party amerced, for
the offence done; for which he put себе him at the
mercy of the lord. Terms de Ley 40. And by the statute
of Magna Carta, c. 14, a freeman is not to be amerced
for a small fault, but proportionable to the offence,
and that by his peers. 9 H. 3 c. Americanum are a more
merciful penalty than a fine; for which if they are too
graven, a fine may be ordered by an ancient writ founded
on Magna Carta, called moderate misfortunia. See
New Nat. Rev. 167; F.N.B. 76. The difference between
amercions and fines, is this; fines are said to be pun-
ishments certain, and grow expressly from some statute;
but americanum are such as are arbitrarily imposed.
Kirk. 78. Also fines are imposed and afflicted by the
court: americanum by the country; and no court can
impose a fine, but a court of record: other courts can
only amerced. 8 Rep. 39. 41.
A court-leet can amerced for public nuisances only.
1 Savd. 115. For a fine and all americanum in a court-
leet, a draft is incident of common right; but for
americanum in a court baron, draft is not to be taken
but by prescription. 11 Rep. 45. When an Americanum
is agreed on, the lord may have an action of debt, or
draft for it, and impose the draft, or sell it at his
pleasure; but he cannot imprison for it. 8 Rep. 41, 45.
Vide the case of the Duke of Beford v. Alcook, B. K.
There is also Americanum in pleas in the courts of
record, when a defendant delays to tender the thing de-
cioned by the king’s writs, on the first day. Co. Lit.
116. And in all personal actions without force, as in
debt, detinue, &c. if the plaintiff be non sui, barred,
or his writ abate for matter of form, he shall be amerced;
but if on judicial process, founded on a judgment and
record, the plaintiff be non sui, barred, &c. he shall
not be amerced. 1 Nelf. Abr. 205. And an infant, if
non sui, is not to be amerced. 7 Term Cmt. 258.
The capital prose is taken away by 5 W. & M. c. 12.
The americanum of the sheriff, or other officer of the
king, for misconduct, is called americanum royal. Terms
de Ley. Americanums are likewise in several other cafes.
See tit. Fines for Offences.
AMUSE, see Amicus.
AMI, vide Amy.
AMICIA, see Amicus.
AMICUS. The uppermost of the six garments
worn by priests, tied round the neck, and covering the
breast and heart — Amicus, alba, cingulum, flata, manu-
fulae et planeta. These were the six garments of priests.
AMICUS CURIE. If a judge is doubtful or mis-
taken in matter of law, a fander-by may inform the
court, as amicus curiae. 2 Co. Inst. 178. In some cafes,
a thing is to be made appear by suggestion on the roll
by motion; sometimes by pleading, and sometimes as
amicus curiae. 2 Coke. 458. Any one as amicus curiae
may move to quash a vicarious indictment; for if there were
a trial and verdict, judgment must be arrested. Com-
ber. 13. A counsel urged, that he might, as amicus
curiae, inform the court of an error in proceedings, to
prevent giving false judgment; but it was denied, un-
less the party was present. 2 Show. Rep. 257.
AMITIERE LEGEM TERRÆ, or LIBERAM
LEGEM. To lose and be deprived of the liberty
of swearing in any court; as to become infamous, renders
a person incapable of being an evidence. Vide Glanvil.
lib. 2. And see the statute 5 Eliz. cap. 9, against per-
jury. So a man that is outlawed, &c. 1 is said to lose
his law, i.e. is put out of the protection of the law, as
long as so far as relates to the suing in any of his majesty’s
courts of justice though he may be free.
AMNOBREGGATION. A service, suggested by Spal-
man to be the same as Cheveaux; which fhe failed.
AMNESTY, amnestia, editio. An act of pardon or
olives, such as was granted at the restoration by king
Charles II.
AMNITUM INSULÆ. Iles upon the West coast of
Britain. Blount.
AMORTIZATION, amortentia, Fr. amortissement.
An alienation of lands or tenements in mortmain, vis-
to any corporation or fraternity, and their successors,
&c. And the right of amortization is a privilege or li-
ce of taking in mortmain. In the statute de libertatis
perpessandis; an 27 Ed. 1. c. 2, the word amorti-
issement is used.
AMOR THESE. Fr. amor. To alien lands in mort-
main.
AMPLIATION, ampliatio. An enlargement; in law
a referring of judgment, till the cause is further examined.
AMY, amicus. In law prochein any is the next friend to be
trusted for an infant. And infants are to have prochein any (i.e. next friend) or guardian, and defended by
guardian. Alien any is a foreigner here subject to some
prince in friendship with us.
AN, JOUR & WASTE. See Year, Day and Waste.
ANCESTOR, antecessor, or predecesser. One that
has gone before in a family; but the law makes a dif-
ference between what we commonly call an ancestor and
a predecesser: the one being applied to a natural person
and his ancestors, and the other to a body politic and
their predecessers. Co. Lit. 78 b.
ANCESTRE. What relates to or hath been done
by one’s ancestors; as hamage antecessor, &c.
ANCHOR. Is a measure of brandy, &c. containing
ten gallons. Lex Mercat.
ANCHORAGE, ancorium. A duty taken of ships
for the use of the haven where they cast anchor. 333.
Ath. Treatr. Amn. The ground in ports and havens be-
longing to the king, no person can let any anchor fall
theron, without paying therefore to the king’s officers.
ANCEINT. Gentlemen of the inn of court.
In Gray’s inn the society consists of barristers, ancients,
bar-
risters, and judeus under the bar; and here the ancients
are of the oldest barristers. In the Middle Temple, such
ANCIENT DEMESNE, or domain; veus patrimonii dominii.] Is a tenancy whereby all the manors belonging to the crown in the days of St. Edward and William, called the Conqueror, were held. The number and names of all manors, after a survey made of them, were written in the book of Domesday; and those by which that book appear to have at that time belonged to the crown, and are contained under the title terra regis, are called ancient demesne. Keb. 98. The lands which were in the possession of Edward the Confessor, and were given away by him, are not at this day ancient demesne, nor any others, except those writ down in the book of Domesday; and therefore, whether such lands are ancient demesne or not, is to be tried only by that book. 1 Sal. 57; 4 Inst. 269; Hob. 188: 1 Brownl. 43. F. N. B. 16. D.

But if the question is, whether lands be parcel of a manor which is ancient demesne, this shall be tried by a jury. For 'parcel or not parcel' is matter of fact, 9 Rep. of the abbot of Braza Marcela, Salk. 56. 774: and see 2 Burnet. 280.

Fitzberk us tells us, that tenants in ancient demesne had their terrors from ploughing the king's lands, and other works towards the maintenance of the king's freedom, on which account they had liberties granted them. F. N. B. 14. 218. And there were two sorts of these tenants and tenantry; one that held their lands freely by charter; the other by copy of court-roll, according to the custom of the manor. Brit. c. 66. The tenants holding by charter cannot be impaled out of their manor; for if they are, they may abate the writ by pleading their tenure: they are free from toll, for all things bought and sold concerning their substance and husbandry. And they may not be impaled upon any inquest. F. N. B. 14. If tenants in ancient demesne are returned on juries, they may have a writ de non ponendis in officiis, &c., and attachment against the sheriff. 1 Rep. 105. And if they are disturbed by taking duties of toll, or by being disfranchised to do unaccommoded services, &c., they may have writs of Mustrevent, to be discharged. See F. N. B. 14. New Nat. Br. 32. 357: 4 Inst. 269. These tenants are free as to their persons; and their privileges are supported to commence by act of parliament; for they cannot be created by grant at this day. 1 Salk. 57.

Lands in ancient demesne are extendible upon a statute merchant, staple, or elegit. 4 Inst. 270. No lands ought to be accounted ancient demesne but such as are held in fee simple; and whether it be ancient demesne or not, shall be tried by the book of Domesday. A lease for years cannot plead in ancient demesne: nor can a lord in action against him plead ancient demesne, for the land is frank-fee in his hands. Dow. Abr. 660.

In real actions, ejfectum, replevin, &c. ancient demesne is a good plea; but not in actions merely personal. Dow. 658. If in ancient demesne a writ of right cloie be brought, and prosecuted in nature of a feudum; a fine levied there by the custom, is a bar; and if this judgment be reversed in C. B. that court shall only adjudge, that the plaintiff be restored to his action in the court of ancient demesne; unless there is some other cause, which takes away its jurisdiction. 1 Jew, Chit. 37; Dyn. 373.

See the statutes 9 H. 4. c. 5. & 8 H. 6. c. 26. to prevent depriving lords in ancient demesne of their jurisdiction by collusion.

A fine in the king's courts will change ancient demesne to frank-fee at common law; so if the lord enfeods another of the tenancy; or if the land comes to the king, 4 Inst. 270. See Fine. But if the lord be not a party, he may have a writ of difficiis, and avoid the fine or recovery; for lands in ancient demesne were not originally within the jurisdiction of the courts of Westminster; but the tenants thereof enjoy this amongst other privileges, not to be called from the intrinsic of the plough by any foreign litigation. 1 Rol. Abr. 327. If the lord be party, the lands become frank-fee, and are within in the jurisdiction of the courts of Westminster, for the privilege of ancient demesne being established for the benefit of lord and tenant, they may destroy it a pleasure. 2 Rol. Abr. 324: 1 Salk. 57.

With respect to pleading, it is to be observed, that in all actions wherein, if the defendant recover, the lands would be frank-fee, ancient demesne is a good plea. 1 Rol. Abr. 322.

Therefore in all actions real, or where the reality may come in question, ancient demesne is a good plea; as office, writ of ward of land, writ of account against a bailiff of a manor, writ of account against a guardian, &c. See 4 Inst. 270: 1 Rol. Abr. 322, 323.

In replevin ancient demesne is a good plea, because by intendment the freehold will come in question. Gold. 64. 1 Bost. 108.

In an ejectment for ancient demesne is a good plea; for by common intendment the right and title of the land will come in question; and if in this action it should not be a good plea, the ancient privileges of these tenants would be lost, insomuch as most titles at this day are tried by ejectment. Hob. 47: 1 Bost. 108: Heil. 177: Cro. Eliz. 826.

But in all actions merely personal, as debts upon a lease, trespasses quare clausum freget, &c. ancient demesne is no plea. Hob. 47: 5 Co. 105. For further matter see Kyd's Com. Dig. tit. Ancient Demesne.

ANCIENTY, Fr. Anciation, Lat. Antiquitate.] Eldership or senility. This word is used in the act of Ireland, 14 Hen. 3.

ANDENA, A swath in mowing; it likewise signifies as much ground as a man can drive over at once.

ANELACIUS, A short knife or dagger. Mat. Par. 277.

ANFELDTYHDE, or according to Summer, Asefizable, A simple accusation; for the Saxons had two sorts of accusations, vis. simplex and triplice: that was called simple, when the oath of the criminal and two more were sufficient to discharge him; but his own oath, and the oaths of five more were required to free him in a triplice accusation. Blunt. See Leg. Addition, cap. 19. 3d Brompton.

ANGARIA, Fr. Angair; interpreted Personal Service.] A troublesome vexation, duty, or service which tenants were obliged to pay their lords, and they performed it in their own persons. Impressing of ships. Blunt. See also Smith's & Crewel; the former of whom gives some fanciful derivations under this word, and v. Parangaria. It seems that it may be easily and rationally derived from Anger Lat.

ANGELICA.
ANGELICA VESTIS. A monkish garment which laymen put on a little before their deaths, that they might have the benefit of the prayers of the monks. It was from them called angelica, because they were called angels, who by their prayers anima salutat intercedent. And the word fasciculatum, in our old books, is understood of one who had put on the habit, and was near death. Monasticon, i tom. p. 632.

ANGEL, An ancient English coin value to a.

ANGILD, Angildian. The bare single valuation or compensation of a criminal; from the Sax. An one, and gild, payment, mulct, or fine. Tawigild was the double mulct or fine; and tawigild the table, according to the rated ability of the person. Lexicon of L. a. c. 20; Speian.

ANGLOTE, A single tribute or tax. The words annate and anns are mentioned in the laws of William the Conqueror; and their sense is, that every one should pay according to the custom of the country, his part and share, as foot and lot, &c. Leg. Tel. c. 1. 64.

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

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

ANNAATS, Annaums. This word has the fame meaning with frilt-fruits, flat. 25 H. 8. c. 20. The reason of the name is, because the fruit of the frilt-fruits paid for spiritual livings, is after the value of one year's profit.

ANNEALING OF TILE, flat. 17 Ed. 4. c. 4. From the Saxons, Onehoch, Attender, signifies the burning or hardening of tile.

ANNIATED, from the Fr. Annéter. Abrogated, frustrated, or brought to nothing. Lit. fei. 711.

ANNIVERSARY DAYS, Dies anniversarii. Solemn days appointed to be celebrated yearly in commemoration of the death or martyrdom of saints; or the days whereon, at the return of every year, men were wont to pray for the souls of their deceased friends, according to the custom of the Roman Catholics, mentioned in the statute of 1 Ed. 6. c. 14. This was in use among our ancient Saxons, as may be seen in Lib. Ranulf. fei. 134. The anniversary, or yearly return of the day of the death of any person, which the religious registered in their devotional or martyrology, and annually observed in gratitude to their founders and benefactors, was by our forefathers called a year-day and a mind-day, i.e. a memorial day.

ANNI NUBILES, see tit. Age.

ANNO DOMINI, The computation of time from the incarnation of our Saviour; which is generally inserted in the dates of all public writings, with an addition of the year of the king's reign, &c. The Romans began their ann. of time from the building of Rome, the Greeks from the Olympic games, and the Christians reckon from the birth of Jesus Christ.

ANNOUCE, ANNOYANCE, or Nuissance, Nuisance, the same term in flat. 22 H. 8. c. 5. Vide titles Nuisance and Highways.

ANNUA PENSIONE. An ancient writ for providing the king's chaplains unpreferred with a pension. It was brought where the king had due to him an annuall pension from an abbot or prior, for any of his chaplains whom he should nominate, being unprovided of livings, to demand the same of such abbot or prior. Terns de la Ley 43; Reg. Orig. 165, 347.

ANNUAL, ANNUALIA. A yearly depend ance, or for laying continued mutes one year, for the soul of a deceased person.

ANNUITY, Annuity redditis: A yearly payment of a certain sum of money, granted to another for life, for years, or in fee, to be received of the grantor or his heirs, so that no freehold be charge thereupon; whereas a man shall never have anlive or other action, but a writ of annuity. Ter. alye Leg. 44; Reg. Orig. 158. Co. Lit. 144. 4.

To make a good grant of an annuity, no particular technical mode of expression is necessary. For if a man grants an annuity to another, he to receive out of that estate, or to be received out of a bag of money, or to be received of a stranger, yet this is sufficient to charge his person, and the subsequen words shall be rejected. 1 Rel. Abr. 227.

If a man grant a rent out of land, in which he has nothing, proviso that he be not charged for this in a writ of annuity, it shall be a good annuity; for the provision, being repugnant, is void. Co. Lit. 146 a; 2 Bolff. 149. See 6 Co. 58 B.

If a man grant a rent-charge out of his land, the grantee has an election to take it as a rent; or as an annuity. Lit. fei. 219; 2 Bolff. 148.

The treaty called Doctor and Student, ch. 1. cap. 3, shews several differences between a rent and an annuity, one that every rent is illusing out of land; but an annuity chargeth the person only, as the grantor and his heirs, who have afeits by deficient.

If no lands are bound for the payment of an annuity, a dillet may not be taken for it. 2 Pol. 69.

But if an annuity suse out of land, (which of late is often done,) the grantee may bring a writ of annuity, and make it personal, or an alms, or an alien, &c. 9 Pol. 100 as to make it real. Co. Lit. 144. And if the grantee take a dillet, yet he may afterwards have a writ of annuity, and discharge the land, if he do not avow the taking, which is in nature of an action. 1 Inf. 145. But if the grantee of a rent bring an alms for it, he shall never alter have writ of annuity; he having elet this to be a rent; so if the grantee of an annuity avow the taking of a dillet in a court of record. Dow. Abridg. 458. And if the grantee purchase part of the land out of which an annuity is illusing, he shall never alter have a writ of annuity. Co. Lit. 148.

Where a rent-charge, illusing out of lands, granted by tenant for life, &c. determines by the act of God; as an interest was vested in the grantee, it is in his election to make it a rent-charge, and to charge the lands therewith, or a personal thing to charge the peron of the grantor in annuity. 2 Rep. 35. A. seised of lands in fee, and B. grant an annuity or rent-charge to another; this prima facie is the grant of A. and confirmation of B. But the grantee may have a writ of annuity against both. If two men grant an annuity of 20l. per annum, although the perons be severall, if the deed of grant be not for them severally, yet the grantee shall have but one annuity against them. Co. Lit. 144.

When a man recovers in a writ of annuity he shall not have a new writ of annuity for the arrears due after the recovery, but a fea facies upon the judgment, the judgment being always executory. 2 Rep. 37. No writ of annuity beinr for arrears only when an annuity is determined, but for the annuity and arrearage, Co. Lit. 285.

Though, if a rent-charge be granted out of a lease for years, it hath been adjudged that the grantee may bring annuity when the lease is ended. More, cap. 450. Where an
ANNUITY.

An annuity is granted to one for life, during the term he shall have a right of annuity; and when that is determined, then his executors may have action of debt; for the reality is referred into the personality. 4 Rep. 49. New Nat. Br. 237.

If the annuitant of an annuity payable half yearly, since the last term of payment, die before the half year is completed, nothing is due for the time he lives. 3 Act. 260. So if a grant be made to A, for life, to be paid at the feast of Easter or within 20 days after, and he die after Easter within 20 days, it has been said his executor shall not have it, for the last day was the time of payment. Dal. 1.

Upon a rent created by way of reservation, no writ of annuity lies. Danw. 483. Writ of annuity may not be had against the grantor's heir, unless the grant be for him and his heirs; and there must be affin to bind the heir, by grant of annuity by his ancestor, when he is named. Co. Lit. 144, 1 Roll. Abr. 226. But it is otherwise in case of the grant of a rent out of land, or a grant of a rent whereof the grantor is seized, for this charges the land, but an annuity charges the person only. Br. Charges, pl. 54.

An annuity granted by a bishop, with confirmation of dean and chapter, shall bind the successor of the bishop. New Nat. Br. 340. If the king grant an annuity, it must be expressed by whose hands the grantee shall receive it, as the king's bailiff, &c. or the grant will be void; for the king may not be sued, and no person is bound to pay it, if not expressed in the patent. New Nat. Br. 341. If, where an annuity is granted pro destitui, the grantor is disturbed of his tithes, the annuity ceaseth; and so it is where any annuity is granted to a person pro confid., and the grantee refuseth to give counsel, for the cause and consideration of the grant amounts to a condition, and the one ceaseth, the other shall determine. Co. Lit. 204.

There are now very few, if any, grants of annuities, without a covenant for payment, expressed or implied; and therefore, where a difficulty can't be made, or is not approved of, the grantee may bring an action of covenant, and recover the arrears in damages, with costs of suit. And that action is now usually brought, real actions and writs of annuity being much out of use.

ANNUITIES FOR LIFE. To guard against the fraudulent and oppressive practices of furfuous money-lenders, exercised on young heirs and other necessitous persons entitled to property in expectancy, the legislature found it necessary to interpose by the following act.

By stat. 17 Geo. 3. c. 26, a memorial of every deed, bond, or other assurance, whereby any annuity or rent-charg be shall be granted for life, or for term of years, or greater estate determinable on lives, shall within 20 days of the execution (exclusive of the day of execution: 5 Term Rep. 283), be enrolled in Chancery; such memorial to contain the date of the deed, the name of all the parties, and for whom any of them are trustees, and of all the witnesses; and to set forth the annual sum to be paid, and the name of the person for whole life the annuity is granted, and the consideration; otherwise every such deed and assurance shall be void. § 1, 2.

In every deed, &c., whereby any annuity shall be granted, the consideration really (which shall be in money only) and also the name of the person by whom, and on whose behalf the consideration shall be advanced shall be set forth in words at length, otherwise such deed shall be void. § 3.

If any part of the consideration shall be (directly or indirectly) returned to, or retained by the party advancing the same, or if the consideration or any part shall be in goods, the annuitant may apply to the court in which any action is brought, to stay proceedings, and the court may order the assurance to be cancelled, and any judgment to be vacated. § 4.

All contracts for the purchase of any annuity with any infant under 21 years of age shall be utterly void; notwithstanding any attempt to confirm the same on the infant's coming of age. And all persons soliciting infants to grant annuities, or advancing money to them on condition of their granting annuities when of age, or engaging them by oath or promise not to plead infancy, and solicitors or brokers demanding gratuities for procuring money (beyond 10. per cent.) shall all be judged guilty of misdemeanors, and liable to fine, imprisonment, and corporal punishment. § 6, 7.

This act does not extend to any annuity given by will or marriage settlement, or for the advancement of a child; nor to any secured on lands of equal annual value whereof the grantor is seized in fee simple or fee tail in possession, or secured by actual transfer in the funds, the dividends being of equal value with the annuity; nor to any voluntary annuity without pecuniary consideration; nor to annuities granted by corporations, or under act of parliament; nor where the annuity does not exceed 10l. unless there be more than one to the same grantor, nor in trust for the same person. § 8.

A deed not registered according to the directions of the above act, is absolutely void and not merely voidable. 2 Term Rep. 603. See also 4 Term Rep. 493, 494, 500, 694, 792, 824.

Notes given as part of the consideration (which if actually given bond fide are to be understood as money) must be circumstantially set out in the memorial, that the court may see whether a full consideration was given or not. 3 Term Rep. 288.—1st: redemption of a former annuity, at a higher price than it was purchased at, is a good consideration. 5 Term Rep. 583.

If the security be for aide for want of complying with the formalities of the act, the consideration, if fair and legal, may be recovered back by the grantee in action of assumpsit, against the person actually receiving such consideration money, but not again as a surety. 1 Term Rep. 732: 2 Term Rep. 366.

How far the act extends to annuities granted previous to its passing, see 1 Term Rep. 267, 8.

For further matter relative to Annuities in general, as well as these for life, see Com. Dig. tit. Annuity.

ANNUITIES PUBLIC, see tit. National Debt.

ANSEI, or Aundel. See Aundel weight.

ANTEJURAMENTUM, and Praesumtun. By our ancestors called præsumtun calamina; in which both the accuser and the accused were to make oath before any trial or purgation, &c., the accuser was to swear that he would prosecute the criminal; and the accused was to make oath on the very day that he was to undergo the ordeal, that he was innocent of the crime of which he was charged. Leg. Alb. I. cap. 23.

If the accuser failed to take this oath, the criminal was disfranchised; and if the accused did not take his, he was in-
tended to be guilty, and not admitted to purge himself. 
Leg. Hier. 1. c. 66.

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

ANTITHETIUS, Signifies where a man endeavours to discharge himself of the fact of which he is accused, by recriminating and charging the accuser with the same fact. This word is mentioned in the title of a chapter in the laws of Comatus, cap. 47.

APATISATIO, An agreement or compact made with another. Upton, lib. 2. c. 12.

APORIARE, To bring to poverty. Walsingham in Reg. 2. In another sense, to hun or avoid.

APOSTARE, To violate: apostare leges, and apostate leges, wilfully to break or transgress, to apostatize from the laws. See Tit. Actio! 2. 1404. 

APOSTATA CAPIENDO, A writ that formerly lay against one who, having entered and professed some order of religion, broke out again, and wandered up and down the country, contrary to the rules of his order; it was directed to the sheriff for the apprehension of the offender, and delivery of him again to his abbot or prior. Reg. Orig. 71, 267.

APOSTACIES, are exempted from serving offices. See tit. Connable, Churchwarden. Their medicines are to be searched and examined by the physicians chosen by the college of physicians, and if faulty shall be burned, &c. 21 Hen. 8. c. 40: 1 M. &c. 2. c. 9. And apothecaries to the army are to make up their chefts of medicines at Apothecaries' Hall, there to be openly viewed, &c. under the penalty of 40l. See Physicians.

APPARITOR, or APPARITOR, A messenger that serves the process of the spiritual court. His duty is to cite the offenders to appear; to arrest them; and to execute the sentence or decree of the judges. &c. See stat. 21 Hen. 8. c. 5.

If a monition be awarded to an apparitor, to summon a man, and he upon the return of the monition avers that he had furnished him, when in truth he had not, and the defendant be therupon excommunicated; an action on the case at common law will lie against the apparitor for the falsity committed by him in his office, besides the punishment inflicted on him by the ecclesiastical court for such breach of trust. Ayl. Part. 702; 2 Blunt. 264.

APPARATOR COMITATUS, An officer formerly called by this name; for which the sheriffs of Buckinghamshire had a considerable yearly allowance; and in the reign of queen Elizabeth, there was an order of court for making that allowance; but the custom and reason of it are now altered. Hale's Ster, Acc. 104.

APPARLEMENT, from the Fr. Parlement, i.e. in like manner. A resemblance or likelihood, as appearance of war. Stat. 2 R. 2. st. 1. c. 6.

APPARURA, Furniture and implements. Caravanserai appurars is plough tackle, or all the implements belonging to a plough. Blount.

APPEAL, is used in two senses.

1. It signifies the removal of a cause from an inferior court or judge to a superior. From the French verb neuerter, apeller, of the same signification. As relative to this sense see the proper titles in this Dictionary. It may be well also in this place to observe the difference between an appeal from a court of equity, and a writ of error from a court of law. First, the former may be brought upon any interlocutory matter; the latter upon nothing but only a definitive judgment. Secondly, that on writs of error the House of Lords pronounces the judgment; on appeals it gives direction to the court below to rectify its own decree. 3 Comm. 52.

2. When spoken of as a criminal prosecution, it denotes an accusation by a private subject against another for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offence against the publick. And in this sense it is derived from the French verb alerter, appellet, to call upon, summons or challenge one. 4 Comm. 312. Or the accusation of a felon at common law by one of his accomplices, which accomplice was then called an approver. (See tit. Accusatory) Co. Lit. 287. See also Bract. lib. 3: Brit. c. 22, 25: Statur. lib. 2. c. 6.

CRIMINAL APPEALS are either capital or not capital—But of the latter fore appears de pecuc, de plagiis, di imprisonments, and of mayhem, are now become objects being turned into actions of trespass long since. Lecth's Harw. P. C. ii. 255: of the last however a few words shall be said hereafter. Capital appeals are either of Trespass or Felony. The latter may be subdivided into 1. Appeals of Debt, or as they are otherwise called Appeals of Murder. 2. Appeals of Larceny or Robbery. 3. Appeals of Rape. 4. Appeals of Assain, which last are now entirely obsolete. 1 Inst. 288 a. and see 2 Harw. P. C. c. 25.

This private process for the punishment of publick crimes, probably had its original in those times, when a private pecuniary satisfaction, or vengel was constantly paid to the party injured, or his relations to expiate enormous omissions. As there fore during the continuance of this custom, a process was certainly given, for recovering the vengel by the party to whom it was due; it seems that when these omissions by degrees grew no longer redeemable, the private process was still continued in order to infure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation. 4 Comm. 313-4.

It was also anciently permitted (as above hinted) for one subject to appeal another of high treason, either in the courts of common law (Brit. c. 22.) or in parliament; or, for treasons committed beyond the seas, in the court of the high constable and marshal. The cognizance of appeals in the latter still continues in force; and so late as 1631, there was a trial by battle awarded in the court of chivalry on such appeal of treason; [By Donald Lord Rae against David Ramsay, Ruffin, vol. 2. part 2. p. 112.] But the cognizance of appeals for treason in the common law courts was virtually abolished by the statute 5 E. 3. c. 9; & 25 E. 3. [Stat. 5. c. 4.] (1 Hale P. C. 349, 359.) and in Parliament expressly by statute 1 H. 4. c. 14. See 4 Comm. 314.

On this subject Mr. Kyd the ingenious editor of Comyn's Digest makes the following useful remark.—it does not appear that the appeal of treason is taken away by this statute (1 H. 4. c. 14.) or any other. The statute 5 E. 3. c. 9, only says, that none shall be attached, &c. against the form of the great charter and the laws of the land. The statute 25 E. 3. [Stat. 5. c. 4.] goes a little farther and says that none shall be taken by petition or su-ggestion to the king or to his council, but by indictment or presentment, or by process of law as the common law, &c. It is conceived that a writ of appeal is a writ original; (2 Harw. 232: 5 Bur. 2043;) therefore if an appeal of treason was part of the common law, these
these statutes do manifestly not take it away. The stat.
1 H. 4. c. 14. applying only to appeals in parliament.
See Com. Dig. tit. Appeal (A 1.)

However, as there has been no instance of any such
appeal, before any court of common law, either since the
making the stat. 1 H. 4. c. 14. nor for many years before,
the law relating to such appeals seems wholly obsolete
at this day. Longh Hawk. P. C. ii. c. 23. § 39.

An appeal of Felony may be brought for crimes com-
mitted either against the parties themselves or their rela-
tions. The crimes against the parties themselves are
Larrye, Rape, Maihem, and Asfou. The only crime
against one's relation, for which an appeal can be brought
is that of killing him, either by murder or manslaughter.
4 Comm. 314. (But this seems an unguarded affection
in the learned commentator, as an appeal is given to the
husband, next of kin, &c. by stat. in case of Rape. See
pol. iii. Appeal of Rape.)

Appeal of Death cannot be brought by every relation,
but only by the wife for the death of her husband, Magna
Charta c. 34. or by the heir male for the death of his an-
celor; which heirship was also confirmed by an ordinance
of king Henry the First to the four nearest degrees of
blood. Mor. 2. § 7. It is given to the wife or an ancestor
of the loss of her husband; therefore if the marriage
before or pending her appeal, it is lost and gone; (2 Iff.
68, 317.) or if the marriage after judgment, she shall not
demand execution. (2 Hawk. P. C. 24.) by which it
seems that the Court may award execution ex officio—sed
Abstitus. The heir must also be heir male, and such
as was the next heir by the course of the common law
at the time of the killing of the ascensor (H. P. C. 182.)
But this rule has three exceptions. 1st. If the perfon kild
leaves an innocent wife, the only and not the heir
shall have the appeal, 2d. If there be no wife, and the
heir be accused of the murder, the perfon who next to
him would have been heir male, shall bring the appeal.
3d. If the wife kill her husband the heir may appeal her
of the death (1 Lew. 325 : 1 Iff. 33.) And by the stat.
of Gloucester E. 1. c. 9. all appeals of death must be sued
within a year and a day after the completion of the Felony
by the death of the party; which seems to be only de-
claratory of the old common law. 4 Comm. 314. 5.

These several appeals may be brought previous to any
indictment; and if the appellee be acquitted therein he
cannot be afterwards indicted of the same offence. 2 Hawk.
P. C. c. 35. § 15. [But if the appellant does not prosecute
his appeal, or if he release to the appellant, the appellee
may be indicted. 3 Iff. 131 : Statutf. 147, 8.] But if a
man be acquitted on an indictment for murder, or found
guilty and pardoned by the king, still he ought not (in
frivolity) to go at large, but be imprisoned or let to bail
till the year and day be past, by virtue of stat. 3 H. 7.
c. 1. in order to be furthering to answer an appeal for the
same felony, though if he has been found guilty of man-
slaughter, or on indictment, and had had the benefit of
clergy and suffered the judgment of the law, he cannot
annually be appealed. 4 Comm. 315.

If the defendant on an indictment is convicted of man-
slaughter, and allowed his clergy, some of the books say
the he may lodge an appeal immediately before clergy
had, and others say clergy ought to be granted, and that
it is unreasonable an appeal should interpose presently
to prevent judgment. 3 Iff. 171. If a person, immedi-
ately after the verdict of manslaughter, put in an appeal
of murder, and before the appeal is arraigned, the defen-
dant demands his benefit of clergy; this is a good bar to
appeal, and praying of clergy, is having of clergy, though
the court delay calling the party to judgment, &c. 1 Salte.
60, 62. Kel. 93. But formerly it was held, that the
court might delay the calling a convict to judgment, and
thereby hinder him from his clergy, and make him liable
to an appeal, especially if the appeal were depending;
and where the record of a conviction of manslaughter is
erroneous, or insufficient, &c. the offender cannot plead
the conviction and clergy had therein, in bar of an appeal
or second indictment, &c. 2 Hawk. P. C. 36. § 12, 14.

If the appellee be acquitted, the appeller (by stat.
Wifm. 2 : 13 E. 1. c. 12.) shall suffer one year's impris-
onment and pay a fine to the king, besides damages
to the party; and if the appeller be incapable to make
restitution in damages, his abettors shall do it for him, and
also be liable to imprisonment. This provision as was
foreseen by the author of Plata (ib. 1. c. 34. § 48.) pro-
duced a great discouragement to appeals; so that thencefor-
ward they ceased to be in common use. 4 Comm. 316.

If the appellee be found guilty, he shall suffer the same
judgment, as if he had been convicted by indictment;
but with this remarkable difference, that on an indict-
ment the king may pardon and remit the execution; but
on an appeal, being the suit of a private subject, to make
atone ment for the private wrong, the king can no more
pardon it than he can remit the damages recovered
in an action of battery. 4 Comm. 316. See 2 Hawk. P. C.
c. 37. § 35. Jenk. 160. pl. 4. [But by the express provi-
dion of stat. 4 § 5. W. & M. c. 8. an accomplice convict-
ing two others guilty of robbery shall have the king's par-
don, which shall be a good bar to an Appeal of Robbery.]

The punishment of the offender may however be re-
mitted and discharged by the concurrence of all parties
interested in the appeal. 1 Hale P. C.

Having said thus much on the subject of appeals in
general, the following miscellaneous matter may serve
for further elucidation on I. Appeals of Death; II. Ap-
peals of Maihem; III. Appeals of Rape; IV. Ap-
peals of Robbery.—The student who wishes for the most
ample information on this subject must apply to Hawkins:

I. For the proceedings on an appeal of Death, see
the case of Bigly's widow v. Kennedy, 5 Burr. 2043; where
they are detailed much at length and with great exactness.
At the common law, a woman as well as a man might
have an appeal of death of any of her ancestors, and there-
fore the fit of a woman shall at this day have an appeal,
if he be heir at the death of the ancestor, for the fit is
not disabled, but the mother only; for the statute of Mag.
c. 34. gives proper appelle of feminines. 2 Iff. 68. the
husband shall not have appeal for the death of his wife,
but the heir only. Danw. Ab. 1. 488.

The judges are so far bound to take notice of this statute,
that if a woman brings an appeal of death of her father,
or of any other beside her husband, they ought ex officio
to abate it, the defendant takes no exception to it.
2 Hawk. P. C. cap. 23. § 42.

A woman shall have appeal where she shall have no other,
at where the close, from her barren. Br. Appeal. pl. 17. cites
50 E. 3. 15. for Tugley.

The
The wife is to be a wife de facto to be intitled to appeal; 2 Lev. 68, 317. Where a woman has judgment in appeal, of the death of her husband, she cannot have execution if she do not personally pray it: a judge went to a woman great with child, to know if she would have execution? She said, yes, and the appeal was hanged. 2 Hen. Cent. 137.

An idiot, or a person born deaf and dumb, or one attainted of treason or felony, or outlawed in a personal action, so long as such attainer or outlawry continues in force, cannot bring any appeal whatsoever. H. P. C. 183: 2 Hawk. P. C. c. 23. § 30.

The appellant is to commence his appeal in person; but he may proceed by attorney, having a special warrant of attorney signed. 1 Sal. 60. The appeal must be brought in a year and a day after the death of the person murdered; and the count must set forth the fact, and the length and depth of the wound, the year, day, hour, place where done, and what weapon, &c. And that the party died in a year and a day. 2 Inst. 655. & 6 & 6 Ed. 1. c. 9. principal and accessories before and after are to be joined in appeal. Danw. Abr. 493. And this is to be observed, though the accessory is guilty in another county.flat. 3 H. 7. c. 1.

An appeal is prosecuted two ways; either by writ, or bill: appeal by writ is when a writ is purchased out of chancery by one for another, to the intent he may appeal a third person of some felony committed by him, finding pledges that he shall do it: appeal by bill is where a man of himself gives up his accusation in writing, offering to undergo the burden of appealing the person therein named. Bracton.

This appeal may be brought by bill before the justices in the King's Bench; before justices of goal delivery, and commissioners of oyer and terminer, &c. or before the sheriff and coroner, in the county court; but the sheriff and coroner have only power to take and enter the appeal and count, for it must be removed by certiorari into B. R.

In appeal by original, principals and accessories are generally charged alike without distinction, till the plaintiff counts: but in otherwise in appeals by bill. Danw. 494.

There is but one appeal against the principal and accessory: if the principal is acquitted, it shall acquit the accessory; and both shall have damages against the appellant on a false appeal, or the accessory may bring a writ of conspiracy. 2 Lev. 183.

If the defendant in appeal is attaint, or acquit: or the Plaintiff nonsuit after appearance, which is peremptory, no other appeals lies. H. P. C. 188. If there be an indictment and appeal depending at the same time against the same person, the appeal shall be tried first, if the appellant be ready. K. B. 107. Otherwise the king would destroy the suit of the party. 2 Hen. 106. c. 4.

The cause of other appeals than of murder, as of robbery, rape, &c. are not within flat. 3 H. 7. c. 1; and therefore cannot fall upon an indictment within the year, stands at common law a good bar to an appeal of robbery, or any offence other than murder or manslaughter; and yet the judges at this day never forbear to proceed upon an indictment of robbery, rape, or other offence, though within the year, because appeals of robbery especially are very rare, and of little use, since the statute of 21 H. 8. cap. 11, gives restitution to the prosecutor as effectually as upon an appeal. 2 Hale's Hist. P. C. 250.

A charter of pardon is no bar of an appeal; and if the party be outlawed, &c. in appeal, and the king pardon him, a special warrant shall issue against the appellant, who may pray execution, notwithstanding such pardon; but if returned, &c., &c., and he appears not, then the appeal shall upon the pardon be discharged. H. P. C. 251. A peer in appeal of murder shall not be tried by his peers, but by a common jury; though he shall upon an indictment for murder. Vide flat. 3 H. 7. c. 1, directing appeals before the sheriff and coroners, or at king's bench, or goal delivery; and flat. 1 H. 1. c. 14. (mentioned before) that no appeals are to be pursued in parliament.

And where appeal of death is brought, the defendant cannot justify as defendants; but must plead not guilty, and the jury are to find the special matter. Br. App. 122. 3 Sal. 37.

The court ex officio will qualify the writ for apparent faults appearing on the face of the writ; as where the demurrer is defective for want of a material word, or where it wants those words of art which the law has appropriated for the description of the offence. 2 Hawk. P. C. c. 23. § 97.

Also the court will abate the writ when the declaration varies from the writ in some material point, either as to the reign of the king, or as to the county wherein the suit is laid, &c. 2 Hawk. P. C. c. 23. § 93.

A release of all manner of actions, or of all actions criminal, or of all actions concerning pleas of the crown, or of all appeals, or of all demands, is a good bar of any appeal; but a release of all personal actions does not bar an appeal of felony, being an action of a higher nature. Cros. Jut. 283. 1 Lev. 204. 2 Hawk. P. C. c. 23. § 155.

If the appelate pleads a special plea, which does not amount to a confession of the fact, he must at the same time plead over to the felony, except in special cases; as where such plea would be prejudicial to him, or where his plea declines the jurisdiction of the court. 2 Hawk. P. C. c. 23. § 137. 3 Car. 56.

In appeal of murder brought by the wife for the death of her husband; the appelate pleaded, that she was never lawfully married to her husband, but did not plead over to the felony; adjudged, that this plea being to be tried by the ordinary upon his certificate, whether the marriage was lawful or not, in such case the defendant need not plead over to the felony; but where the plea is triable by the common law, he must plead over to the felony. Cros. Eliz. 224.

II. Appeal of Malice. Is the accusing one that hath maintained another: but this being generally no felony, it is in a manner but an action of trespass; and nothing is recovered by it but damages. In an action of assault and battery, the court may increase damages, on view of the malice, &c. And though malice is not felony, in appeals and indictments of malice, the words felonie and malice are necessary. 3 Lev. 93. Bracton calls appeal of malice appelnum de plagia & malitiais, and writes a whole chapter upon it. Lib. 3. t. 167. cap. 1. In an action of malice, the defendant pleads that the plaintiff had brought an action of trespass against him, for the same wounding, and had recovered, and damages given, &c. and this was a good plea in bar of the appeal; because in both actions damages only are to be recovered. 4 Rep. 43. And where there is a recovery in assault and battery,
battery, &c., the jury give damages according to the hurt, which was done, and it shall be intended a maibem at that time; and therefore appeal of maibem, doth not lie. 
Hob. 94: 1 Leon. 318. In appeal of maibem, the appellant ought not to plead in abatement of the writ, and likewise over to the maibem; if he doth, he will lose the benefit of his plea to the writ. Moor 457: See 2 Hawk. P. C. c. 23. § 16—28.

III. Appeal of Rape. Lies where a rape is committed on the body of a woman. 3 Inst. 30. A femene covert, without her husband, may bring appeal of rape: and stat. 6 R. 2. c. 6, gives power where a woman is ravished, and afterwards consents to it, for a husband, or a father, or next of kin, there being no husband, to bring appeal of rape: also the criminal, in such case, may be attained at the suit of the king. 3 Inst. 131: 6 R. 2. cap. 6.

If a woman be ravished by her next of kin, and consents to him, and has neither husband nor father, the next of kin to him shall have the appeal; for he has disabled himself by the rape, whereby he becomes a felon. 3 Inst. 414.—Hale's Inst. P. C. 532. S. P. citas 28 H. 6. Cowen 459—2 Hawk. P. C. c. 23. § 64. S. P.

If there be no husband, nor father, then the appeal is given to the heir, whether male or female. Hale's P. C. 185.

This statute, as to the husband, shall be construed strictly, and be intended of a husband in possession, that there be good cause of divorce; for he is his husband till a divorce be had. See Br. Parliament. pl. 89. cites 1 H. 4. 13. 14: 2 Hawk. P. C. c. 13. § 62. says, that no waives guilty, &c., is a good plea, and shall be tried by the bishop's certificate, who, if the marriage were unlawful by reason of a pre-coitus, ought to certify against the appellant.

The statute of Wills. 1. c. 13, which reduced the crime of rape to a treason, enacts that appeal of rape shall be brought within forty days, but by that Wills. 2. c. 54, which makes this offence felony, no time is limited for the prosecution; so that it may be brought in any reasonable time. H. P. C. 186. Appeal of rape is to be commenced in the county where committed; and if a woman be assaulted in one county, and ravished in another, the appeal of rape lies in that county where she was ravished. H. P. C. 186. It is held, that though formerly the defendant might have his clergy, 'tis taken away by the stat. 18 Eliz. c. 17: Dyer 201. See further on this subject, 2 Hawk. P. C. c. 23. § 58—73.

IV. Appeal of Robbery, or Larceny. A remedy given by the common law, where a person is robbed of his goods, &c., to have restitution of the good stolen; as they could not be restored on indictment at the king's suit, this appeal was judged necessary. 3 Inst. 242. If a man robbed makes first pretext after, and apprehend and prosecute the felon, he may bring appeal of robbery at any time afterwards. Stannif. 62.

An infant shall have an appeal of robbery. St. P. C. 60. b. cap. 9.

Appeal of felony lies against a femene covert without her baron. St. P. C. 62. cap. 11.

So it lies against an infant; and so of all others who may commit felony. St. P. C. 62. cap. 11.

A woman at this day may have an appeal of robbery, &c., for she is not restrained thereof. 2 Inst. 68.

Adjudged, that an appeal of robbery may be brought by the party robbed twenty years after the offence committed, and that he shall not be bound to bring it within a year and a day, as he must do in appeal of murder. 4 Leon. 16.

But the courts of law would now scarce permit a prosecution after such a length of time, unless good cause could be shown why it had not been sooner commenced, as that the offender had fled the kingdom, and was but just returned, &c.

If one man robs several persons, every one of them may have appeal: likewise if the robber be attainted at the suit of one, he shall be tried at the suit of the rest, so as their appeals were commenced before the attainer. Dem. Abbr. 494. In appeal of robbery, the plaintiff must declare of all the things whereof he is robbed, or they shall be forfeited to the king; for the appellant can have restitution for no more than is mentioned in his appeal. 3 Inst. 227. By the Year book 21 Ed. 1. 16, restitution of goods was granted upon an outlawry, in appeal of robbery; but a person having preferred an indictment against a robber, and afterwards an appeal, on which he was outlawed, the plaintiff proved to have restitution of his goods, and it was denied. 2 Leon. 198.

If the court or declaration in appeal of burglary be sufficient, and the defendant is convicted at the suit of the party upon the appeal; he shall not be again impeached for the same offence at the king's suit. 4 Rep. 39. By stat. 21 H. 8. c. 11, the like restitution of stolen goods may be had on indictment after attainer, as on appeals; and appeals of robbery are now much out of use. See further 2 Hawk. P. C. c. 23. § 44—57; and this Dick. tit. Robbery.

APPEAL TO ROME. At the reformation in the reign of H. 8. the kingdom entirely renounced the authority of the see of Rome; and therefore by the several statutes 24 H. 8. c. 12, and 25 H. 8. c. 19 and 21, to appeal to Rome from any of the king's courts, (which tho' illegal before, had at times been connived at), to sue to Rome for any licence or dispensation; or to obey any process from thence are made liable to the pains of perjury, and by stat. 5 B. 46, c. 1, to defend the pope's jurisdiction in this realm is a perjury; for the first offence, and high treason for the second. See tit. Papists.

Where an appeal in an ecclesiastical case is made before the bishop, or his commissary, it may be removed to the archbishop; and if before an archbishop, to the court of arches, and from the arches to the archbishop; and when the cause concerns the king, appeal may be brought in fifteen days from any of the said courts to the prerates in convocation. St. c. 24 H. 8. c. 12.—And the stat. 25 H. 8. c. 19, gives appeals from the archbishop's courts to the king in chancery, who thereupon appoints commissioners finally to determine the cause; and this is called the court of delegates: there is also a court of commissioners of review, which commission the king may grant as supreme head, to review the definitive sentence given on appeal in the court of delegates.

APPEARANCE. In the law signifieth the defendant's filing common or special bail, when he is served with copy of, or arrested on any process out of the courts at Westminster: and there can be no appearance in the court of B. R. but by special or common bail. There are four ways for defendants to appear to actions; in person,
Attorneys subscribing warrants to appear, are liable to attachment, upon non-appearance. And where an attorney promises to appear for his client, the court will compel him to appear and put in common bail, in such time as is usual by the course of the court, and that although the attorney may have no warrant for appearance, nor shall repeating a warrant of attorney, to delay proceedings, excuse the attorney for his non-appearance, who may be compelled by the court. See Impy's Prat. K. B. 189, cites R. M. 1634. The defendant's attorney is to file the warrant the same term he appears, and the plaintiff the term he declares, under penalties by fl. 4 and 5 Ann. c. 18.

An attorney is not compellable to appear for any one, unless he take his fee, or back the warrant; after which the court will compel him to appear. 1 Salk. 87.

If an attorney appears, and judgment is entered against his client, the court will not set aside the judgment, though the attorney had no warrant, if the attorney be able and responsible; for the judgment is regular, and the plaintiff is not to suffer when in no default; but if the attorney be not responsible or sufficient, the judgment will be set aside; for otherwise the defendant has no remedy, and any one may be undone by that means. 1 Salk. 86.

Attachment denied by the court against an attorney, who appeared for the plaintiff without a warrant; but fail an action on the cause lies. Comb. 2.

In actions by original, appearances must be entered with the fiazer of the county; and if by bill, they shall be entered with the prothonotary; and by fl. 5 Geo. 2. c. 27, where defendant is served with a copy of the process appearances and common bail are to be entered and filed by him within eight days after the return of the process. And if defendant does not appear, plaintiff may on affidavit of the service of process enter a common appearance for defendant and proceed thence, fl. 12 C. 1. c. 29, and by fl. 25 Geo. 3. c. 80. c. 22, a common appearance may be filed by plaintiff without entering or filing of record, a memorandum or minute for defendant.

An appearance entered by plaintiff for defendant in a wrong name may be amended after declaration. 3 Wilf. 49.


In what cases common appearance will be ordered, see Impy's Prat. K. B. 189, and this Dist. tit. Bail, Arrest, &c.

On two writs return upon a seire & alias seire facias, they amount to a seire seire, and the plaintiff giving rule, the defendant is to appear, or judgment shall be had against him by default: and where a defendant doth not plead after appearance, judgment may be had against him. Style 258.

A wife may appear without her husband. 1 Wilf. 264.

A man may appear before the return of a capias ad respondentum. Id. 49. For the appearance is to the suit.

Appearance in person and by attorney are very different. Vide 1 Sid. 93, 322, 392; 4 Rep. 71: 1 Lev. 80: Roy. 59.

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

APPENDANT. [append.]: Is a thing of inheritance, belonging to another inheritance that is more worthy. As an adwolfe, common, court, &c. may be appendent to a major,
APPENDICIPUS.

A manor, common of fishing, appendant to a freehold; land appendant to an office; right to a leet. But land is not appendant to land, both being corporeal, and one thing corporeal may not be appendant to another that is corporeal; but an incorporeal thing may be appendant to it. Co. Lit. 121b. 4 Rep. 28; Danv. Abr. 509.

A forest may be appendant to an honour; and walls and eavors to a leet. Co. Lit. 567. And incorporeal things, adrowers, ways, courts, commons, and the like, are properly parcel of and appendant to corporeal things; as houes, lands, manors, &c. Plowd. 170; 4 Rep. 28.- If one diffuse me of common appendant belonging to my manor, and during the diction I sell the manor, by this the common is extinct for ever. 4 B. 3. 21; 11 Rep. 47.

Common of eoffers cannot be appendant to land; but to a houes to be spent there. Co. Lit. 120. By the grant of a walthage, the orchard and garden will pass as appendant.

Appendants are ever by prescription, and this makes a distinction between appendants and appurtenances, for appurtenances may be created in some cases at this day; as if a man at this day grant to a man and his heirs, common in such a moor for his beasts, levant orouching upon his manor; or if he grant to another common of eoffers or turbery in see-fimple, to be burnt or spent within his manor; by these grants, this commons are appendant to the manor, and shall pass by the grant thereof; in the civil law it is called adjiuntum. Co. Lit. 121b.

A way may be a quasi appendant to a houe, &c. and as such pass by grant thereof. Cre. Fac. 190.

What things may be appendant. Vide Plew. Con. 103. b. 104. a. 170. See also tit. Apportionments.

APPENDITIA, The appendage or pertinences of an estate. Hence our penitices or pen-houes, are called appendita domus, &c.

APPENNAGE, or appendage. Fr.] Is derived from appendant, or the German word appanage, signifying a portion. It is used for a child's part or portion; and is properly the portion of the king's younger children in France. Spiel. Chat.

APPENSURA. The payment of money at the scale or by weight. Hist. Elton. edit. Gale. l. 2. c. 19.

APPLES. A duty is granted on all apples imported into Great Britain. By what means apples are to be sold, see 1 Ann. lat. 1. c. 15.

APPODIARE. A word used in old historians, which signifies to clean on, or prop up anything. &c. Walshingham. 1271. Mat. Pict. Chron. Asia Regia ann. 1221.

APPONEC. To pledge or pawn. Neuburgensis lib. 1. c. 2.

APPORTIONMENT, apporriatione. [Is a dividing of a rent, &c. into parts, according as the land out of which it issues is divided among two or more. If a tenant recovers part of the land, a lease shall pay, having regard to the recovered, and what remains in his hands. Where the lessee recovers part of the land or enters for a forfeiture in part thereof, the rent shall be apportioned. Co. Lit. 148. If a man leases three acres, rending rent, and afterward grants away one acre, the rent shall be apportioned. Co. Lit. 144. Lessee for years leases for years, rending rent, and after devises this rent to three persons, this rent may be apportioned. Danv. Abr. 505. If a lease for life or years under rent, surrenders part of the land, the rent shall be apportioned:

but where the grantee of a rent-charge purports part of the land, there all is extinct at law. Mox. 231. But he shall have relief in equity, Tomil., Lisb. Traction of Equity l. 379. A rent-charge out of land, may not be apportioned; nor shall things entire, as if one holds lands by serjeant to pay yearly to the lord, at such a rent, &c. &c. Co. Lit. 149. But if part of the land, out of which a rent-charge issues, devolves to the grantee of the rent, this shall be apportioned. Danv. 457.

A grantee of rent releaseth part of the rent to the grantor, this doth not extinguish the residue, but it shall be apportioned, for here the grantor dealeth not with the land, only the rent. Co. Lit. 148. On partition of lands out of which a rent is issuing, the rent shall be apportioned. Danv. Abr. 507. And where lands held by lease rending rent are extended upon a legacy, one moiety of the rent shall be apportioned to the lexor. Ibid. 509.

If part of lands leased is surrounded by fresh water, there shall be no apportionment of rent; but if it be surrounded with the sea, there shall be an apportionment of the rent.

Deer 56.

The statute 11 Geo. 2. c. 19. § 15 has in certain cases altered the law as to the apportiioning of rents, in point of time; its being thereby enabled, 'That if any tenant for life shall happen to die before, or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of any such tenant for life, that the executors or administrats of such tenant for life, shall and may, in an action on the same, recover, of and from such under-tenant or under-tents of such lands, tenements, and hereditaments, if such tenant for life died on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively.'

Before this statute, the rent, by the death of a tenant for life, was lost; for the law would not suffer his representative to bring an action for the use and occupation, much less if there was a lease, and the remainder-man had no right, because the rent was not due in his time; nor could equity relieve against this hardship by apportioning the rent. 1 P. Wms. 392. The legislature having, however, by the above statute, interpolated in favour of tenants for life, its provisions have, by an equitable construction, been extended to tenants in tail. 136a. 2 Brot. C. Rep. 659.

But though the executor of tenant for life is now intitled to an apportionment of the rent, yet the dividends of money directed to be laid out in lands, and in the mean-time to be invested in government securities, and the interest and dividends to be applied, as the rents and profits would in case it were laid out in land, were held not to be apportionable, though tenant for life died in the middle or half of the year. 3 Ack. 502: Ains. Rep. 279: 2 Wms. 672: and the authority of the case on the will of Lord C. J. Esth., 3 Vin. Abr. 18. pl. 3 was overruled.

But where the money is laid out in mortgage till a purchase could be made, the interest is apportionable, 2 P. Wms. 176. This distinction, however, may be referred to interest on a mortgage being in fact due from day to day, and
APPORATION.

and to not properly an apporitionment: whereas the divi-
dends accruing from the publick funds are made payable
to certain days, and therefore not apporriable; and
upon the principle of this distinction the Master of the
rolls decreed an apporionment of the money, it be-
ing for the daily subsistence of the infant. 2 P. Wms.
501. See also Mr. Cor's note (1). And the principle ex-
tending to a separate maintenance for a lame covert, such
apporionment has, in such case, been allowed at law.
2 Black Rep. 1016. Q. Whether equity would not ap-
porion dividends of the funds, directed to be
apportioned for the maintenance of an infant, or secured
by the husband as a separate provision for his wife, as it
would be difficult for them to find credit for necessities,
if the payment depended on their living to the end of a
quarter? That equity will not in general apporion di-
vidends, see 3 Bro. Ch. R. 99.

As to apporionment of fines paid on renewal of leases,
by tenant for life, see 1 Bro. Ch. R. 440: 2 Bro. Ch.
Rep. 243, and the cases there referred to.

In what cases eviction of part of the land is a ground
for apporitionment, see Co. Litt. 143. See Poulebouec's
Treat. of Equity 376.

A man purchases part of the land where he hath common
apprentices, the common shall be apporriated: common
apprentices as otherwise, and if by the act of the party,
the common is extinct. 8 Rep. 79. Common appren-
tice and apporionment may be apporriated on alienation of part
of the land to which it is apporriated or apporriant.
Webb's Litt. 159. If where a person has common of pasture
found under, part of the land descends to him, this being
intire and uncertain cannot be apporriated: but if it had
been common certain, it should have been apporriated. Co.
Litt. 145.

APPORTUM, from the Fr. [appor.] Signifies properly
the revenue or profit which a thing brings in to
the owner: and it was commonly used for a conveyance or
security. It hath also been applied to an augmentation
given to an abbot out of the profits of a manor for his
better support. Apporionment of Sheriffs, The charging them with
money received upon their accounts in the exchequer.
Stat. 23 & 24 Car. 2. c. 22.

APPRAISERS of goods, are to be sworn to make true
appraisement; and, valuing the goods too high, shall be
obliged to take them at the price appraised. Statute 11
Ed. 1. 1 Stat. Alton Burn. See Appraisers.

APPRAISER, [Fr.] A fee or profit appraise, is fee
or profit to be taken or received. Stat. 2 & 3 Ed. 6.
chap. 3.

APPRENTICE, apprentiss, [Fr. apprendre] Contracts to learn. A young peron bound by indentures to a tradesman or artificer, who upon certain covenants is to
Teach him his mystery or trade.

It will be proper under this head to consider.

I. Who may be bound apprentices, and in what manner;
and who are compellable to receive them.

II. How they are to be provided for and governed
during their apprenticeship, and in what manner they are to
be employed, &c.

III. What trades may not be exercised without having
served on apprenticeship. IV. For what offenses they are punishable, and how.

APPRENTICE I.

Of apprentices acquiring settlement, see tit. Settlement.
[For more full matter relative to apprentices, particularly parish apprentices, see Mr. Conj's edition of Bell's
Poor Laws.]

1. It seems clearly agreed, that by the common law
infants, or persons under the age of twenty-one years,
cannot bind themselves apprentices, in such a manner as
to intile their masters to an action of covenant, or other
action against them for departing from their service, or
other breaches of their indentures; which makes it neces-
sary, according to the usual practice, to get some of
their friends to be bound for the faithful discharge of their
offices, according to the terms agreed on. 11 Co. 89 b.
2 Inf. 379, 580. 3 Leon. 63: 7 Mod. 14. And not-
withstanding flat. 5 Eliz. c. 4. enacted, that although
persons bound apprentices shall be within age at the time
of making their indentures, they shall be bound to serve
for the years in their indentures contained, as they
were at full age at the time of making them; it hath
been held, that although an infant may voluntarily bind
himself an apprentice, and, if he continue an apprentice
for seven years, he may have the benefit to use his trade;
yet neither at the common law, nor by any words of the
above mentioned statute, can a covenant or obligation of
an infant, for his apprenticeship, bind him; but if he
might have himself, the master may correct him in his ser-
vice, or complain to a judge of peace, to have him pur-
ished according to the statute, but no remedy lie against
an infant upon such covenant. Cro. Car. 179: Co. Car. 194. S. P.

But if any one entices an apprentice from his master's
service, or harbours him after notice, the master may
maintain a special action on the case, against the person
so doing. Vide 1 Sa. 380.

By the custom of London, an infant unmarried, and
above the age of fourteen, may bind himself apprentice
to a freeman of London, by indenture with proper coven-
tants; which covenants, by the custom of London, shall
be as binding as if he were of full age. Mec. 134:
2 Rum. 102: 1 Rol. Rep. 365: Palm. 361: 1 Mod. 271:
2 Kib. 687. But a waterman's apprentice is not, within
the custom of London, to bind himself being under twenty-
one. 6 Mod. 69.

A freeman's widow may take a maid-apprentice for seven
years, and inrol her as a youth; if the be above fourteen
years old; and if an exchange woman, that hath a hus-
band free of London, take such apprentice, she shall be
bound to the husband: and may be made free, at the end
of the apprenticeship, if she be then unmarried. See Lon-
den. 48.

By Stat. 5 Eliz. c. 4, sect. 35. The justices may com-
pel certain persons under age to be bound as apprentices,
and on refusal may commit them. And by flat. 13
Eliz. c. 2, and 18 Geo. 3. c. 47, churchwardens and over-
speers of the poor may bind out the children of the poor
to be apprentices, with the consent of two justices; if boys
until 21, if girls till that age or marriage. And if any
person refuse to accept a poor apprentice, he shall forfeit
10l. Stat. 8 & 9 W. 3. c. 30, § 5. All justices of peace
and churchwardens, &c. may put out poor boys appren-
tice to the sea-service. Stat. 2 & 3 Ann. c. 6, and 4 Ann.
c. 19. And by flat. 9 Jac. 1. c. 3, apprentices bound out
by publick charities are regulated. See title Chimney-
Sweepers.
APPRENTICE II.

As to the manner of their being bound.

By the statute 5 Eliz. c. 4, sect. 25, an apprentice must be bound by deed indented; and this must be complied with for all purposes except for the obtaining a settlement.

Indentures must also be indented in all towns corporate under stat. 5 Eliz. c. 5, and 5 Geo. 2. c. 45; and in London, by the custom, in the chamberlain's office there.

In London, if the indentures be not indented before the chamberlain within a year, upon a petition to the mayor and aldermen, &c., a fine of £1 shall lie to the master, to show cause why not indented; and if it was through the master's default, the apprentice may sue out his indentures, and be discharged: otherwise if through the fault of the apprentice, as if he would not come to present himself before the chamberlain, &c., for it cannot be indented, unless the apprentice be in court and acknowledge it. 2 Rel. Rep. 305: 3 Lawj. 361: 1 Med. 271.

Indentures are likewise to be stamped, and are chargeable with several duties by act of parliament.

By the act 8 Ann. c. 9, made perpetual by the act 9 Ann. c. 21, a duty of 6d. in the pound under 50l. and 12d. in the pound for sums exceeding it, with any apprentices (except poor apprentices) is granted. And if the full sum agreed to be performed, or the duty paid, indentures shall be void, and apprentices not capable of following trades; and the masters are liable to 100l. penalty.

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

The payment of the duties on apprentice-fees is enforced by several acts, 19 Geo. 2. c. 22; & 20 Geo. 2. c. 45; the former of which provides, that if the apprentice shall pay the duties, on the neglect of the master, he may recover back the apprentice fee; and the latter, that if no suit is commenced, and the master shall pay double duties within two years after the end of the apprenticeship, the indentures shall be valid, or the apprentice may pay them, and in such case recover double the apprentice-fee, by action, from his master.

The statutes 5 Eliz. c. 4 & 5 direct who shall take apprentices, and direct that every cloth worker, fuller, bowerman, scoller, tailor, or fire maker, taking three apprentices, shall have one journeyman, and for every other apprentice above three, also one journeyman. 35—Stat. 1 Jac. 1. c. 17, allows only two apprentices at a time to basters and felt makers (except apprentices); and, Stat. 13 & 14 Car. 2. c. 5, allows only two to Norriswh sewerers, who must then have also two journeymen. As by the statute 5 Eliz. c. 4, the justices of the peace, have a power of imposing an apprentice on a master, in consequence thereof an indictment lies for disobedience to their orders, either in not receiving, or receiving and after turning off, or not providing for such apprentice; for tho' an act of parliament prescribe an easier way of proceeding by complaint; yet that does not exclude the remedy by indictment. 6 Med. 163; 3 Salk. 381.

The justices of peace may discharge an apprentice not only on the default of the master, but also on his own default; for in such case it is but reasonable that the contracts, which were made by their authority, should be dissolved by the same power. Skin. 108: 2 Med. 159: 2 Salk. 471.

And under the said statute 5 Eliz. c. 4, justices, or the Sessions, may hear and determine disputes between masters and apprentices; and the Sessions may discharge the apprentice, and vacate the indentures, or correct the apprentice.

An order of justices on the master to return money is good, that it is not averred that he had any with the apprentice; for the order being to return money, it is necessary a proof of the receipt of it, as if it had been expressly alleged; and the court held, that the justices had jurisdiction to oblige the master to refund. Tin. 7 Geo. 2. in R. R. The King v. Anise, that an order of this nature has been quashed. Bot. (by Con. 5) 1 Pr. 5.

By the statute 20 Geo. 2. c. 19, Any two justices, upon complaint of any apprentice put out by the parish, or with whom no more than 5l. was paid, of any mis-usage, refusal of necessary provisions, cruelty, or other ill treatment by his master, may summon the master to appear before them; and upon proof of the complaint on oath, to their satisfaction, (whether the master be present or not, if service of the summons be proved,) to discharge such apprentice by warrant or certificate, for which no fee shall be paid: and on complaint of the master against any such apprentice, touching any misdemeanor, murther, or ill behaviour, the justices may punish the offender by commitment to the house of correction, there to be corrected and kept to hard labour, not exceeding a calendar month; or otherwise by discharging such offender. Either party may appeal to the Sessions, and the determination there is to be final. By 31 G. 2. c. 17. This act is extended to servants in husbandry, though hired for less than a year.

By the statute 6 Geo. 3. c. 25, Apprentices (with whom less than 10l. premium is paid) alleging themselves during their apprenticeship, shall serve an equal time beyond their term. In London, apprentices are all under the control of the chamberlain, whose jurisdiction is fixed in the several statutes. The statute 33 Geo. 3. c. 57, makes some additional regulations as to the punishing and relieving pariah apprentices.

With regard to the offering of apprentices, it hath been held, that an apprentice is not assignable. He cannot be bound nor discharged without deed. 1 Salk. 68. pl. 7. 1st. 15 W. 3. B. R.

But though an apprentice is not assignable, yet such assignment amounts to a contract between the two masters, that the child should serve the latter. 1 Salk. 68. pl. 7: 1st. 15 W. 3. B. R. Cafer v. Excheq. Par. 1st.

By the custom of the city of London, also an apprentice may be turned over from one master to another; and if the master refuse to make the apprentice free at the end of the term, the chamberlain may make him free: in other corporations, there must be a mandamus to the mayor, &c., to make him free in such case. 1st. 421. Wood's Inst. 51.

But it hath been held, that the justice of peace have a jurisdiction of discharging apprentices, and may bind them to other masters, that they cannot turn them over; and therefore an order that an apprentice, whose master was dead, should serve the remainder of his time with his master's widow's second husband, was quashed; because the justices have nothing to do about turning over an apprentice; and the said he applied to them, that could not give them a jurisdiction. Chitn. 324.
APPRENTICE III.

It seems agreed, that, if a man be bound to instruct an apprentice in a trade for seven years, and the master dies, that the condition is dispensed with, being a thing personal; but if he be bound further, that in the mean time he will find him in meat, drink, and clothing and other necessaries, here the death of the master doth not dispense with the condition, but his executors shall be bound to perform it as far as they have effects. 1 Sid. 216: 1 Keb. 761, 820: 1 Lev. 177.

But if a person is bound apprentice by a justice of peace, and the master happens to die before the term expired, the justices have no power to oblige his executor, by their order, to receive such apprentice and maintain him; for by this method the executor is deprived of the liberty of pleading "Jure administrativi," which he may do, in case covenant be brought against him, and must maintain the apprentice, whether he hath affairs or not. Carth. 251: 1 Sleth. 66: 1 Show. 403. It is said, however, that the executor or administrator may bind him to another master for the remaining part of his time. Born.

But it is said, that in this case of the master’s dying, by the custom of London, the executor must put the apprentice to another master of the same trade. 1 Sleth. 66, per Holt Ch. J.

By Stat. 32 Geo. 3, c. 57, in case of the death (43) or infirmity (48) of the master or mistress of a parliam­prenice (with a premium not exceeding £1) the justices, shall by indenture on the indenture, direct the apprentice to serve another master, &c. And so always. And masters, &c. of apprentices under Stat. 3 & 4 W. 3, c. 50, may with consent of two justices assign them.

Whatever an apprentice gains is for the use of his master; and whether he was legally bound or no, is not material, if he was an apprentice de facto. Sleth. 68. For inticing an apprentice to embezzle goods, indictment will lie. 1 Sleth. 530. A master may be indicted for not providing for, or for turning away, an apprentice. If a master gives an apprentice license to leave him it cannot afterwards be recalled. Mod. Co. 70. If an apprentice marries, without the master’s privity, that will not justify his turning him away, but he must sue his covenant. 2 Vern. 452. By the custom of the city of London a freeman may turn away his apprentice for gaming. Ibid. 241. Though if a master turns an apprentice away on account of negligence, &c. equity may decree him to refund part of the money given with him. 1 Vern. Rep. 450. As no apprentice can be made without writing; no one may be discharged by his master, but by writing under his hand, and with the allowance of a justice of peace, by statute. Dall. 121.

III. As to the exercising of trades.

By the common law no man may be prohibited to work in any lawful trade, or in more trades than one, at his pleasure. 11 Co. 53. So that without the act of parliament no man may be restrained, either from working in any lawful trade; or using divers mysteries or trades; therefore an act of parliament made to restrain any person herein, must be taken strictly, and not favourably as acts made in affirmation of the common law. Born.

It is enacted by the 5 Eliz. cap. 4, sect. 31, "That it shall not be lawful to any person or persons, other than such as now do lawfully use or exercise any art, mystery, or manual occupation, to set up, occupy, use or exercise any craft, mystery or occupation, now used or occupied within the realm of England or Wales, except he shall have been brought up therein seven years, at the least, as an apprentice; nor to set any person on work in such mystery, art or occupation, being not a workman at this day, except he shall have been apprenticed, as is aforesaid; or else having served as an apprentice, as is aforesaid, shall or will become a journeyman, or hired by the year; upon pain that every person willingly offending, or doing the contrary, shall forfeit and lose for every default forty shillings for every month."

It hath been ruled, that there are many trades within the general words and equity of this act, besides those which are particularly enumerated therein; yet it seems agreed, and hath frequently been adjudged, that in every indiction, &c. it must be alleged, that it was a trade at the time of making the statute, for the words thereof are, "any craft, mystery or occupation, now used, &c." from whence it seems to follow, that a new manufacture, which to all other purposes may be called a trade, is yet not a trade within this statute. 2 Sleth. 611: Palm. 538: 1 Sid. 679.

Also it seems agreed, that the act only extends to such trades as imply mystery and craft, and require skill and experience; that therefore merchants, husbandmen, gardeners, &c. are not within the statute; and on this foundation hath it been held, that a hump-dropper is not within the statute, as not requiring much learning or skill, and being what every husbandman doth use for his necessary occasions. 8 Co. 130: 2 Baff. 190: Co. Car. 499.

It is clearly agreed, that the following the common trade of a brewer, baker or cook, is within the statute, as unskilfulness herein may be very prejudicial to the lives and healths of his majesty's subjects; but it is at the same time agreed, that the exercising of any of these trades in a man's own house or family, or in a private person's house, is not within the restraint of the statute. 11 Co. 54 a: Co. Car. 499: Hoo. 185, 211: Moor 886: 8 Co. 129: Palm. 542: Lit. Rep. 251: Bridg. 141.

It hath been held, that this statute doth not restrain a man from using several trades, so as he had been an apprentice to all, wherefore it indemnifies all petty chapmen in little towns and villages, because their masters kept the same mixed trades there before. Carth. 163.

A man may exercise as many trades as he hath worked at, or served as an apprentice to, for seven years. 2 Wiff. 168.

It hath been resolved, that there is no occasion for any actual binding, but that the following a trade for seven years, is a sufficient qualification within the statute. 1 Sleth. 67: 2 Sleth. 613.

By Acts. 2 & 3 P. & M. c. 11, and 5 Eliz. c. 4, Aliens and demizens are restrained to use any handicraft or trade therein mentioned, unless they have served seven years apprenticeship within the realm, under the penalty of £1, per month. Hoo. 132. But it hath been adjudged, that if an apprentice serve seven years beyond ten, he shall be excluded from the penalties of the statute. 5 Eliz. c. 4. And so if he serves seven years, tho' he was never bound. 1 Sleth. 76.

So it hath been held, that serving five years to a trade out of England and two in England, is sufficient to satisfy the statute; but that there must be a service of a full time; and therefore serving five years in any country, where
where by the law of the country more is not required, will not qualify a man to use the trade in England. Ca.
in Law and Eq. 70.

By the statute 31 Eliz. cap. 5. sect. 7. It is enacted,
"That all suits for using a trade without having been
brought up in it, shall be sued and prosecuted in the
general quarter sessions of the peace, or assizes in the same
county where the offence shall be committed; or other­
wise inquired of, heard and determined in the assizes, or
general quarter sessions of the peace in the same county
where such offence shall be committed, or in the leet
within which it shall happen."

In the construction of this statute it hath been held,
that it restrains not a suit in the king's bench or exchequer,
for such offence happening in the same county where
these courts are sitting; for the negative words of the statute are not,
that such suits shall not be brought in
any other court, but that they shall not be brought in
any other county; and the prerogative of these high courts
shall not be restrained without express words. Cro. Jac.
178: Hob. 184: 4 Sail. 373.

But where the offence is in a different county, such
 suits in the, or any other courts out of the proper county
seem to be within the express words of the statute. Hob.
184, 327: Cro. Jac. 85.

Infants voluntarily binding themselves apprentice, and
continuing seven years, shall have the benefit of their
trades; but a bond for their service shall not bind them.
Cro. Car. 179. See the several statutes enabling soldiers
and mariners to exercise trades.

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

At common law, a servant or apprentice, without
any regard to age, may be guilty of felony in feloniously
taking away the goods of their master, tho' they were
goods under their charge, as a shepherd, butler, &c. and
may at this day for any such offence be indicted, as for
felony at common law; but at common law, if a man
had delivered goods to his servant to keep, or carry
for him, and he carried them away,[a] [b] [c] [d] [e] [f] [g] [h] [i] [j] [k] [l] [m] [n] [o] [p] [q] [r] [s] [t] [u] [v] [w] [x] [y] [z]

APPROVEMENT, APPROPRIE.

This contrivance seems to have sprung from the policy
of monastic orders. At the first establishment of pa­
rochial clergy, the tithes of the parish were distributed
in four parts—one for the bishop; one to maintain
the fabric of the church; a third for the poor; and the 4th
for the incumbent. The Sees of the bishops becoming
amply endowed, their shares sunk into the others; and
the monasteries inferring that a small part was enough
for the officiating priests, appropriated as many benefices,
as they could by any means obtain, to their own use;
undertaking to keep the church in repair, and to have it
confantly served. But in order to compleat such approp­
riation effectually, the king's licence and consent of
the bishop must first be obtained; because they might
both, some time or other have an interest by lapsed
in the benefit; if it were not in the hands of a corporation which
never dies. The consent of the patron is also necessarily
implied, because the appropriation could originally be
made to none but to such spiritual corporation as is also
the patron of the church; the whole being indeed nothing
else but an allowance for the patrons to retain the tithes
and glebe in their own hands, without presenting any
clerk. Petrol. 496—500.

When the appropriation is thus made, the appropi­
ators and their successors are perpetual patrons of the
church, and must sue and be sued in all matters con­
cerning the rights of the church by the name of patrons.
Hob. 307. —An appropriation cannot be granted over. Ibid.

This appropriation may be severer and the church
become disappropriate two ways. 1. If the patron or
appropriate present a clerk who is intituted and inducted
to the parsonage; for such incumbent is not to all intents
and purposes complete parson; and the appropriation
being once severtier can never be reunited again, unless
by a repetition of the same solemnities. Ca. Litt. 46:
7 Rep. 13. And, when the clerk so presented is distant
from the vicar, the rectory thus velled in him becomes
what is called a fine cure; because he has no cure of
souls, having a vicar under him to whom that cure is
committed; though this is not the only mode of creating
fine-cures. See 2 Burn's Ecc. Law 347. Also if the cor­
poration to which the benefice is annexed is dissolved
the parsonage becomes disappropriate at common law.
1 Comm. 386.

In this manner may appropriations be made at this
day; and thus were made, if not all, now existing,
originally made. At the dissolution of the monasteries
by l. 27 H. 8. c. 28, and 31 H. 8. c. 13, the appro­
priations belonging to those religious houses (being more
than one third of all the parishes in England) would at
common law have been disappropriated; had not a clause
been inserted in those statutes to give them to the king,
in the same manner as the alien priories had before been.
2 Inf. 584.—And from hence have sprung all the lay
impropriations or secular parsonies in the kingdom; they
having been afterwards granted out from time to time
719.—See also tit. Patron, Poets.

APPROPRIATE COMMUNION, to inclose or approp­
rinate any parcel of land, that was before open com­
mon, and thus to disfranchise it.

APPROVE, approbation. To augment a thing to the ut­
mot: to approve land is to make the best benefit of it,
by increasing the rent, &c. 2 Inf. 474.
APP

APPRAISER. A man that hath common in
the lord's waste, and the lord maketh an inclosure of part
of the waste for himself, leaving sufficient common with
See tit. Commons.
The word Appraiser is also used for the profits of the
lands themselves. Cramp. Jurist. 132. And the statute
of Mortes 20 H. 1. c. 4, makes mention of land newly
approved. F. N. B. 71. Approval is also the same
with improvement.

APPROVER, or PROVER, approbation.] One that
confessing felony committed by himself, appealed or
accused others to be guilty of the same crime. See tit.
Assizes, II. 5. He is called approver because he must
prove what he hath alleged; and that proof was anciently
by battle, or by the country, at the election of him
appealed; and the form of this accusation you may find in
Cramp. Juv. 270. See also Barton, lib. 3: Steph. Pl.
Cor. 52. If a person indicted of treason or felony, not
disabled to accuse, upon his arraignment, before any
plea pleaded, and before competent judges, confesseth the
indictment, and takes an oath to reveal all treasons and
felonies that he knoweth of; and therefore prays a coro
ner to enter his appeal, or accusation against those
that are partners in the crime contained in the indictment;
such a one is an approver. 3 Inst. 129: H. P. C. 102.

When a person hath once pleaded not guilty, he cannot
be an approver. 3 Inst. 129. And persons attainted
of treason or felony shall not be approvers; their accusation
will not then be of such credit as to put a man upon his
trial. 2 Henw. 205. Vide 3 H. 4. c. 2, as to char-
ters of pardon.

Infants under age of discretion may not be approvers:
and being in the discretion of the court to suffer one to
be an approver, this method of late hath seldom been
practised. See tit. Assizes, II. 5; tit. Appeal; and Lench's

APPROVERS. In old statutes, bailiffs of lords; in
their franchises are called their approvers, and approvers in
the marches of Wales were such as had licence de vendre &
assignat bestia, &c. But by the statute 2 Ed. 3. c. 12,
approvers are such as are from counties to inclose the
farms of hundreds, &c. held by sheriffs. Such persons
are as the letting of the king's demesnes, in small
manors, are called approvers of the king (approbatores regis)
flat. 51 H. 3. fl. 5. And in the flat. 1 Ed. 3. fl. 1. c. 8,
sheriffs are called the king's approvers.

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

APPUINANCES, pertinentia, derived from the
French appui, to belong to.] Signify things both corpo-
real and incorporeal appertaining to another thing as
princip: as: hamlets to a chief manor; and common of
pasture, piscary, &c. Allo liberties and services of tenants.
Hydt. cap. 99. If a man grant common of ejectors to be
burnt in his manor, these are appertaining to the manor;
for things appurtenant may be granted at this day. Co.
Litt. 121. Common appurtenant may be to a house,
pasture, &c. Out-houses, yards, orchards, and gardens
are appurtenant to a meadow; but lands cannot properly
be said to be appurtenant to a meadow. 1 Litt. Adv. 91.
And one mead, cannot be appurtenant to another:
ibid. Lands cannot, in the true sense of the words cum
pertinentibus, be appurtenant to the house; but the word
pertinentia may be taken in the sense of a usually lettered or
cor. 2; but it seems now settled that lands will not pass by
the word appurtean: t, but only such things which do
Lands, a common, &c. may be appurtenant to a
house; though not in a way. 3 Salk. 40. Grant of a ma-
nor, without the words cum pertinentibus, is held valid
all things belonging to the manor. Cocc's Rep. 31.
Where a person hath a mead, &c. to which ejectors
are appurtenant, and it is blown down or burnt by the act
of God; if the owner receive it, in the same place and
manner as before, he shall have the ancient appurtenances.
4 Rep. 86. A turbery may be appurtenant to a house;
so a feast in a church, &c. but not to land; for the things
must agree in nature and quality. 3 Salk. 49: Vide tit.
Appendant, and see Pip. Com. 103. 6, 104. b, 170: Allo
vide Com. Dig. 1 (v.) tit. Appendant and Appurtenances.

AQUAGE, aquagium, quae aquae agsion, i.e. aqua-
ductus & aqugangium.] A water-course.—In some
instances used for toll paid for water carriage. See Ewage.
ARACE, angl. To raise or erate from the French ar-
racher, eveler, Blom. 
ARAIA, Arabic grounds, Cosel.
ARARO, Iracando junctaque, i.e. To make oath in
the church, or some other holy place; for according to the
Riparian laws, all oaths were made in the church upon
the relics of saints. S. John.
ARATRUM TERRAE, As much land as can betilled
with one plough.—Aratrum terrae is the service which
the tenant is to do for his lord in ploughing his land. See
Arva.

ARBITRATION, ARBITRATOR, and ARBI-
TRAMENT. See tit. Award.

ARCA CYROGRAPHICA, f. e. cyrographum Judae-
orum. This was a common chest with three locks and keys,
kept by certain Christians and Jews; wherein all the con-
tracts, mortgages, and obligations belonging to the Jews
were kept, to prevent fraud; and this by order of R. 

ARCHERY. A service of keeping a bow, for the use
of the lord to defend his castle. Co. Litt. f. 1. 157.

ARCHBISHOP, archipresbyter.] The chief of the cleri-
gy in his province. See title Bishop.

ARCHDEACON, archipresbyter.] Is one that hath
ecclesiastical dignity, and jurisdiction over the clergy and
laymen next after the bishop throughout the diocese, or in
some part of it only. Archdeacon had anciently a superin-
tendent power over all the parochial clergy in every
diocese in their precincts; they being the chief of the
deacons; though they have no original jurisdiction, but
what they have get is from the bishop, either by pre-
scription or composition; and Sir Simon Diggg tells us, that,
it appears an archdeacon is a mere substitute to the bishop;
and what authority he hath is derived from him, his chief
office being to visit and inquire, and episcopo muniri, &c.
In ancient times archdeacons were employed in several duties
of collecting and distributing alms and offerings; but at
length, by a personal attendance on the bishop, and a
delegation to examine and report some causes, and com-
misions to visit the remote parts of the dioceses, they
became, as it were, overseers of the church; and by de-
gress advanced into considerable dignity and power.
Lafrarie,
Lafranc, archbishop of Canterbury, was the first prelate in England who instituted an archdeacon in his diocese, which was about the year 1075. And an archdeacon is now allowed to be an ordinary, as he hath a part of the episcopal power lodged with him. He visits his jurisdiction once every year; and he hath a court, where he may inflict penance, supple, or excommunicate persons, prove wills, grant administrations, and hear causes ecclesiastical, &c. subject to appeal to the bishop of the diocese under Stat. 24 Hen. 8. c. 12. It is one part of the office of an archdeacon to examine candidates for holy orders, and to instruct clerks within his jurisdiction, upon receipt of the bishop's mandate. 2 Co. 556: 1 Lev. 193: Wood's Hist. 30.

Archdeaconries are commonly given by bishops, who do therefore prefer to the same by collation; but if an archdeacon be in the gift of a laity, the patron doth prefer to the bishop, who institutes in like manner to another benefice; and then the dean and chapter do induce him, that is, after some ceremonies place him in a stall in the cathedral church to which he belongeth, whereby he is said to have a place in the choir. Walf. c. 15.

Archdeaconies, by Stat. 13 & 14 Car. 2, c. 4, are to read the Common Prayer and declare their assent thereto, as other persons admitted to ecclesiastical benefices; and also must subscribe the same before the ordinary; but they are not obliged by Stat. 15 Eliz. c. 12, to subscribe and read the thirty-nine articles; for although an archdeacon be a benefice with cure, yet it is not such a benefice with cure as seems to be intended by that statute, which relates only to such benefices with cure as have particular churches belonging to them. Walf. c. 15. And they are to take the oaths at the sessions, as other persons qualifying for offices.

The judge of the archdeacon's court (where he doth preside himself) is called the official. Wood's Hist. 30.

Where the archdeacon hath a peculiar jurisdiction, he is totally exempt from the power of the bishop, and the bishop cannot enter there, nor hold court; and in such case, if the party who lives within the peculiar be sued in the bishop's court, a prohibition shall be granted: for the statute intends that no suit shall be perpetuated; but if the archdeacon hath not a peculiar, then the bishop and he have a concurrent jurisdiction, and the party may commence his suit either in the archdeacon's court or the bishop's, and he hath election to choose which he pleaseth; and if he commence in the bishop's court, no prohibition shall be granted; for if it should, it would confine the bishop's court to determine nothing but appeals, and render it incapable of having any causes originally commenced there. L. Rayn. 123.

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

ARCHES COURT, curia de arcab. The chief and most ancient consistory court belonging to the archbishop of Canterbury for the debating of spiritual cases. It is so called from the church in London, commonly called St. Mary Le Bow, (de Archab.) where it was formerly held; which church is named Bow Church from the specele which is raised by pillars, built archwise, like so many bent bows. Cave.

The judge of this court is called the Dean of the Archab, or Official of the Archab court; he hath extraordinary ju-
knight was made by giving him the whole armour.
Orderum Vitae, lib. 8. de Herosio, &c.

ARM A LIBERA, A sword and a lance which were usually given to a servant when he was made free. Leg. With. cap. 6.

ARM A MOLUTA, Sharp weapons that cut, opposed to such as are blunt, which only break or bruise. Bract. lib. 3. They are called armes emplata by Feoe, lib. 1. c. 39. par. 6.

ARM A REVERSA, A punishment when a man was convicted of treason or felony, thus the historian Kingius, speaking of Hugh Spencer, tells us, Prince nefftrant cam non refistunt cum armis fort reversas. Lib. 3. p. 246.

ARMARIA, Vide Almaria.

ARMIGER, Esquire. A title of dignity, belonging to such gentlemen as bear arms; and these are either by courtesy, as sons of noblemen, eldest sons of knights, &c. Or by creation, such as the king's servants, &c. The word armiger has been also applied to the higher servants in convents. Paroch. Antiq. 576. See title, Esquire, and Spleman in v.

ARMISCARA, Is a sort of punishment decreed or imposed on an accused by the judge. Modest. lib. 3. p. 97; Woburnham, p. 430. At first it was to carry a scaffold at his back in token of subjection. Bracton says, that in the year 1176, the king of the Scots promised king Hen. 2. at York, Laniam & Siam, quom saper altarem Sancti Petri ad perpetuum injusti subjectiones memoriam offere. See Spleman in v.

ARMOUR and ARMS, In the understanding of law, are extended to any thing that a man wears for his defence, or takes into his hands, or useth in anger to strike or cast at another. Comp. Juv. 65. Arms are also what we call in Latin insignia, ensigns of honour; as to the original of which, it was to distinguish commanders in war; for the ancient defensive armures being a coat of mail, &c. which covered the persons, they could not be distinguished, and therefore a certain badge was painted on their shields, which was called arms; but not made hereditary in families till the time of King Rlbs. 1. on his expedition to regain Jerusalem from the Turks: and besides shields with arms, they had a filk coat drawn over their armours, and afterwards a fluff coat, on which their arms were painted all over, now the herald's coat of arms. Lid. 352.

By lat. 13 R. 2. fol. 1. c. 2. The constable (Lord High Constable) shall have cognizance of contracts touching deeds of arms done out of the realm; but it seems he cannot pass for painting coats of arms, &c. See 2 Haw. P. C. c. 4. §§ 38. and this Dit. ut. Constable.

By the common law it is an offence for persons to go or ride armed with dangerous and unusual weapons; but gentlemen may wear common armours according to their quality, &c. 3 Jef. 160.

By lat. 7 E. 1. fol. 1. The king may prohibit force of arms, and punish offenders of contracts touching deeds of arms done out of the realm. And by lat. 2 E. 3. fol. 1. enforced by acts. 7 R. 2. c. 13. and 20 R. 2. c. 1. None shall come with force and arms before the king's justices, nor ride nor go armed in array of the peace, on pain to forfeit their armours, and suffer imprisonment, &c.

Under these statutes none may wear (unusual) armours publicly upon pretence of protecting his person; but a man may assemble his neighbours to protect his house without transgressing the act. 1 Haw. P. C. 267. But no wearing of arms is within the flat, unless they are such as terrier, therefore the weapons of falhion, as swords, &c. or privy costs of mail may be worn. Lid. 10. And one may arm to suppress riots or dangerous insurrections. ibid. 268.

By the Bill of Rights, 1 W. & M. f. 2. c. 2. It is declared that "the subjects which are Protestant may have arms, for their defence suitable to their conditions as allowed by law." See Art. 53 §. 5. 6. And tit. Game and Fishable III. 2. 

Embattling the king's armours, felony;flat. 31 Eliz. c. 4. Armours may be exported, unless prohibited by proclamation; flat. 12 Car. 2. c. 4. Importing arms or ammunition prohibited; 1 flat. c. 8.

ARNALDIA, Arable grounds. This word is mentioned in Dunstable, tit. Essex.

ARNALDIA, Arwindia; A diaca that makes the hair fall off like the alopecia, or like a dillerem in foxes. Reg. Houden, p. 603.

AROMATARIUS, Lat. A word often used for a Greek, but held not good in law proceedings. 1 Pent. 142.

ARPEG, or Arpeg. An acre or furlong of ground: and according to the old French account in Domestay-book, 100 perches make an arpeg. The most ordinary acre, called Parquet de France, is one hundred perches square: but some account it but half an acre.

ARPECTORATOR, A measure or surveyor of land.

ARQUEBUS, Fr. Arquebuse. A short hand-gun, a caliver or pístol; mentioned in some of our ancient statutes. Law Fr. Dit.

ARRACK, A duty and excise is payable for arrack imported from the East Indies; See tit. Navigation Acts.

ARRAIATIO PEITUM, Is used in Pat. 1. Ed. 2. for the arraying of foot soldiers.

ARRAIERS, Arraiutors. Such officers as had the care of the soldiers' armour, and whose busines was to see them duly accounted. In several reigns commissions have been appointed for this purpose.

ARRaign, from the Fr. arranger, To set a thing in order; hath the same signification in law: but the true derivation is from the French arraigner, i.e. ad rigum poteur. To call a man to an answer in form of law. A prisoner is arraigned, when he is indicted and brought to trial; and to arraign a writ of affize, is to cause the demandant to be called to make the plaint, in such manner as the tenant may be obliged to answer. Co. Lit. 252. But no man is properly arraigned but at the suit of the king, upon an indictment found against him, or other record wherewith he is to be charged; and this arraignment is to take care that the prisoner do appear to be tried, and hold up his hand at the bar, for the certainty of the person, and plead a sufficient plea to the indictment. Co. Lit. 252. 263.

The prisoner is to hold up his hand only in treason and felony; but this is merely a ceremony; if he owns that he is the person, it is sufficient without it; and then upon his arraignment his setters are to be taken off; and he is to be treated with all the humanity imaginable. 2 Inf. 315; 3 Inf. 35. A peer need not hold up his hand, 4 St. Trials 214, 508.

Prisoners are now generally tried in their coats, because taking them off is usually attended with great pain and trouble.
ARR

An attainder of high treason has been reversed for the omission of an arraignment. 2 Hacik. P. C. 438, which see for further matter as to Arraignment.

If in action of slander for calling one thief, the defendant justifies that the plaintiff felle goods, and it is thereon taken; if it be found for the defendant in B. R. and for felony in the same county where the court sits, or before justices of affize, &c. he shall be forthwith arraigned upon this verdict of twelve men, as on an indictment. 2 Hat. Hift. P. C. 151.

The pleas upon arraignment are either the general issue, Not guilty; plea in abatement, or in bar; and the prisoner may demurr to the indictment: he may also confess the fact, but then the court has nothing more to do than to proceed to judgment against him.

For the solemnity of the arraignment and trial of a prisoner, see Dall. chapt. 185. p. 515.

ARRAY, arraya five arraignment. An old French word, signifying the ranking or setting forth of a jury of men impanelled upon a cause. And when we say to array a panel, that is, to set forth the men impanelled one by another. F. N. B. 157. To challenge the array of the panel, is at once to except against all the persons arrested or impanelled, in respect of partiality, &c. See Lit. 156.

If the sheriff be of affinity to either of the parties, or if any one or more of the jurors are returned at the nomination of either party; or for any other partiality; the array shall be quashed. The word array also relates, in a particular manner, to military order, as to conduct persons armed, &c. St. 13 & 14 Car. 2. cap. 3.

ARRAREAGES, averagia, from the French averier, recte, behind. Money unpaid at the due time, as rent behind; the remainder due on an account; or a sum of money remaining in the hands of an accountant.


ARRITATUS, arraigned, accused. Rot. Parl. 21 Ed. 1. 1.

ARRITATION, from the Spanish arrar, adcerum reddidum dimitter. The licensing the owner of lands in the forest, to incline them with a low hedge and small ditch, according to the offiie of the forest, under a yearly rent; seeing the arratone is a power to give such licences. Ordin. Forest. 34 Ed. 1. § 5.

ARRREST, arrastum from the Fr. arrest, to stop, or stay. A restraint of a man's person, obliging him to be obedient to the law; and it is defined to be the execution of the command of some court of record or officer of justice. An arrest is the beginning of imprisonment, where a man is first taken, and restrained of his liberty, by power or colour of a lawful warrant; also it signifies the decree of a court, by which a person is arrested. 2 Steph. Abr. 199.

ARRESTS are either in civil or criminal causes.

An arrest in a civil cause is defined to be the apprehending or restraining one's person by process in execution of the command of some court, or officer of justice. Wood's Inf. 575.

There are several statutes, securing the liberty of the subject, against unlawful arrests and suits. See Magna Charta, e. 29: 3 Ed. 1. e. 35: and See tit. Barrator.

Some persons are also privileged from arrest, viz. peers of the realm, members of parliament, preachers by birth (1 Inf. 111: 2 Inf. 50: 4 Bacon's Ab. 223.) peers of Scotland. (2 Str. 990.) peers by marriage. (Co. Lit. 16: 6 Co. 53: Dyer 79.) members of convocation actually attending thereon. (St. 8 H. 6. c. 1.) bishops, ambassadors, or the domestic servant of an ambassador, really or bare in that capacity. (St. 7 Ann. c. 12: 3 Wilf. 33: 2 Str. 759: 2 Ed. Rayn. 1544: 4 Barr. 2010: 17: 3 Barr. 1675.)

The king's servants, (1 Rayn. 152: 8 Mist. 12.) marshals, of the Helt, (1 Vest. 65.) clerks, attorneys, and all other persons attending the courts of justice, (4 Inf. 71: 2 Inf. 5471: 12 Mont. 163.) clerks and others performing divine service, and not merely staying in the church with a fraudulent design, (Stati. 50 E. 3. c. 5: 1 R. 2. c. 168.) suitors, (Bro. Privil. 57.) witnesses suppressed, and other persons necessarily attending any court of record upon business; (Sir T. Rayn. 101: 1 Vent. 11: Rules in Chanc. 217: 3 Inf. 141.)

A bankrupt coming to surrender, or within forty-two days after his surrender (5 5 Ge. 2. c. 30. § 5.) and See Comp. 150: witnesses properly summoned before commissioners of bankrupt, or other commissioners under the great seal, (1 Abk. 54.) but not creditors coming to prove their debts (4 Term. Rep. 777.) heirs, executors, or administrators. R. M. 1654: except on personal contracts by themselves (1 T. Rep. 716.) or in cases of delectavit (1 Salt. 98.) tailor or voluntor d得意: (unless the debt is twenty pounds.) Stati. 1 Geo. 2. c. 14. § 15: 31 Geo. 3. c. 13. § 65. See Barnes 114: 1 Str. 27: 1 Black. Rep. 29. 30. Officers of courts are allowed these privileges only where they sue or are sued in their own right; not if as executors or administrators, nor in joint actions. Hbk. 177: Dyer 24. p. 150: 2 Sid. 157: Ladb. 195: Godb. 10: 2 Rot. Abr. 274.

But this privilege does not extend to Irish or other foreign peers, (2 Inf. 48: 3 Inf. 70.) or to peers by marriage, if they afterwards intermarry with commoners. Co. Lit. 16: 2 Inf. 50: 7 Co. 15: 16.

And though the servants of peers necessarily employed about their persons and estates, could not formerly be arrested; (2 Str. 165: 1 Wilf. 278.) yet this privilege seems to have been taken away by the 11 Geo. 3. c. 56: § 6.

Members of corporations aggregate, and hundreders, not being liable to a capias, cannot be arrested in their corporate capacity, or on the statutes of hue and cry, &c. Bro. tit. Corp. 43: 3 Rob. 196, 7. Corporations must be made to appear by dicingari. Finch. 153: 3 Salt. 46.

In an action against husband and wife, the husband alone is liable to be arrested, and shall not be discharged until he have put in bail for himself and wife; 1 Vent. 49: 1 Mod. 8: and if she is arrested, she shall be discharged on common bail. 1 Term Rep. 486: 1 Salt. 115. See tit. Bail.

A clerk of the court ought not to be arrested for any thing which is not criminal, because he is supposed to be always present in court to answer the plaintiff. 1 Litt. 64. Arrears are not to be made within the liberty of the king's palace: nor may the king's servants be arrested in any place, without notice first given to the lord chamberlain, that he remove them, or make them pay their debts. Vide tit. Ambassador.

There is this difference between arrests in civil and criminal cases; that none shall be arrested for debt, trespass, &c. or other cause of action, but by virtue of a precept or commandment out of some court: but for treason, felony,
ARREST.

or breach of the peace, any man may arrest without warrant or precept. Term of Leas 54.

The abuses of gaolers and sheriff’s officers towards their prisoners are well restrained and guarded against by Stat. 32 Geo. 2. c. 28; the chief provisions of which are, that an officer shall not carry his prisoner to any tavern, etc. without his consent, nor charge him for any liquor but such as he shall freely call for, nor demand for captioun or attendance any other than his legal fee, nor exact any gratuity-money, nor carry his prisoner to gaol within twenty four hours after his arrest, unless the prisoner refuses to go to some safe house (except his own) of his own choosing. Nor shall any officer take for the diet, lodging or expenses of his prisoner more than shall be allowed by an order of seessions. Bailiffs to shew a copy of the act to prisoners, and to permit them to have and use their own bed and bedding, &c.


The fees now allowed by the Master for arrests on meane process in term are 10s. 6d. in the country 1s. 1d. and 1s. per mile. Inj:cy’s Sheriff 122.

By Stat. 29 Car. 2. c. 7. No writ, processes, warrant, etc. (except in cafes of treason, felony, etc. for breach of the peace) shall be served on a Sunday; on pain that the person serving them shall be liable to the fine of the party grieved, and answer damages, as if the same had been done without writ: an action of false imprisonment lies for arrest on a Sunday, and the arrest is void. 1 Salk. 78.

A defendant was arrested on a Sunday by a writ out of the May anchest, and the court of B. R. being moved to discharge him, it was denied; and he was directed to bring an action of false imprisonment. 5 Mod. Rep. 95. The defendant being taken upon a Sunday, without any warrant, and locked up all that day; on Monday morning a writ was got against him, by which he was arrested; it was ruled, that he might have an action of false imprisonment, and that an attachment should go against those who took him on the Sunday. Mod. Cof. 96. Attachments have been often granted against bailiffs for making arrests on Sunday; but affidavit is usually made, that the party might be taken upon another day. 1 Mod. 6. A person may be detained on a Sunday, where arrested the day before, &c. Mod. Cof. 231. And a man may be taken on a Sunday on an escape-warrant: or on fresh process when taken the day before. 2 Ld. Raym. 1028: 2 Salk. 625. when he goes at large out of the rules of the King’s Bench or Fleet prison, &c. Stat. 5 Ann. c. 9. Also Bail may take the principal on a Sunday, and confine him till Monday, and then render him. 1 Atk. 239: 6 Mod. 251. A party cannot be arrested on a Sunday on an attachment for non-performance of an award, it being only in the nature of a civil execution. 17. Rep. 250, denies 1 Atk. 581.

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

And now by Stat. 19 Geo. 3. c. 76. No person can be arrested or held to bail upon process out of any inferior court for less than 10s. but proceedings are to be had in inferior courts according to the directions of 12 Geo. 1. c. 29, extended by 19 Geo. 3. to debts under 10l.

By § 3 of 19 Geo. 3. c. 70, so much of all acts of parliament for the recovery of debts within certain districts, as gives power to arrest debtor for less than 10l. is repealed. And by § 4, when final judgment is obtained in such suits, and defendant cannot be found within the jurisdiction, the superior courts may issue execution.

By Stat. 11 & 12 W. 3. c. 9. No person is to be held to bail in W. c. on process out of the courts at W. under 50l for less than 20l. in trover the defendant may be held to bail of course. 2 Str. 1127: Comp. 529. For this is more an action of property than a suit. 1 Will. 25.

In an action of debt on a judgment, whether after verdict or by default, defendant cannot be arrested if he was previously held to bail in the original action. Say. 162.

It is now settled both in K. B. and C. P. that a defendant may be arrested in an action for debt, for damages and costs: though the original debt alone were under 10l. 4 Term Rep. 570. on the authority of 2 Black. Rep. 1274; (though it had been otherwise ruled in K. B. 2 Burr. 1359: 4 Burr. 2197: 3 Burr. 2560: Comp. 128.)

Bail cannot be had in an action on the second judgment, where bail has been given on the first. 2 Str. 782.

In what cases special bail shall be required, See tit. Bail.

Formerly one great obstractory to public justice, civil as well as criminal, was the number of privileged places, such as the Mint, Savoy, &c. under pretense of their being ancient palaces; but these sanctuaries for iniquity are now abolished, and the opposing any process therein is made highly penal by Stat. 8 & 9 W. 3. c. 27: § 15: 9 Geo. 1. c. 28: § 11 and 11 Geo. 1. c. 22; by which persons opposing the execution of process, or abusing the officer, if he receives any bodily hurt, are declared guilty of felony.

When a person is apprehended for debt, &c. he is said to be arrested; and writes express arrest by two several words capias and attachment, to take and catch hold of a man; for an officer must actually lay hold of a person, besides saying he arrests him, or it will be no lawful arrest. 1 Litt. Abr. 96. If a bailiff be kept off from making an arrest, he shall have an action of assault; and where the person arrested makes resistance, or assaults the bailiff, he may justify beating of him. If a bailiff touches a man, which is an arrest, and he makes his escape, it is a refusal, and attachment may be had against him. 1 Salk. 79. If a bailiff lays hold of one by the hand, (whom he had a warrant to arrest) as he holds it out at the window, this is such a taking of him, that the bailiff may justify the breaching open of the house to carry him away. 1 Vent. 306.

When a person has committed trespass or felony, &c. doors may be broke open to arrest the offender; but not in civil cases, except it be in pursuance of one arrested; or where a house is recovered by real action, or in ejectment, to deliver possession to the person recovering. Plowd. 5 Rep. 91. Action of trespass, &c. lies for breaking open a house to make arrest in a civil action. Mod. Cof. 105. But if it appears a bailiff found an outer door,
ARREST.

door, &c. open, he may open the inner door to make an arrest. Comb. 527.

In the case of Lea v. General Gaufel, the court of King's Bench determined, that the chamber door of a lodge, is not to be considered as his outer door; but that the street door being open, the officers had a right to force open the chamber door, the defendant being in the room, and refusing to open it. Coop. 1.

Also it is enacted by the 3 & 4 Jac. I. par. 33. That upon any lawful writ, warrant or process awarded to any sheriff or other officer, for the taking of any person recusant, standing excommunicated for such recusancy, it shall be lawful, if need be, to break any house. 2 Hawk. P. C. c. 14. § 10.

But it hath been resolved, that, where justices of peace are, by virtue of a statute, authorized to require persons to come before them to take certain oaths prescribed by such statute, the officer cannot lawfully break open the doors. 2 Hawk. P. C. c. 14. § 11.

An arrest in the night, as well as the day, is lawful. 9 Rep. 66. And every one is bound by the common law to arrest not only the sheriff in the execution of writs, and making arrests, &c. but also his bailiff that hath his warrant to do it. 2 Inst. 192. A bailiff upon an arrest ought to shew at whose suit, out of what court the writ issues, and for what cause, &c. when the party arrested solemnly himself to the arrest: a bailiff, sworn and known, need not shew his warrant, though the party demands it; nor is any other special bailiff bound to shew his warrant, unless it be demanded. 9 Rep. 68, 69; Corr. Fac. 485.

If an action is entered in one of the counties of London, a city constable may arrest the party without the sheriff's warrant. 1 Lev. Abr. 94. And by the custom of London, a constable may be arrested before the money is due, to make him find security: but not by the common law. 1 Nels. Abr. 258.

If a wrong person is arrested: or one for felony, where no felony is done, &c. it will be false imprisonment.

By Glyn Ch. 1. Mecb. 1658. If one be arrested by the sheriff of the county, within a liberty, without a search warrant, yet the arrest is good; for the sheriff is sheriff of the whole county, but the bailiff of the county may have his action against the sheriff, for entering of his liberty. But upon a quod minus, a sheriff may enter any liberty, and execute it impepid. Profit. Reg. 72.

With regard to arrests in criminal causes, it hath already been observed, that for treason, felony, or breach of the peace, any person may arrest without warrant or pretence. But the king cannot command any one by word of mouth to be arrested: for he must do it by writ, or order of his courts, according to law: nor may the king arrest any man for suspicion of treason, or felony, as his subjects may; because, if he doth wrong, the party cannot have an action against him. 2 Inst. 180.

Arrests by private persons are in some cases commanded. Persons present at the committing of a felony must use their endeavours to apprehend the offender, under penalty of fine and imprisonment. 3 Inst. 117; 4 Inst. 177.

And for this cause, by the common law, if any homicide be committed, or dangerous wound given, whether with, or without malice, or even by misadventure or self-defence, in any town, or in the lanes or fields thereof, in the day time, and the offender escape, the town shall be amerced, and if out of a town, the hundred shall be amerced. 3 Inst. 53.

And since the statute of Wingham, ii. 5, which ordains that walled towns shall be kept shut from fun-setting to fun-rising; if the fact happen in any such town by night, or by day, and the offender escape, the town shall be amerced. 3 Inst. 53.

And, as private persons are bound to apprehend all those who shall be guilty of any of the crimes above mentioned in their view, so also are they, with the utmost diligence, to pursue and endeavour to take all those who shall be guilty thereof, out of their view, upon a hue and cry levied against them. 3 Inst. 117.

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

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

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

With regard to arrests by public officers, they may be made either with or without process.

Arrests without process may be made by watchmen, constables, bailiffs of towns, or justices of peace. For the power of watchmen, see Stat. Wingham, c. 4. It has been held, that this statute was made in affirmation of the common law, and that every private person may by the common law arrest any suspicious night-walker, and detain him till he give a good account of himself. 2 Hawk. P. C. c. 12. § 6.

As to arrests by constables, see tit. Constable III. 1, 2.

The better opinion at this day, that any constable, or even a private person, to whom a warrant shall be directed from a justice of peace, to arrest a particular person for felony, or any other misdemeanor within his jurisdiction, may lawfully execute it, whether the person mentioned in it be, in truth, guilty or innocent: and whether he were before indicted of the same offence or not, and whether any felony were, in truth, committed or not: for, however the justice himself may be punishable for granting such a warrant, without sufficient grounds, it is reasonable that he alone be answerable for it, and not the officer, who is not to examine or disprove the real guilt or innocence of the proceeding. 2 Hawk. P. C. c. 13. § 17.

The doctrine of general warrants (i.e. to apprehend all the authors and publishers of libels, or generally all persons suspected of any particular crime, without mentioning the name of the person accused) seem exploded as illegal. See Leath's Hawk. P. C. ii. c. 13, § 19; and the note there as to Wilkes's cafe. But it is to be observed that the term general warrant used by Hawkins in that place, does not seem to mean a warrant, without the name of the
the party being specified, but one which does not contain the specific charge against the party. See the case of Money v. Leach, and also 4 Com. 201.

The great point gained by these determinations, was the refining persons from the malice or ignorance of the inferior ministers of justice.

With regard to arrests by bailiffs of towns, their power is founded on the above-mentioned statute of Winchelsea, c. 4. And as to arrests by justices of peace, arrests by their command are either by word of mouth or by warrant.

A justice of peace may, by word of mouth, authorise any one to arrest another, who shall be guilty of an actual breach of the peace in his presence, or shall be engaged in a riot in his absence. 2 Hawk. P. C. c. 13. § 14:

Debt. c. 117.

And a justice of peace may lawfully grant a warrant for apprehending, or arresting persons charged with treason, felony, premunire, or any other offence against the peace; and generally, wherever a statute gives one or more justices of peace a jurisdiction over any offence, any one justice of peace may, by his warrant, cause such offenders to be arrested and brought before him. 2 Hawk. P. C. c. 13. § 15.

But it is said, that anciently no one justice of peace could legally make out a warrant for an offence against a penal statute, or other misdemeanor; cognizable only by a felion of two or more justices; for that one single justice of peace hath no jurisdiction of such offence, and regularly those only who have jurisdiction over a cause can award process concerning it. Yet the long, constant, universal, and uncontroverted practice of justices of peace seems to have altered the law in this particular, and to have given them an authority, in relation to such arrests, not now to be disputed. Id. § 16.

A justice of peace may justify the granting a warrant for the arrest of any person upon strong grounds of suspicion of felony, or misdemeanor, but he seems to be punishable, as well at the suit of the king, as of the party grievred, if he grant any such warrant groundlessly, or maliciously, without such a probable cause as might induce a candid and impartial man to suspect the party to be guilty. Id. § 18.

Every warrant ought to be under the hand and seal of the justice of peace, and specify the day it was made out: if it be for the peace or good behaviour, it is advisable to set forth the special cause upon which it is granted, but if it be for treason or felony, or other offences of an enormous nature, it is said that it is not necessary to set forth the special cause, and it seems to be rather discretionary than necessary to set it forth in any case. Id. § 21—15.

The warrant may be directed to the sheriff, bailiff, constable, or to any indifferent person by name, who is no officer; for, though the justice may authorise any one to be his officer, whom he pleases to make such, yet it is most advisable to direct it to the constable of the precinct wherein it is to be executed; for that no other constable, and a fortiori no private person, is compellable to serve it. Id. § 27.

A bailiff or constable, if they be sworn, and commonly known to be officers, and act within their own precincts, need not shew their warrant to the party, notwithstanding he demand the sight of it; but that and all other persons whatsoever making an arrest, ought to acquaint the party with the substance of their warrant; and all private persons to whom such warrants shall be directed, and even officers, if they be not sworn and commonly known, and even then, if they act out of their own precincts, must shew their warrants, if demanded. Id. § 28.

And therefore Stat. 27 Geo. 2. c. 20, provides, that in all cases where a justice is empowered by statute to issue a warrant of distrife for levying a penalty, the officer executing such warrant, if required shall shew the same to the defendant, and suffer a copy to be taken.

The sheriff, having such warrant directed to him, may authorise others to execute it; but every other person, to whom it is directed, must personally execute it: yet, it seems, that any one may lawfully affh it. Id. § 29.

After premonition or indictment found in felony, &c. the first process is a capias, to arrest and imprison the offender: and if the offender cannot be taken, an exigent is awarded in order to outlawry. H. P. C. 209. For further matter See it. Dibb. Dibb.

ARREST OF JUDGMENT. To move in arrest of judgment, is to shew cause why judgment should be stayed, notwithstanding verdict given. Judgment may be arrested for good cause in criminal cases, as well as civil; if the indictment be insufficient, &c. 3 Inst. 210.

Arrest of judgment arises from intrinsic causes appearing upon the face of the record; for a judgment can never be arrested but for that which appears on the face of the record itself. Id. Ryn. 232. Motions in arrest of judgment may be made at any time before judgment signed. Doug. 747: Str. 845. Sunday is no day, 4 Burr. 21, 30, or 2 d. St. 768. It is a rule to shew cause, therefore, where much notice to be given, nor yet an affidavit to ground it on; as it arises out of the record; and after judgment upon demurrer, there can be no such motion made, as the court will not suffer any one to tell them that the judgment they gave on mature deliberation is wrong. It is otherwise indeed in the case of judgment by default; for that is not given in so solemn a manner; or if the fault arises on the writ of inquiry or verdict, for then the party could not allege it before. Str. 425.

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

After verdict a man may allege any thing in the record, in arrest of judgment, which may be assigned for error after judgment. 2 Roll. Abr. 716. And judgment after verdict, shall not be arrested for an objection that would have been good on demurrer. 3 Burr. 1725. For further matter See it. Amendment, Judgment; and for causes of arrest of judgment, See 3 Com. 393, 4.

ARREST OF ENQUEST is to plead in arrest of taking the enquest, upon the former issue, and to shew cause why an enquest should not be taken. Br. it. Repleid.

ARRESTANDIS BONIS NE DISSIPENTUR. A writ which lay for a man whole cattle or goods are taken by another, who during the contest doth or is like to make them away, not being of ability to render satisfaction. Rov. Orig. 126.

ARRESTANDO IPSUM QUI PECUNIAM RECEPIT, &c. Is a writ that lay for apprehending a person who hath taken the king's good-money to serve in wars, and hides himself when he should go. Rov. Orig. 24.

ARRESTO
ARRESTO FACTO SUPER BONIS MERCATORUM ALIENGENORUM. A writ that lay for a de
nizenz against the goods of alien found within this king
dom, in recompence of goods taken from him in a for
eign country, after denial of restitution. Reg. Orig. 129.
This the ancient civilians called clarigate; but by the
moderns it is termed regalis.
ARRETTED, arrestatus, quaifi: ad rem anacer.] Is
where a man is conveyed before a judge, and charged
with a crime. Stannus. Pl. Co. 45. And it is sometimes
used for impounded or laid unto; as no folly may be ar
retted to one under age. Littleton, cap. Remitter. Chaucer
Ue the verb arresteth, that is, lays blame, as it is inter-
preted. Braden says, ad reatum habere malefactorum, i.e.
to have the malefactor forth-coming, so as he may be
charged, and put to his trial. Bradl. lib. 5. cl. 2. cap.
10. And in another place, reletas de morte hominis, charged
with the death of a man.
ARROWS. By an ancient statute, all heads for ar-
rows shall be well brazed, and hardened at the point with
steel, on pain of forfeiture and imprisonment: and to be
marked with the mark of the maker. Stat. 7 H. 4. c. 7.
ARRURA.—In the black book of Hereford, De Oppe-
rationibus Arrura, signifies days' work of ploughing; for
anciently customary tenants were bound to plough certain
days for their lord. Una arurra, one day's work at the
plough: and in Wiltsire, earing is a day's ploughing.
Parth. Antq. p. 41. See Arruram terre.
ARSON, from ardo, to burn.] House-burning,
which is felony at common law. 3 Inst. 69. It must be
maliciously, voluntarily, and an actual burning: not put-
ting fire only into a house, or any part of it, without
burning; but if part of the house is burnt, or if the
fire doth burn, and then goeth out of itself, it is felony.
2 Inst. 188; H. P. C. 87, and thus the house of
another, for if a man burns his own house only, though
with intention to burn others, it is not at common law
felony, but a great misdemeanour, punishable with fine,
pillory, &c. But a pauper may be guilty of this offence
by burning the public workhouse. Leach's Hawk. P. C.
1. c. 39. § 3. and in note.
If a house is fired by negligence or mischance, it can-
not amount to arson. 3 Inst. 69; H. P. C. 85. Where
one burns the house of another, if it be not wilful and
malicious, it is not felony, but only trespass: therefore
if A shoot unlawfully in a gun at the cattle or poultry
of B. and by means thereof sets another's house on fire,
this is not arson; for though the act he was doing was
unlawful, yet he had no intent to burn the house. 1 Hale's
Hist. P. C. 569. By Stat. 5 Eliz. c. 13, to burn corn
in the four Northern counties, is felony without clergy.
And the Stat. 22 & 23 Car. 2. c. 7, makes it felony to
set barns, houses, stacks of corn, hay, &c. on fire in the
night-time, or any out-houses, or buildings: but the
offender may be transported for seven years.
By 9 Geo. 1. c. 22, (made perpetual by 31 Geo. 2.
c. 42.) Setting fire to any house, barn, or out-house, or to
any hovel, cock, cow, or flock of corn, straw, or wood,
and to refuse any officer is made felony without benefit
of clergy.—Leach's Hawk. P. C. 1. c. 53. App. 4. § 3.
As to other malicious burning, by Stat. 37 H. 8. c. 9.
§ 4, to burn any cart loaded with fuel, incurs a penal-
ty and treble damages. By Stat. 4 & 5 W. & M.
c. 23, to burn the covert for red or black game, one
month's imprisonment; and by Stat. 28 Geo. 2. c. 19, to
burn the covert for deer or game, a penalty between 40fl.
and 5l. By Stat. 1 Geo. 1. c. 48, to burn any wood or
coppice is felony. By Stat. 10 Geo. 2. c. 32, to set fire
to a coal mine, felony without clergy. By Stat. 9 Geo.
c. 30, to burn any mill, felony without clergy, if pro-
fected within eighteen months.
The offence of arson was denied the benefit of clergy,
by Stat. 2 H. 8. c. 1; but that Stat. was repealed by
Stat. 1 E. C. c. 12; and arson was afterwards held to be
outraged of clergy, with respect to the principal offender,
only by inference from the Stat. 4 & 5 P. & M. c. 41
which expressly denied it to the accursory before the fact:
though now it it expressly denied to the principal in all
cases within the Stat. 9 Geo. 1. c. 22; 4 Comm. 273,
which See and Leach's Hawk. P. C. vol. 1. and ii.
ARSE IN LE MAIN, burning in the hand, is the
punishment of criminals that have the benefit of clergy.
Terms of Ley.
ARSO, The trial of money by fire, after it was
coined. In Doncetlay we read, redhit 50l. ad arsum,
which is meant of lawful and approved money, whose al-
lay was tried by fire.
ART AND PART, Is a term used in Scotland
and the North of England; when one charged with a crime,
in committing the same, was both a contriver of, and
acted his part in it.
ARTHEL, A British word, and more truly written
artelho, or according to the South Welsh model, fig-
ting to svouch; as if a man were taken with stolen
goods in his hand, he was to be allowed a lawful artel
(or voucher) to clear him of the felony. it was part of
the law of Howl Dho; according to whose laws every
tenant holding of any other than of the prince or the
lord of the fee, paid a fine pro defension regis, which
was called arden arvhal. The privilege of artel occasioning
a delay and exemption of criminals from justice, provi-
sion was made against it by Stat. 28 H. 8. c. 6.—Blunt.
ARTICULI CLERI, (articles of the clergy.) Are sta-
tutes containing certain articles relating to the church
and clergy, and causes ecclesiastical. 9 E. 2. Stat. 1.
ARTICULUS, An article, or complaint, exhibited
by way of libel, in a court Christian. Sometimes the re-
ligious bound themselves to obey the ordinary, without
such formal process. Parth. Antq. p. 344.
ARTIFICERS, See lit. Manufactures and Manufac-
turers.
A stranger, artificer in London, &c. shall not keep
above two strangers' servants; but he may have as many
English servants and apprentices as he can get, Stat.
21 H. 8. c. 16. Artificers in wool, iron, steel, brafs, or
other metal, &c. perfons contracting with them to go
out of this kingdom into a foreign country, shall be fined
not exceeding 100fl. and be imprisoned three months:
and English artificers going abroad, not returning in six
months after warning given by our ambassadours, &c.
shall be disabled to hold lands by descent or devise, be
incapable to take any legacy, &c. and deemed aliens.
Stat. 5 Geo. 1. c. 27.
By the Stat. 23 Geo. 2. c. 12. Persons convicted of fe-
delitting artificers in the manufactures of Great Britain
or Ireland, out of the dominions of the crown of Great
Britain, to forfeit 500l. and to be imprisoned for twelve
months; for the second offence to forfeit 1000l. and be
K 2
imprisoned
imprisoned two years. See also Stat. 14 Geo. 3. c. 71; 15 Geo. 3. c. 5; and 21 Geo. 3. c. 37; by which heavy penalties are inflicted on masters of ships aiding in such seduction.

ARUNDEL. See London.

ARUNDINETUM, A ground or place where reeds grow. 1 Ser. 4. And it is mentioned in the book of Domesday.

ARVI, Supper. A feast or entertainment made at funerals, in the North part of England; arvici bread is the bread delivered to the poor at funeral solemnities. Coel. And avici, arvici, are used for the burial or funeral rights.

ASCETERIUM, Abbot, abburitium, atelierium, alestiriun, archirarium, from the Greek.] A monastery. It often occurs in old histories. Du Cange.

ASSAULT, or Assafl. Was a custom of purgation used of old in Wales, by which the party accused did clear himself by the oaths of 300 men. It is mentioned in ancient MSS. and prevailed till the time of Hen. 5. when it was abrogated. 1 H. 5. c. 6: Selom. And see Stat. 27 H. 8. c. 7.

ASSAULT, Assault from the Fr. Assaut, To make a blow.] Assault of redadulation or a culture. Peta. lib. 4. c. 21. And the word assault is by Spelman derived from exercitum, to pull up by the roots: for sometimes it is wrote efferit. Others derive it from exercitum or exercitus, which signifies to plow or cut up. Maxwood, in his Forst Laws, says it is an offence committed in the forest, by pulling up the woods by the roots, that are thicker and coverts the deer, and making the ground plain as arable land; this is esteemed the greatest trespass that can be done in the forest to vert or venison, as it contains in it waste and more; for whereas waste of the forest is but the falling down the coverts which may grow up again, efferit is a plucking them up by the roots, and utterly destroying them, so that they can never afterwards spring up again. See the Red book in the Escheuer.

But this is no offence if done with licence; and a man may, by writ of ad quod damnum, sue out a licence to efferit ground in the forest, and make it several for tillage. Rop. Orig. 257. Hence are lands called efferit: and formerly efferit rents were paid to the crown for forest lands efferit. See Stat. 22 Car. 2. c. 6. Assollections seem to be used in the same sense in Rol. Parl. Of assaults you may read more in Crewt. Jusj. p. 205. And Charta de Forstia, anno 9 H. 3. c. 6. Maxwood, part 1, p. 171.

ASSAULT, Assault, from the Fr. Assaut.] An attempt or offer, with force and violence, to do a corporal hurt to another; as by striking at him, with or without a weapon. But no words whatsoever, be they ever so provoking, can amount to an assault, notwithstanding the many ancient opinions to the contrary. 1 Han. P. C. 62. 41. See also Lamb. Eiren. lib. 1. c. 3: 22 Lib. Ass. pl. 60.

Assault does not always necessarily imply a hitting, or blow; because, in trespass for assault and battery, a man may be found guilty of the assault, and excused of the battery. 1 Han. P. C. 263. But every battery includes an assault; therefore if the assault be ill laid, and the battery good, it is sufficient. Id. 46.

If a person in anger lift up or stretch forth his arm, and offer to strike another; or menace any one with any fist or weapon, it is trespass and assault in law: and if a man threaten to beat another person, or lie in wait to do it, if the other is hindered in his business, and receives loss thereby, action lies for the injury. Lamb. lib. 3. 22 Aff. pl. 60.

Any injury whatsoever, be it never so small, being actually done to the person of a man, in an angry or revengeful, or rude or insolent manner, as by striking in his face, or any way touching him in anger, or violently jolting him, are batteries in the eye of the law. 1 Hawk. P. C. 263. 4.—from the Fr. Battre to beat or strike.

In many cases a man may justify an assault; thus, to lay hands gently upon another, not in anger, is no foundation of an action of trespass and assault: the defendant may justify malitier manus imposuit in defence of his person, or goods; or of his wife, father, mother, or master; or for the maintenance of justice. Brat. 9 E. 4: 35 H. 6. c. 51.

A servant, &c. may justify an assault in defence of a master, &c. but not t'outre. Id. Raym.

If an officer, having a warrant against one who will not suffer himself to be arrested, beat or wound him in the attempt to take him, he may justify it; so if a parent in a reasonable manner chastise his child, or master his servant, being actually in his service at that time, or a schoolmaster his scholar, or a gaoler his prisoner, or even a husband his wife (for reasonable and proper cause,) or if one confines a friend who is mad, and bind and beat him, &c. in such manner as is proper in his circumstances; or if a man force a sword from one who offers to kill another; or if a man gently lays his hand on another and thereby lay him from inciting a dog against a third person; or if I beat one (without wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to dispossess me of my lands or goods, or the goods of another delivered to me to be kept for him, and who will not desist upon my laying my hand gently on him and disturbing him; or if a man beat, wound or maim one who makes an assault upon his person, or that of his wife, parent, child, or master; or if a man fight with, or beat one who attempts to kill any stranger, if the beating was actually necessary, to obtain the good end proposed, or rendered necessary in self defence; in all these cases it seems the party may justify the assault and battery. See 1 Hawk. P. C. 259. and the several authorities there cited.

And on an indictment the party may plead Nol guilty, and give the special matter in evidence; but in an action he must plead it specially. 6 Meek. 171. Supposing it matter of justification.—If the facts, it is said it may be given in evidence, on the general issue. Bull. N. P. 17.

Also in cases of assault, for the assault of the wife, child, or servant, the husband, father, and master, may have action of trespass, for good service amiss. In case of a wife, husband and wife should join in the action for the personal abuse of the wife, (the husband not having sustained any damage). If the husband has been damaged, as by tearing her clothes, &c. or loss of her affiance, &c. in his domestic concerns, for that peculiar injury to himself he alone must sue.

As to parent and child, master and servant, unless injury accrues to the parent or master, the child or servant may sue.

For an assault, the wrong doer is subject both to an action at the suit of the party, wherein he shall render damages; and also to an indictment at the suit of the king,
ASSAULT.

king, wherein he shall be fined according to the heinousness of the offence. 1 Hawk. 263.

But if both are depending at one time, unless in very particular cases, the attorney general, will, on application, grant a specific process, if the party will not continue his action.

Stat. 8 & 9 W. 3. c. 11, enables, That where there are several defendants to any action of assault, &c. and one or more acquitted, the peron so acquitted shall recover costs of suit, unless the judge certify that there was a reasonable cause for making such person a defendant or defendants to such action.

If any person assault a privy councilor, in the execution of his office, it is felony. stat. 8 Ann. c. 16.

Stat. 6 Geo. 1. c. 23. fet. 11. If any person shall wilfully and maliciously assault any person in the public streets or highways, with an intent to tear, spoil, cut, burn or deface, and shall tear, spoil, cut, burn, or deface the garments, &c. of such person, it is felony; and the offender may be transported for seven years.

Assaulting persons in a forcible manner, with intent to commit robbery, is made felony and transportation, by stat. 7 Geo. 2. c. 21. And assaulting or threatening a councilor at law, or attorney employed in a cause against a man; or a juror giving verdict against him; his adversary for doing him, &c. is punishable on an indictment, by fine and imprisonment, for the contempt.

1 Hawk. 58. There are other assaults punishable in a peculiar manner—by stat. 5 Hen. 4. c. 6, & 11 Hen. 6. c. 11. render assaults on members of parliament more than usually penal, upon non-surrender on proclamation. Stat. 9 Eliz. 1. c. 3, gives a double criminal process against those who assault clergymen, indictment for the temporal offense, and proceed in the ecclesiastical court, for the spiritual one. By stat. 5 Eliz. c. 4, servants assaulting their master, mistress, or overseer may be imprisoned twelve months on conviction before two justices; By stat. 9 Ann. c. 14. § 8, to assault, beat or challenge another on account of money won by gaming incurs forfeiture of goods and two years' imprisonment. By stat. 9 Geo. 1. c. 23, to assault another by wilfully shooting at him is felony without clergy. By stat. 12 Geo. 1. c. 34, assaulting a master woodcutter or weaver, &c. for not complying with the demands of workmen, is felony and transportation for seven years.

ASSAY of weights and measures, (from the Fr. assayer, i.e. a proof or trial). Is the examination of weights and measures, by clerks of markets, &c. Reg. Org. 279.

ASSAYER OF THE KING, Assayer regii. An officer of the king's mint, for the trial of silver; he is indiscriminately appointed between the master of the mint and the merchants that bring silver thither for exchange. See tit. Gold and Silver; and Money.

ASSAYERS, Of plate made by goldsmiths, &c. See tit. Goldsmiths.

ASSAYSARE, To associate, to take as fellow judges; a word used in old charters. Cart. Abbat. Glatt. MS. § 57.

ASSECURARE, Adsecutare.] To make secure by pledges, or any solemn interposition of faith. In the charter of peace between Hen. 2. and his sons, this word is mentioned. Hav. ed. anno 1174.

ASSEMBLY UNLAWFUL. See tit. Riot.

ASSENT, or consent. To a legacy of goods, the assent of the executor is necessary. See tit. Executor and Legacy.

ASSAULTS, Fr. Assises, i.e. Suits.] Goods enough to discharge that burden which is cast upon the executor or heir, in satisfying the debts and legacies of the testator or ancestor. En. tit. Assises.

Assists are real, or personal, where a man hath lands in fee-simple, and dies seized thereof, the lands which come to his heir are assists real; and where he dies possessed of any personal estate, the goods which come to the executors are assists personal.

Assists are also divided into assists per se, and assists inter indivis. Assists per se, is where a person is bound in an obligation, and dies seized of lands which descend to the heir, the land shall be assists, and the heir shall be charged as far as the land to him descended will extend.

Assists inter indivis, is when a man indebted makes executors, and leaves them sufficient to pay his debts and legacies; or where some commodity or profit attached to them in right of the testator, which are called assists in their bands. Terms de Ley 50, 77.

As to assists by defect it is to be observed, that by the common law, if an heir had sold or aliened the lands which were assists, before the obligation of his ancestor was put in suit, he was to be discharged, and the debt was lost; but by statute, 3 W. & M. c. 14, made perpetual by 6 Will. 3. c. 14, the heir is made liable to the value of the land by him sold, in action of debt brought against him by the oblige, who shall recover to the value of the said land, as if the debt was the proper debt of the heir; but the value which is sold or aliened shall be paid before the action brought, shall not be liable to execution upon a judgment recovered against the heir in any such action.

And by stat. 29 Car. 2. c. 3. § 10, Lands of chiefque tenement shall be assists by defect; and by the same stat. § 12, Estates par autre vie shall be assists in the hands of the heir, if it come to him by reason of a special occupancy; and where there is no special occupant, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assists in their hands.

Where a man binds himself and his heirs in a bond, and dies leaving issue two sons, if the eldest son enters on the lands by descent as heir to the father, and die without issue; and then the youngest son enters, he shall be charged with assists as heir to the father. Dyn. 568. Lands which come to the heir by purchas shall not be assists; for it is only lands by defect that are assists. 1 Dods. Abr. 577.

A reversion in fee, depending upon an estate tail, is not assists; because it lies in the will of the tenant in tail to descend and bar it by fine, &c. 6 Rep. 50. But after the tail is spent, it is assists. 3 Mees. 257. And a reversion on an estate for life or years shall be assists. A reversion expectant upon the determination of an estate for life.
ASSETS.

is assents, and ought to be pleaded specially by the heir; and the plaintiff in such case may take judgment of it com
accident. Dyer 371; Cart. 129. An acknowledgment is assents; but not a presentation to a church actually void, which
may not be sold. Co. Lit. 374.

And lands by defect in ancient demesne will be assents in debt. But a copyhold estate, being a heri is
not assents; nor is any right to an estate without possession, &c. till recovered and reduced into possession. Dyer 377.

An annuity is no assent, for it is only a chose en action. Br. Assents per Defeant, p. 26.

Equity of redemption of an estate mortgaged, and for a term years to attend the inheritance are assents, 3 Lea. 32. An heir may plead vis per defenct, but the plaintiff may reply that he had lands from his ancestor; and special matter may be given in evidence, &c. 5 Rep. 60. A special judgment against assents shall only have relation to, and bind the land from the time of filing the original writ or bill. Carth. 235: See tit. Her. — and Com. Dig. tit. Assents.

Assents also are either legal or equitable; of the former some have been specified above; for the latter see Com. Dig. tit. Chancery, (2 G. t.) &c.

As to assents in mortmain. See tit. Executor, V. 5.

ASEWERIARE. To draw or drain water from marsh grounds. Mon. Aug. 2 vol. f. 334.

ASSIDERE, or Affidere. To tax equally. To affid. Mat. Civ. anno 1234. Sometimes it hath been used to affid an annual rent, to be paid out of a particular farm, &c.

To ASSIGN, affimates. Hath various significations; one general, as to set over a right to another, or appoint a deputy, &c. another special, to set forth or point at; as to affid error, affid false judgment, waive, &c. And in affidging of error, it must be shown where the error is committed; in false judgment, wherein the judgment is unjust; in waive, wherein especially the waive is done. P. N. B. 15, 112: Reg. Orig. 72. Alto justices are said to be affid to affid assents. tit. 11 H. 6. c. 2.

ASSIGNS or ASSIGNERS, affimates. L. 37 Those who are affidged, depur or appointed by the act of the party, or the operation of the law, to do any act, or enjoy any benefit on their own accounts and risks—an affid being one that posses a thing in his own right; but a deputy, he that acts in right of another. Perkins. Affid of by deed is when a lease of a term, &c. falls and affid the same to another, that other is his affid by deed: affid in law he whom the law so makes, without any appointment of the person; as an executor is affid in law to the testator. Dyer 6. But if there be an affid in deed, affid in law is not allowed: if one covenant to do a thing to J. S. or his affid by a day, and before that day he dies; if before the day he name any affid, the thing must be done to his affid named; otherwise to his executor or administrator, who is affid in law. 27 H. 8. 2.

He is called affid, who hath the whole estate of the affidee: and an affidee, though not named in a condition, may pay the money to save the land; but he shall not receive any money, unless he be named, Co. Lit. 215.

Affidgements may take advantage of forfeitures on conditions, when they are incident to the reversion, as for rent, &c. 1 And. 82. What covenants affid or benefit affidees, see tit. Covenant, Condition.

ASSIGNMENT.

Under the word affid, shall be included the assignee of an affid in reversion, the heir of an affid, or the affidee of an affid. Co. Lit. 384 b. Plowd. 23 15 b. So the affidee of an affidee's executor. 2 Show. 57. And a devisee. 2 Show. 39. Est. 161. But if an obligation be, to pay such person as he shall name by his will, or writing; there must be an express nomination, and his executor shall not take as affidee. M. 855 — an administrator is an affidee. Mor. 44.

ASSIGNMENT. Affidates. The setting over or transferring of the interest a man hath in any thing to another. Herein shall be considered principally what things are assignable. — As to what covenants, &c. affect or benefit affidgements, see tit. Condition, Covenants.

Assignments may be made of lands in fee, for life, or years; of an annuity, rent-charge, judgment, statute, &c. but as to lands they are usually of leases and estates for years, &c. And by the statute of frauds, flat. 29 Car. 2, c. s, no estate of freehold, or term for years, shall be assigned but by deed in writing signed by the parties; except by operation of law. A possibility, right of entry, title for condition broken, a trust, or thing in action, cannot be granted or assigned over, Co. Lit. 214.

But though a bond, being a chose in action, cannot be assigned over so as to enable the affidee to sue in his own name, yet he has by the assignment such a title to the paper and wax, that he may keep or cancel it. Co. Lit. 232. And in the assignment of bonds, &c. is always contained a power of attorney to receive and sue in the affidee's name.

Affid in equity a bond is assignable for a valuable consideration paid, and the affidee alone becomes intitled to the money; so that if the obligor, after notice of the assignment, pays the money to the obligee, he will be compelled to pay it over again. 1 Pern. 495: In the case of a policy of insurance the court of K. B. will do no act notice of an assignment, as to permit an action to be brought in the name of the affidee. 1 Term Rep. 26. And the assignor who has become a bankrupt may sue the assignee for the benefit of the affidee. 1 T. 619.

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

Tho' a possibility or contingent interest, be not greatable at law, yet (whether in real or personal estate) it is transmissible and vestible. 44. 5 W. 356: Ferriby 117: 8 Vite. Abr. 112: pl. 38: 2 Art. 616: 1 Vite. 396: Talfrey 44: 1 Term. Rep. 84: 2 Bow. 1151: 1 Bow. Rep. 18: Fetter's Con. Rep. 444. — The cases in the books, (1 C. R. 18: 1 Ch. Cas. 8: Poller. 31, 44: 1 P. Wms. 572: 2 P. Wms. 132: 2 Frel. 250: 9 Mod. 101: 2 P. Wms. 608,) abundantly prove, that interests in contingency, respecting personal estates are assignable in equity; but it may be material to observe, that in the case of assignments of such interests, Equity requires the affidee to shew that he gave a valuable consideration for the interest assigned; and therefore will not interpose to afford volunteers. But courts of equity will establish assignments of contingent interests against executors, administrators, or heirs at law, even where such assignments are made, not for consideration of money, but in consideration of love and affection, and advancement of children. 1 Vite. 409, see Foulsham's Treatise of Equity 1. 203.

An affidee must take the security assigned, subject to the same equity that it was in the hands of the obligee;
as if on a marriage treaty the intended husband enters into a marriage-brokage bond, which is afterwards assigned to creditors, yet it still remains liable to the same equity, and is not to be carried into execution against the obligor.

2 N.g. 428.

Where there is a bond for the performance of the covenants in a lease, if the lesee assigns the lease, he may likewise assign the bond; but this must be before any of the covenants are broken; but if any of the covenants are broken, and the lesee afterwards assigns the lease and bond, and the assignee puts the bond in suit, for those breaches, it is maintenance. Gohl. 81.

'This enacted by the statute 7 Jac. 1. c. 15. That a lease to the king shall not assign any debts to him, but such as did originally grow due to the lessee; afterwards there was a debtor to the husband in 2000l. by a statute; the husband made his wife executrix, and died; the married again one G. D. who was indebted to the king, and then the husband and wife assigned this statute to the king in satisfaction of the debt due to him; adjudged, that the assignment was good, for the second husband had the statute in right of his wife, and by consequence the debt was not originally due to him; yet because he might release the statute, it is the same thing as if it had been originally taken in his name. 2 C. 32.

An office of trust is not grantable or assignable to another; and therefore it was adjudged, that the office of a flayer, which was an office of trust could not be assigned; nor could it be extended upon a statute. D. 267.

A bare power is not assignable, but where it is coupled with an interest it may be assigned: 2 Fl. 420: 2 Mod. 417.

Assignment of rents, &c. is a duty in attorn, and not assignable. See Skir. 6.

It hath been doubted if a lease for years, before entry and possession, be assignable. See Show. 201.

A leasee out of possesion cannot make any assignment of his term off the land, but must first enter, and reconstituce his possesion, or seal and deliver the deed upon the land, which puts the assignee into actual possession. Dall. 81.

But it has been adjudged that where lease for years of the crown is put out of his estate by a stranger, yet he may assign the term, though he is not in possession; because the reversion being in the crown, he cannot lawfully be put out of possession, but at his own will. C. Edw. 275.

If lease for years assign all his term in his lease to another, he cannot reserve a right in the assignment; for he hath no interest in the thing by reason of which the rent reserved should be paid; and where there is no reversion there can be no diffis: but debt may lie upon it, as on a contract. 1 Lid. 46. 99. Where the executor of a lease assigns the term, debt will not lie against him for rent incurred after the assignment; because there is neither privity of contract, nor estate between the lessor and executor: but if the leasee himself assigns his lease, the privity of contract remains between him and the lessor, although the privity of estate is gone by the assignment; and he shall be chargeable during his life; but after his death, the privity of contract is likewise determined. 3 Rep. 14. 24.

Although a lease make an assignment over of his term, yet debt lies against him by the lessor or his heir; (not having accepted rent from the assignee) but where a lease assigns his term, and the lessor his reversion, the privity is determined, and debt doth not lie for the reversion against the first lesee. Mor. 472. Vide Barker v. Downer. 1 Sh. 191.

A man made a lease, provided that the lesee or his assign should not alien the premises without licence of the lessor, &c. who afterwards gave licence to the lesee to alien; by this the lesee or his assigns may alien in infinitum. 4 Rep. 49.

Ajudged, that some things in respect of their nature are not assignable, or to be granted over; as for instance, if the dower in tail holder of the donor by fealty, he cannot assign it over to another, because fealty is incident to, and inseparable from, the reversal; so if the founder of a college grant his foundation, though it be to the king, the grant is void, because it is inseparable from his blood.

11 Rep. 66. 6, in Magdalen College's case.

Several things are assignable by acts of parliament, which seem not assignable in their own nature; as promissory notes and bills of exchange by Stat. 3 & 4 Ann. c. 9; bail-bonds by the sheriff, by 4 & 5 Ann. c. 16; a judge's certificate for taking and prosecuting a felon to conviction, by 10 & 11 W. 3. c. 23; a bankrupt's effects by the several statutes of bankruptcy.

A lease was made for years of land, excepting the woods; the lesee grants the trees to the lesee, and he assigns the land over to another; the trees do not pass by this assignment to the assignee. Gohl. 188.

Where tenant for years assigns his estate, no consideration is necessary; for the tenant being subject to payment of rent, &c. is sufficient to vest an estate in the assignee: in other cases some consideration must be paid. 1 Mod 263. The words required in assignments are, grant, assign and for ever, which may amount to a grant, feufoffment, lease, release, confirmation, &c. 1 Jef. 301.

In these deeds the assignor is to covenant to have harmless from former grants, &c. That he is owner of the land, and hath power to assign; and that the assignee shall quietly enjoy, and to make further assurance; and the assignee covenants to pay the rent, and perform the covenants, &c.

Form of an Assignment of a Bond.

To all whom these presents shall come, greeting: Whereas A. B. of, &c. in and by one bond or obligation, bearing date, &c. becom bound to C. D. of, &c. in the penal sum of, &c. conditioned for the payment of, &c. and interest at a day long since passed, as by the said bond and condition thereof may appear: And whereas there remain due to the said C. D. for principal and interest on the said bond, the sum of, &c. Now know ye, That the said C. D. for and in consideration of the said sum of, &c. of lawful British money to him in bond paid by E. F. of, &c. the receipt whereof the said C. D. doth hereby acknowledge; be the said C. D. hath assigned and for ever, and by these presents doth assign and for ever unto the said E. F. the said vested bond or obligation, and the money thereupon the and owing, and all his right and interest of, in, and to the same. And the said C. D. for the consideration of aforesaid. Hath made, constituted and appointed, and by these presents doth make, constitute and appoint, the said E. F. his executors and administrators, his true and lawful attorney and attorn, or other, for himself, and in his name, and in the name and names of his executors and administrators, but for the sole and proper
ASSIGNMENT.

ASSIS CADERE. This word signifies to be non-suited; as when there is such a plain and legal insufficiency in a suit, that the complainant can proceed no further on it. Petru, lib. 4. c. 15; Bristow, lib. 2. c. 7.

ASSIS CADIT IN JURATUM, is when a thing in controversy is so doubtful, that it must necessarily be tried by a jury. Petru, lib. 4. c. 15; See post Attaint.

ASSIS CONTINUANDA, a writ directed to the justices of assize for the continuation of a cause, when certain records alleged cannot be produced in time by the party that has occasion to use them. Reg. Origg. 247.

ASSIS PROROGANDA, is a writ directed to the justices affigned to take assizes, for the delay of proceedings, by reason of the party's being employed in the king's business. Reg. Orig. 268.

ASSIS, Fr. Affis.] According to our ancient books is defined to be an assembly of knights, and other substantial men, with the justice, in a certain place, and at a certain time appointed. Coftam. Norman. cap. 24. This word is properly derived from the Latin verb assisto, to fit together; and is also taken for the court, place or time, when and where the writ and process of assize are served or taken. And in this signification assist is general; as when the justices go their several circuits with commission to take all assize; or special, where a special commission is granted to certain persons (formerly oftentimes done) for taking an assize upon one or two defendants only. Brev. lib. 3.

Concerning the general assize, all the counties of England are divided into six circuits; and two judges are assigned by the king's commission to every circuit, who hold their assizes twice a year in every county (except, Middlesex, where the king's courts of record do sit, and where his courts for his counties palatine are held; and these judges have five several commissions.

1. Of oyer and terminer, directed to them and many other gentlemen of the county, by which they are empowered to try treasons, felonies, &c. and this is the largest commission they have.

2. Of gaol delivery, directed to the judges and the clerk of assize allocate, which gives them power to try every prisoner in the gaol committed for any offence whatsoever, but none but prisoners in the gaol; so that one way or other they rid the gaol of all the prisoners in it.

3. Of affises, directed to themselves only, and the clerk of assize, to take affises; and do right upon writs of affise brought before them by such as are wrongfully thrust out of their lands and possessions; which writs were heretofore frequent, but now men's possessions are sooner recovered by ejectments, &c.

4. Of nisi prius, directed to the judges and clerk of assize, by which civil causes brought to assize, or before the day prefixed, the judges of assize come into the county in question.—This they are sure to do in the preceding vacation.

5. A commission of the peace, to every county of the circuits; and all justices of the peace of the county are bound to be present at the assize; and their assizes are to give their attendance on the judges, or they shall be fined. Bristow's Eleon. 15, 16, &c. 5 Comm. 60, 209.

There is a commission of the peace, oyer and terminer, and gaol delivery of Newgate, held eight times in a year, for the city of London and county of Middlesex, at Justice Hall in the Old Bailey, where the lord mayor is the chief judge.

In Wales there are but two circuits, North and South Wales; for each of which the king appoints two persons learned in the laws to be judges; flat. 18 Eliz. c. 8. If justices sit by force of a commission, and do not adjourn the commission, it is determined. 4 Inf. 295.

The constitution of the justices of assize was begun by Hen. 2; though somewhat different from what they now are: and by Magna Charta justices shall be sent through every county once a year, who, with the knights of the respective shires, shall take assises of novel definite, &c. in their proper shires, and what cannot be determined there shall be ended by them in some other place in their circuit; and if it be too difficult for them, it shall be referred to the justices of the bench, there to be ended. 9 Hen. 3. c. 12.

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

ASSIS is likewise used for a jury, where assizes of novel definite are tried: the panels of assizes shall be arrayed, and a copy indented delivered by the sheriff, &c. to the plaintiffs and defendants six days before the elections, &c. if demanded, on pain of 40 l. by flat. 6 Hen. 6. cap. 2. And assize, is taken for a writ for recovery of possession of things immovable, whereof any one and his ancestors have been dispossessed. Likewise, in another sense, it signifies an ordinance or statute as Assisa Panis et Cerifer. Reg. Orig. 270.

ASSIS OF NOVEL DISSEISIN. Assisa nova dis­jilina.] See Diffusia.

An assise of novel diffusia is a remedy maximinimum, for the recovery of lands or tenements, of which the party was dispossessed. 2 Inf. 410. And it is called novel diffusia, because the justices in oyer went their circuits from seven years to seven years; and no assize was allowed before them.
ASSISE.

...
ASSISE.

The court of Common Pleas or King's Bench may hold plea of affisse of land in the county of Middlesex, by writ out of Chancery. 1 Litt. 105. And in cities and corporations an affisse of freehold lies for recovery of possession of lands, within forty days after the affisse, as the ordinary assise in the county. F. N. B. 7.

ASSISE OF MORT D'ANCESTOR, [Affiva mortis antecessoris.] is a writ that lay where a man's father, mother, brother, sister, uncle, aunt, &c. died, deceased of lands, tenements, rents, &c., that were held in fee, and after their death a stranger abated. Reg. Orig. 223. It is good as well against the abator, as any other in possession of the land; but it lies not against brothers or sisters, &c., where there is privity of blood between the person profecting and them. Co. Lit. 244. And it must be brought within the time limited by the statute of Limitations, [50 years, 3 Comm. 189.] or the right may be lost by negligence.

If tenant by the curtesy alien his wife's inheritance, and dieth, the heir of the wife shall have an affisse of mort d'ancstor, if he have not affixed by defect from the tenant by the curtesy; and the same shall be as well where the wife was not feised of land the day of her death, as where she was feised thereof. New Nat. Br. 489. A warden of a college, &c., shall have affisse of mort d'ancstor of rent where his predecessor was feised. And a man may have affisse of mort d'ancstor of rents, against several persons in several counties; having in the end of the writ several summonses against the tenants: and the process in this writ, is summonses against the party; and if he makes default at the day of the affise returned, then the plaintiff ought to sue out a writ of summons; and if he makes default again, the affise shall be taken, &c. Br. Abst. 88.

In a mort d'ancstor, if the tenant says, the plaintiff is not next heir, and this is found against him, the points of the plaintiff may be taken in the assise. See Jack. 215, 287: 4 Co. 4 b: 2 Inst. 26: F. N. B. 181: 3 Comm. 389.

The plaintiff need not be so certain in affise as in other writs; the judgment being to recover per aliam recognitum; and if the plaintiff be not so certain as that the recognitors may put the defendant into possession, it is sufficient. Dyer 84.

To prevent frequent and vexatious dislikes, it is enacted by the statute of Morton, 20 Hen. III. c. 3, that if a person disdained recovery seisin of the land again, by affise of void dislike, and be again disdained of the same tenements by the same dislike, he shall have a writ of re-dislike; and, if he recover therein, the re-dislike shall be imprisoned; and, by the statute of Mortimer 52 Hen. III. c. 8, shall also pay a fine to the king; to which the flat. Wifem. 2. (13 E. 1) c. 25, hath superadded double damages to the party aggrieved. In like manner, by the same statute of Morton, when any lands or tenements are recovered by affise of mort d'ancstor, or other jury, or any judgment of the court, if the party be afterwards disdained by the same person against whom judgment was obtained, he shall have a writ of self dislike, against him; which subjecteth the self dislike to the same penalties as a re-dislike. The reason of all which, as given by Sir Edward Coke, (2 Inst. 83, 84,) is because such proceed-
ASSISE

ASSUMPSIT.

W. fin. 2. (13 El. 1) c. 20; though they differ in this point of form, that thes ANGRIL writs (like all other writs of pricipe) expressly affect a title in the demandant, (wit, the seal of the ancoetor at his death, and his own right of inheritance) the assise affeets nothing directly, but only plays an inquiry whether thoese points be so. 2 Lea. 359. There is also another ancetoral writ, denominated a WIPER ob iterative, to establish an equal division of the land in question, where on the death of an ancetor, who has several heirs or co-ancetors, one enters and holds the others out of possession. F. N. B. 197; Finch. L. 293; Leg. Orig. 226; New Nat. Br. 237; 8: Book on Real Actions. But a man is not allowed to have any of these ancoetoral writs for an abatement, consequent on the death of any collateral relation, beyond the 4th degree, (Hale on F. N. B. 221) though in the lineal ancetor he may proceed ad infinitum. (Fitzh. Abr. tit. Coifinage 15.) 3 Comm. 186.

It was always held to be law, that where lands were devisible in a man's last will by the custum of the place, there an assise of mort a d'ancetor, did not lie. For, where lands were so deisible, the right of possession could never be determined by a procefs, which inquired only of these two points, the feifin of the ancetor, and the heirship of the other ancetors. And hence it may be reasonable to conclude, that when the statute of wills, (the point of form, that these are devifiable, an assise of mort ancoetor can be commenced by a writ or patent sent by the king, either at his own motion or at the suit of a party plaintiff, to the justices appointed to take assises, or of pertain and tenants, &c to have others associated to them. And this is usual where a justice of assises dies; and a writ is issued to the justices alive to admit the person so associated: where a justice is disabilit, this is praeticed. F. N. B. 185; Reg. Orig. 261, 269, 223. The clerk of the assises is usually associated of course; in other cases, some learned officers at law are appointed. It hath been held, that an association after another association allowed and admitted, doth not lie; nor are the justices then to admit other association in that writ afterwards, so long as that writ and commisston stand in force. Br. Abf. 386; Mich. 3. H. 6. The king may make an association unto the sheriff upon a writ of assises, as well as upon assise of novel admissio. New Nat. Br. 416, 417. See mort tit. Assise.

ASSISE, Rented or farmed out for such an assises, or certain assised rent in money or provisions. TERRA ASSISE was commonly opposed to terra dominica; this last being held in domain, and occupied by the lord, the other let out to inferior tenants. And hence comes the word to assises or allot the proportion and rates in taxes and payments.

ASSISTMENT, A weargild or compensation, by a pecuniary mulct: from the preposition ad, and the Sex. Ass. vice, word, or voice; expedit ad expend. delict. solut. solut. Blount.

ASSOCIATION, associatio.] Is a writ or patent bung by the king, either at his own motion or at the suit of a party plaintiff, to the justices appointed to take assises, or of pertain and tenants, &c. to have others associated unto them. And this is usual where a justice of assises dies; and a writ is issued to the justices alive to admit the person so associated: also where a justice is disabilit, this is praeticed. F. N. B. 185; Reg. Orig. 261, 269, 223. The clerk of the assises is usually associated of course; in other cases, some learned officers at law are appointed. It hath been held, that an association after another association allowed and admitted, doth not lie; nor are the justices then to admit other association in that writ afterwards, so long as that writ and commisston stand in force. Br. Abf. 386; Mich. 3. H. 6. The king may make an association unto the sheriff upon a writ of assises, as well as upon assise of novel admissio. New Nat. Br. 416, 417. See mort tit. Assise.

ASSOICE, assimilier.] To deliver from excommunicacion. Stawf. Pl. Cr. 72. In fl. 1 H. 4. c. 10, mentioned being made of K. Ed. 3, it is added, whom God assh.

ASSUMPSIT, from the Lat. Assumpsit.] Is taken for a voluntary promise, by which a man adumbrates or takes upon him to perform or pay any thing to another: it comprehends any verbal promise, made upon consideration, and the
the civilians express it diversely, according to the nature of the promise, calling it sometimes *pactum*, sometimes *promissum*, or *co.ntractum*, &c. Terms de Ley. An action upon the *causa* *affermatis* (or as it is also expressed, *on promissis*) is an action the law gives the party injured by the breach or non-performance of a contract legally entered into; it is founded on a contract either express or implied by law; and gives the party damages in proportion to the loss he has sustained by the violation of the contract.

4 Co. 92: 9th Ed. 607.

Here is to be considered,

I. In what cases an *affirmatis* is or is not the proper action.

II. What marks will create an *affirmatis*.

III. What consideration is sufficient.

IV. Of the proceedings.

I. In every action upon *affirmatis*, there ought to be a consideration, promise, and breach of promise. 1 Leon. 405.

The law distinguishes between a general *indebitatus* *affirmatis* and a *special affirmatis*: for though they come under the denomination of actions on the *causa*, and the party is to be repaid in damages alike in both; yet, the former seems to be of a superior nature, and will lie in no case, but where debt will lie: but for a particular undertaking, or collateral promise to discharge the debt or duty of another, a *special affirmatis* must be brought. 1 New Abr. 163.

Affirmate the *causa* on *affirmatis*, for not making a good effate of land sold, according to promise; not paying money upon a *bargain* and *sale*, according to agreement; not delivering goods upon promise, or demand; this is by express *affirmatis*; an implied *affirmatis* is where goods are sold, or work is done, &c. without any price agreed upon; in an action on the *causa* by *quantum meruit* or *quantum valebat* the law implies a promise and satisfaction to the value.

When one becomes legally indebted to another for goods sold, the law implies a promise that he will pay this debt; and if it be not paid, *indebitatus affirmatis* lies. 1 Don. Abr. 25. And *indebitatus affirmatis* lies for goods sold and delivered to a stranger ad reque.issement of the defendant. Ibid. 27. But on *indebitatus affirmatis* for goods sold, you must prove a price agreed on, otherwise the action will not lie; though this is helped by laying a *quantum meruit* with the *indebitatus affirmatis*, wherein if you fail in proof of the price agreed on, you may recover the value. 2 Wood's Abr. 330.

If A. and B. having dealings with each other, make up their accounts, and B. is found in arrear, and promises to pay the balance, an *affirmatis* lies against him, on honest comptes deffent and A. need not bring a writ of account. 2 R. 629; Kal. 70. S. P. 1 Red. Abr. 7. 3 P. 1 Red. Rep. 396: Bull. 288: Mor. 874.

So if A. gives money, or delivers goods to B., to merchandize therewith, and B. promises to render an account, *affirmatis* lies on this express promise, as well as account. 1 Red. 9: Br. Acc. 81: Raym. 211: 2 R. 813: Vide Style 151, 283: Cr.

II. So if a tenant, being in arrear for rent, failles an account of arrears with his landlord, and promises to pay him the sum in which he is found in arrear, *affirmatis* lies on this promise. 1 Red. Abr. 9: Br. Acc. 81: Raym. 211: 2 R. 813: Vide Style 151, 283: Cr.

III. So if a man comes to buy goods, and they agree upon a price and a day for the payment, and the buyer takes them away, an *affirmatis* for the money is the proper action, for *causa* will not lie for the goods, because the property was changed by a lawful bargain, and by that bargain the buyer was to convert the goods before the money was due. 1 New Abr. 167.

If a man and a woman, being unmarried, mutually promise to marry each other, and afterwards the man marries another woman, by which he renders himself incapable of performing his contract, an *affirmatis* lies, in which the woman that receives damages. Cr. 233.

An *indebitatus affirmatis* lies for money by custom due for usance; adjudged upon a special verdict, by which it was found, that the sum demanded was due by custom, but that there was no express promise to pay it. 2 Lev. 176.

If one receives my rent, under pretence of title, I may have an *indebitatus affirmatis* against him. 2 Mod. 163.

If a farm sole marries a man, who in truth is married to another woman, and he makes a lease of her lands and receives the rents, he may bring an *indebitatus affirmatis* against him for so much money received to her use; adjudged after verdict. 1 Sale. 28.

Where action is brought upon a *contract*, if the plaintiff mistakes the sum agreed upon, he fails in his action; but if he brings it upon the *promissum* in law, arising from the debt, there, though he mistakes the sum, he shall recover. Allyn. 29. Every contract made between parties, implies a mutual promise for performance: and yet an action may be brought on a reciprocal promise by one against the other, although he who brings it hath not performed on his side. 2 Dyer 30, 75. When an *affirmatis* or promise is the ground of the action, it must be precisely set forth. 3 Lev. 319. If a promissum be made without limitation of time for its performance, reasonable time shall be allowed, if there be an immediate consideration for it; and not during life. 1 Lit. Ab. 111. On promiss to deliver a thing such a day, the party is bound to do it without request. 1 Lev. 284. But if a promise be to do any thing upon request, the request is necessary to intitle the plaintiff to the action, on which it shall arise. 1 Lev. 48.

That in every *indebitatus affirmatis*, it is alleged the defendant promised to pay on request and that he was requed, and refused payment, yet no request is ever proved. The time for the performance of the promissum being elapsed, and the promissum not performed, the law presumes request, unless in a particular case where a thing is not to be done, until request. Every executory contract, and debt that is not upon record, or on a specially, which may be turned into damage, imports in it a *special affirmatis* in law, and one may have debt or action on the *causa* upon it at his election; for when a man doth agree to pay money, or to deliver any thing, he thereby promissum to pay or deliver it. Plowd. 118: 1 Cro. 94.

Every
ASSUMPTIS II.

Every contract executory implies an assumpsit to pay money at the day agreed, or immediately, if no time be limited. 

The assumpsit in an agreement that will be binding and give action, must be complete and perfect, and duly pur- chased and observed: and if the party that makes the assumpsit, and he to whom it is made, agree together, and a bond is given and taken, for what is promised; by this the assumpsit is discharged. Also where an assumpsit is to stand to an award, if the award made be void; it will make the assumpsit void. 

In Indeb. assumpsit lies by a praemunire against an attorney, for fees for work done for defendant as attorney. 

Holt’s Rep. 20. 

Indebitus assumpsit lies for a customary fine, upon mortem domini. Show. 35. Indebitus assumpsit lies upon a personal contract for a sum in gross, as pro rerum venditid. 

Indebitus lies for fees for being knighted. Show. 78. 

Indebitus assumpsit lies for money paid by mistake, on an account or debt; but not for money paid knowingly in illegal consideration, as an usurious bond. Show. 12. 

Assumpsit lies in many cases where debt lies, and in many where debt doth not lie. 2 Burr. 1005; which fee for many cases where assumpsit will lie; as also, 1 Term Rep. 256. 

Indebitus assumpsit lies on a judgment of a foreign court without declaring upon or proving the grounds or cause of action; and if the judgment was obtained unfairly, defendant must shew it. 

Dow. 1, 4. 

Though, assumpsit lies not for rent usually reserved on leases; yet if a man promise to pay, without a lease, so much a week as A. B. & Co. permits him to enjoy a warehouse, &c., which is a special cause of promise, this action will lie. 2 Cro. 592. Now by 11 Geo. 2. c. 19. § 14, where the demise is not by deed, the landlord may recover his rent in an action on the covenanted, for use and occupation. 

Where a person pays money upon a mistake; or if he receives more from another in a reackoning than he ought, or more fees than should be taken, an assumpsit lies. 1 Salk. 222. Comb. 442. 

If a man receives money for the use of another person, assumpsit may be had against him, which supplies the place of action of account; and where money was deposited in a ware, an indebitus lay for money received to a man’s use. Show. 117. 

If where a promise is made, one part of it is against law, and another part of it lawful, this is ground sufficient for assumpsit. 4 Rep. 94. 

The person to whom a promise is made, shall have the action; and not those who are strangers, or for whom benefit it is intended. Dow. 64. Nor shall action be brought against one for what another receives, nor at his request. 3 Salk. 25. But if a man delivers money to A. B. to my use, I may have an action on the covenanted, for this money. If a man accounts, and upon the account is found in arrear to a certain sum, and presently in consideration thereof assumes to pay the debt at a day; action on the covenanted, in this case, after the debt is due. 

If on a promise to pay a sum of money at so much a month, an action on the covenanted may be brought before the whole is payable; for it is grounded upon the promise, which is broken by every non-payment, and damages may be recovered. 2 Cro. 504. See title Debt.

II. Some agreements though never so expressly made are deemed of so great a nature, that they ought not to red to verbal promise only, which cannot be proved but by the memory of witness. To prevent which, the statute of frauds and parol, 29 Car. 2. c. 3, enables, that in the five following cases no verbal promise shall be sufficient to ground an action upon, but at the least some notes or memorandum of it shall be made, in writing, and signed by the party to be charged therewith. 1. Where an executor or administrator promises to pay damages out of his own estate. 2. Where a man undertakes to assure, for the debt, default, or miscarriage of another. 3. Where any agreement is made, upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein. 5. And lastly, where there is any agreement that is not to be performed within a year from the making thereof. In all these cases a more verbal assumpsit is void. 

The same statute provides that no contract for sale of goods for the price of 10l. or upwards shall be good, except the buyer actually receive part of the goods sold, or give earnest; or there be some note or memorandum in writing of the bargain being made by the parties or their agents. 

A letter written by a party is a sufficient memorandum. 

3 Burr. 1665. And see it. Agreement. 

A parol promisse of marriage between parties is not within the statute. 

Str. 34. § 24. 

As to promises for the debt, &c. of another. 

If a person for whose use goods are furnished, be liable at all, any other promise by a third person to pay that debt must be in writing. 2 Term Rep. 80. 

And there is no distinction between a promise to pay for goods furnished to a third person made before they are delivered, and one after. 2 Term Rep. 80; Chup. 227. 

But if the credit was given to the promiser originally, and the party furnishing the goods cannot recover against the person for whose use they were furnished, then the person promising is liable; as if one say “let A. have goods and I will pay you,” or “look to me for payment,” Comm. Dig. iii. Action upon the Cafe ou Assumpsit. (P. 3.) 

The intent of the parties by and to whom the promise or assumpsit is made, is more to be regarded than the form of words, and this intent and meaning is to be followed, not in the letter, but in the substance of it: if a promiser be to provide wedding cloaths for a woman, this shall be taken for such cloaths to be worn on the wedding or feast-day according to the dignity of the person. 

Dow. 162; 

Pepb. 182; 

Teilw. 87: 3 Cro. 53. 

All promisses and contracts are to receive a favourable interpretation; and such construction is to be made, where any obscurity appears, as will best answer the intent of the parties; otherwise a person, by obscure wording of his contract, might find means to evade and elude the force of it. Hence it is a general rule, that all promises shall be taken most strongly against the promiser, and are not to be rejected, if they can by any means be reduced to a certainty. 

If a man promises another, in consideration that he will sign to him a certain term, to pay him 10l. this is a good assumpsit, though the time of assignment and payment be not appointed; for the 10l. shall be paid in a convenient time after the assignment, which also must be done.
done in a convenient time, and he shall not have time during his life. 1 Roll. Abr. 14, 15.

If there be an agreement to enter into an obligation for performance of a thing of a certain value, without mentioning in what sum, it shall be according to the value. 1 Sid. 249.

III. The consideration is the ground of the common action on the case: and no action on the case lies against a man for a promise where there is no consideration why he should make the promise. 1 Danw. 52.

A consideration altogether executed and past was anciently held not to be sufficient to maintain an assumpsit, but this doctrine is denied by the court of K. B. 3 Burr. 1671. See also Cra. Eliz. 282, by which it appears that tho' the consideration were executed, it would be sufficient if laid at plaintiff's request.

If an infant promisef after full age to pay a debt incurred in his infancy, this will bind him. 1 Term Rep. 648.

If a tenant to do a thing without hire, as to take brandies out of one cellar, and to lay them down in another cellar, no action lies for the non-performance; but if he enters on the doing it, action lies for a non-performance, if he be through his own neglect, or mismanagement, because it is a deceit; but not if by mere accident; per Holt, 1 Salk. 26: Vide 3 Salk. 11.

Where the doing a thing will be a good consideration, a promise to do that thing will be so too; per Holt, Ch. J. 12 Mod. 259.

Parting with my rent to the defendant is a good consideration. 7 Mod. 12, 13.

An assumpsit may be upon a general consideration; but it doth not lie where the plaintiff has an obligation to pay the money, which is a stronger lien than assumpsit; nor when the party has a recognizance for the duty, &c., 4th Edw. 253.

Love or friendship are not considerations to ground actions upon. 10 Edw. 30. Also idle and insignificant considerations are looked upon as none at all; for whereas a person promises without a benefit arising to the promisor, or loss to the promisee, it is looked upon as a void promise. 2 Bulst. 269.

Lastly, it is to be observed, that considerations may be void as being against law, for if they are wicked and ill in themselves, or unlawful, by being prohibited by some act of parliament, they are void; therefore if an officer, who, by the duty of his office, is obliged to execute writs, promises in consideration of money paid him, to serve a certain process, an assumpsit will not lie on this promise; for the receipt of the money was extortion, and the consideration is unlawful. 1 Rol. Abr. 16.

Implied contracts, are such as do not arise from the express determination of any court, or the positive direction of any statute; but from natural reason, and the just construction of law, which extends to all presumptive undertakings and assumpsits: which, though never perhaps actually made, yet constantly arise, upon this general implication and intention of the courts of judicature, that every man hath engaged to perform what his duty or sufficiency requires. Thus, if I employ a person to transport any business for me, or perform any work, the law implies that I undertook, or assumed to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury, by bringing his action on the case upon this implied assumpsit; whereas he is at liberty to recover, that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited. This is called an assumpsit on a quantum meruit. There is also an implied assumpsit on a quantum valebatur, which is very similar to the former; being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes, that both parties did intentionally agree, that the real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.

Another species of implied assumpsit is, when one has had and received money belonging to another, without any valuable consideration given on the receiver's part; for the law concludes this to be money had and received for the use of the owner only; and implies, that the person receiving promised and undertook to account for it to the true proprietor. And if he unjustly detains it, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repair the owner is damages equivalent to what he has detained in such violation of his promise. This is applicable to almost every case where the defendant has received money, which ex sequo et bona, he ought to refund. 2 Burr. 1012.

This species of assumpsit lies in numberless instances for money the defendant has received from a third person; which he claims title to, in opposition to the plaintiff's right, and which he had by law authority to receive from such third person. 2 Burr. 1909.

One great benefit which arises to suitors from the nature of this action, is, that the plaintiff need not state the special circumstances, from which he concludes, that ex sequo et bona, the money received by the defendant, ought to be deemed as belonging to him: he may declare generally that the money was received to his use, and make out his case at the trial. 2 Burr. 1010.

This is equally beneficial to the defendant. It is the most favourable way in which he can be freed; he can be liable no further than the money he has received; and against that may go into every equitable defence upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by every thing, which shows that the plaintiff, ex sequo et bona, is not intitled to the use of his demand, or to any part of it.

This action will lie to recover premiums of insurance paid by the insured to the lottery-office-keeper. Coup. 790. But it will not lie to recover back winnings paid by the lottery-office-keeper or insurer of lottery tickets. 4 Burr. 1964.

If two persons engage jointly in a stock jobbing transaction and incur losses, and employ a broker to pay the differences, and one of them repay the broker with the privy and consent of the other the whole sum, he may recover a moiety from the other, in an action for money paid to his use. 3 Term Rep. 418.
ASSUMPSIT IV.

But in such a case of an illegal transaction, if one partner pay money for another, without an express authority he cannot recover it back. 16id.

And, generally, assumpsit for money paid, laid out, and expended will not lie when the money has been paid against the express consent of the party for whose use it is supposed to have been paid. 1 Term Rep. 29.

See title Consideration.

IV. The plaintiff must set forth every thing essential to the gift of the action, with such certainty, that it may appear to the court that there were sufficient grounds for the action; for if any thing material be omitted, it cannot appear to the court whether the damages given by the jury were in proportion to the demand, or whether the party was at all intitled to a verdict. And therefore, in an action upon the claim, the plaintiff cannot declare quod cum the defendant was indebted to the plaintiff in such a sum, and that the defendant, in consideration thereof, took upon himself to have been paid. See title Consideration.

10 Co. 77.

If in an assumpsit the plaintiff declares quod cum there were several reckonings and accounts between the plaintiff and defendant; and at such a day, &c. infra cum parietem; for all debts, reckonings and demands; and the defendant upon the said account was found to be in arrear the sum of 20 l. in consideration whereof the defendant promised to pay, &c. this is a good declaration, without showing it was pro mercenariis, or otherwise, wherefore he should have an account; for an account may be for divers causes, and several matters and things may be included and comprized therein, which in esse comptus are reduced to a sum certain, and thereupon being indebted to the plaintiff, it is sufficient to ground an action. 159. 116.

If in an assumpsit the plaintiff declares, that the defendant did assume and promise to pay to the plaintiff so much money, and also to carry away certain wood before such a day; the defendant as to the money cannot plead that he paid it, and as to the carriage of the wood, not assumpsit, for the promise being intire, cannot be apportioned. 13. 160.

March 100.

On an assumpsit in law, payment, or any other matter that excuses payment, may be given in evidence, on the general issue. In an assumpsit in deed, it must be pleaded. 1 G. Evid. 204. 5.

If the plaintiff declares upon an indebitatus assumpsit, and upon a quantum meruit, and the defendant pleads, that after the said several promissies made, and before the action brought, the plaintiff and defendant came to an account concerning divers sums of money, and that the defendant was found in arrear to the plaintiff 30 l. and thereupon, in consideration that the defendant promised to pay the said 30 l. the plaintiff likewise promised to release and acquit the defendant of all demands, this is a good plea; for by the account the first contract is merged. 2 Moz. 43. 44.

The defendant cannot plead that he revoked his promise, as if A. is in execution at the suit of B. and J. S. defers B. to let him go at large, and that he will satisfy him; to which B. agrees; though J. S. before anything is done in pursuance of this promise and agreement, comes to B. and tells him, that he revokes his promise, and that he will not stand to it; yet such revocation cannot be pleaded in bar to the action. 1 Reo. 243. 32.

In an action upon an assumptas, if the consideration be executory; as if one promises to do something for me, in consideration of something to be done before me, to or for him, if I will sue him for that: he is to do for me. I must aver, that I have done that which was first to be done by me, for till that be done I may not maintain an action upon the promiss. Cro. jac. 585, 520. For further particulars see Com. Dig. tit. Action on the Cafe on Assumpsit; and see also 3 Comm. 170: and this Dictionary tit. Agreement, Consideration.

ASSUMPTION, The day of the death of a faint so called, Quia ejus anima in colis assumitur. Du Cange.

ASSURANCE of lands, is where lands or tenements are conveyed by deed: and there is an assurance of ships, goods and merchandise, &c. See Indenture.

ASTER, and Homo Ater, A man that is resdent. Britton 151.

ASTRAURIUS HERES, (from Astra, the hearth of a chimney,) is where the ancestor by conveyance hath left his heir apparent and his family in a house in his life-time. Co. Litt. 8.

ASTRUM, A house or place of habitation, also from astra. Plac. Hilar. 18 Ed. 1.

ATEGAR, A weapon among the Saxons, which seems to have been a hand-dart, from the Sax. Astan to fling or throw, and Gar a Weapon. Spelm. 116.


ATIA, See idio & atia. A writ of enquiring whether a person be committed to prison on just cause of suspicion. 17. 16.

ATIALIA, Utenciils or country implements. Blount.

ATRIMUM, A court before the house, and sometimes a church-yard.

To ATTACH, Attachiares, From the Fr. atacher.] To take or apprehend by commandement of a writ or precept. Lamb. Eiren. lib. 1. cap. 16. It differs from arrest, in that he who arresteth a man carrieth him to a person of higher power to be forthwith disposed of; but he that attaches keepeth the party attached, and presents him in court at the day assigned; as appears by the words of the writ. Another difference there is, that arrest is only upon the body of a man; whereas an attachment is oftentimes upon his goods. Kitch. 279. A-capias taketh hold of immovable things, as lands or tenements, and properly belongs to real actions, but attachment hath place rather in personal actions. Bratt. lib. 4. Flitn. lib. 5. cap. 24.

ATTACHIAMENTA BONORUM, A distress taken upon goods or chattels, where a man is sued for personal estate or debt, by the legal attachiators or bailiffs, as security to answer an action. There is likewise attachmentia de jinis & byia, a privilege granted to the officers of a forefe, to take to their own use, thorns, brush, and wind-fall within their precincts. Kennett's Parish Antiq. p. 209.

ATTACHMENT, Is a proceed from a court of record, awarded by the justices at their discretion, on a bare suggestion, or on their own knowledge: and is properly
ATTACHMENT.

perly grantable in cases of contempts, against which all courts of record, but more especially those of Westminster-hall, and above all the court of R. R. may proceed in a summary manner. *Leech's* Hawk. P. C. ii. c. 22; See 1 Wif. 350.

The most remarkable instances of contempts seem reducible to the following heads.—1. Contempts of the king's writs. 2. Contempts in the face of a court. 3. Contumacious words or writings concerning the court. 4. Contempts of the rules or awards of the court. 5. Abuse of the process of the courts. 6. Forgeries of writings or other deceits tending to impede on the court.

All courts of record have a kind of discretionary power over their own officers, and are to see that no abuses be committed by them, which may bring disgrace on the courts themselves; therefore if a sheriff or other officer shall be guilty of a corrupt practice in not serving a writ; as if he refuse to do it, unless paid an unreasonable gratuity from the plaintiff, or receive a bribe from the defendant, or give him notice to remove his person or effects, in order to prevent the service of any writ; the court which awarded it may punish such offences in such a manner as shall seem proper by attachment. *Dyer* 218.

But if there be no palpable corruption, nor extraordinary circumstance of wilful negligence or obduracy, the judgment whereof is to be left to the discretion of the court, it seems not usual to proceed in this manner; but to leave the party to his ordinary remedy against the sheriff, either by action or by rule to return the writ, or by an alias and pluries, which if he have no excuse for not executing, an attachment goes of course. *Edw. 62. 254. Noy. 101. F. N. B. 38. Finch 237. 5 Mod. 314, 315.*

Attachment lies against attorneys for injustice, and base dealing by their clients, in delaying suits, &c. as well as for contempt to the court. *Hawk. c. 22. § 11.* If affidavits to ground an attachment be full as to the charge; yet if the party deny such charge by plain and positive affidavits, he shall be discharged; but if he take a false oath, he may be indicted of perjury. *Mod. Cafl. in L. & E. 81.*

Against sheriffs making false returns of writs, and against bailiffs for frauds in arrests, and exceeding their power, &c. attachment may be had. For contempts against the king's writs; using them in a vexatious manner; altering the tuffe, or filling them up after sealed, &c. attachment lies. And for contempts of an enormous kind, in not obeying writs, &c. attachment may issue against peers. *Hawk. c. 22. § 33,* &c. For perverting jurors not to appear on a trial, attachment lies against the party, for obstructing the proceedings of the court. *1 Litt. 121.*

The court of R. R. may award attachment against any inferior courts usurping a jurisdiction, or acting contrary to justice. *Sal. 257.* Though it is usual first to send out a prohibition.

Attachment lies for proceeding in an inferior court, after a habeas corpus issued, and a jaysafe for to stay proceedings. *21 Car. B. R.* And attachment may be granted against justices of peace, for proceeding on an indictment after a continuance delivered to them to remove the indictment. *1 Litt. 121.* But it does not lie against a corporation, the mode of compulsion being by legislation. *Chap. 377.*

Attachment lies against a lord that refuses to hold his court, after a writ issued to him for that purpose, so that his tenant cannot have right done him. *New Stat. Br. 6. 27.*

An attachment is the proper remedy for disobedience of the rules of court; as of those made in ejection, arbitration, &c. So where a defendant in account, being adjudged to account before the auditors, refuses to do it, unless they will allow matter disallowed by the court before; or where one refuses to pay costs taxed by the master, whose taxation the law looks upon as a taxation by the court. *1 Mod. 21; 1 Sal. 71.*

But an attachment is not granted for disobedience of a rule of nisi prius, unless it be first made a rule of court; nor for disobedience of a rule made by a judge at his chamber, unless it be entered; nor for disobedience of any rule without personal service. *1 Sal. 84.*

Also an attachment is proper for abuses of the process of the court; as for failing to execute where there is no judgment; bringing an appeal for the death of one known to be alive; making use of the process of a superior court, to bring a defendant within the jurisdiction of an inferior court, and then dropping it, using such process in a vexatious, oppressive, or unjust manner, without colour of serving any other end by it. *2 Hawk. P. C. c. 22. § 33,* &c. It seems also that confederals are punishable by attachment for foul practices. *2 Hawk. P. C. c. 22. § 50.*

Grievances are thus punishable for misbehaviour in their offices. *Id. 68. Writs for non-attendance on a trial. Leeb. Hawk. P. C. c. 22. § 52.* In—Peers are liable to attachment for certain outrageous contempts, as a disobedience to a writ of habeas corpus, and generally of other writs. *Id. 68.*

Attachments are usually granted on a rule to show cause, unless the offence complained of be of a flagrant nature, and positively shown to; in which last case the party is ordered to attend, which he must do in person, as must every one against whom an attachment is granted; and if he shall appear to be apparently guilty, the court in discretion, on consideration of the nature of the crime, and other circumstances, will either commit him immediately, in order to answer interrogatories to be exhibited against him concerning the contempt complained of, or will further him to enter into recognizance to answer such interrogatories; which if they be not exhibited within four days, the party may move to have the recognizance discharged; otherwise he must answer them, though exhibited after the four days; but in all cases, if he fully answer them, he shall be discharged as to the attachment; and the prosecutor shall be left to proceed against him for the perjury, if he thinks fit; but if he deny the part of the contempt, only, and confesses other part; he shall not be discharged as to those denied, but the truth of them shall be examined, and such punishment inflicted as from the whole shall appear reasonable; and if his answer be evasive as to any material part, he shall be punished in the same manner as if he had confessed it. *2 Hawk. P. C. c. 22. § 1; 1 Sal. 84; 6 Mod. 73; 2 Jones 178.*

Upon all these examinations the matter is to make his report, and the party is then and not before acquitted, or adjudged in contempt. *Hawk. 253,* and in the latter case is either immediately sentenced or committed to the marshal, unless the Court waive giving judgment (as they sometimes do from motives of lenity) and order the recognizance to be discharged. *3 Burn. 1256; or the Attorney*
ATTACHMENT.

Attorney General consent that the party may continue on the recognizance to appear under a rule of court at some future time. 2 Burn. 757.

Attachments for non-payment of costs, and for non-performance of an award, are in the nature of civil execution. 4 Tae. Rep. 256.

Attachment out of Chancery may be had of course, upon affidavit made that the defendant was served with a subpoena, and appeared not; or upon non-performance of any order or decree; also after the return of this attachment, that the defendant on his ex injuria, &c. then attachment with proclamation issues against him, &c. Wiff. Synb. And for contempt, when a party appears, he must upon his oath answer interrogatories exhibited against him; and if he be found guilty, he shall be fined.

On attachment the party is not obliged to answer any interrogatories tending to convict him of any other offence. Sola. 444; or which may subject him to a penalty. Harw. 239.

Attachment of privilege is where a man by virtue of his privilege calls another to that court whereinto he himself belongs, and in respect thereof is privileged, there to answer some action (as an attorney, &c.); or it is a power to apprehend a man in a place privileged. Book Estr. 431. Corporation courts have sometimes power by charter to issue attachments, and some courts baron grant attachments of debt. Kitch. 79.

Attachment foreign, is an attachment of the goods of foreigners, found in some liberty, to satisfy their creditors within such liberty. Carth. Rep. 60.

Foreign Attachment under the custom of London is this: if a plea be entered in the court of the mayor, or the sheriff against A. and the process he return ictus, and thereupon plaintiff suggests that another person within London is indebted to A or the debtor shall be sworn (where he is called the garnishor) and if he does not deny himself to be indebted to A. the debt shall be attached in his hands. Com. Dig. tit. Attachment foreign, cites 22 El. 4. 30.

The plaintiff may be exhibited in the mayor's or the sheriff's court; but the proceeding in the former is the most advantageous. Id. ib.

This custom of foreign attachment is said to prevail in Exeter and other places. Sed qa. But a foreign attachment cannot be had when a suit is depending in any of the courts at Westminster. C. Eliz. 191. And nothing is attachable but for a certain and due debt; though by the custom of London money may be attached before due, as a debt; but not levied before due. Sed 327; 1 Nell. Abr. 282, 283.

Foreign attachments in London, upon plea of debt, are made after this manner: A. sues B. 100 l. and C. is indebted to A. 100 l. B. enters an action against A. of 200 l., and by virtue of that action a serjeant attaches 100 l. in the hands of C. as the money of A. to the use of B. which is returned upon that action. The attachment being made, and returned by the serjeant, the plaintiff is immediately to see an attorney before the next court, or the defendant may then put in bail to the attachment, and return the plaintiff four court days must pass before the plaintiff can attach the garnishor, in whose hands the money was attached to, to whose causa why B. should not condemn the 100 l. attached in the hands of C. as the money of A. the defendant in the action (though not in the attachment) to the use of B. the plaintiff; and the garnishor C. may appear in court by his attorney, wage his law, and plead that he hath no money in his hands of the defendant's, or other special matter; but the plaintiff may hinder his wagering of law, by producing two sufficient citizens to swear that the garnishor had either money or goods, in his hands, of A. at the time of the attachment, of which affidavit is to be made before the lord mayor, and being filed, may be pleaded by way of set off: then the plaintiff must put in bail, that if the defendant come within a year and a day into court, and he can discharge himself of the money condemned in court, and that he owed nothing to the plaintiff at the time in the plaint mentioned, the said money shall be forth-comings. &c. If the garnishor fail to appear by his attorney, being warned by the officer to come into court to shew cause as aforesaid, he is taken by default for want of appearing, and judgment given against him for the goods and money attached in his hands, and he is without remedy either at common law or in equity; for if taken in execution, he must pay the money condemned, though he hath not one penny, or go to prison; but the garnishor appearing to shew cause why the money or goods attached in his hands ought not to be condemned to the use of the plaintiff, having filed an answer, the court, or the jury, shall try his appeal against whom the attachment is made; and it will then be tried by a jury, and judgment awarded; &c. But after trial, bail may be put in, whereby the attachment shall be discharged, but the garnishor, &c. and his security will then be liable to what debt the plaintiff shall make out to be due, upon the action: and an attachment is never thus perfected, till there is a bail, and satisfaction upon record. Priv. Leg. Lond.

But the original defendant must be summoned and have notice; otherwise judgment against the garnishor will be erroneous; and the money paid or levied in execution, or it will not discharge the debt from the garnishor to the defendant; (though it was alleged that the custom of the city court is to give no notice.) 3 Wiff. 297; 2 Black. Rep. 834. Sec 1 Ed. Raym. 727.

Where a foreign attachment is pleaded to an action, the custom is to let forth, that he who levied the plaintiff shall have execution of the debt owing by himself, and by which he was attached, if the plaintiff in the original action shall not dispute it within a year and a day; now if the plaintiff in the action below does not set forth such conditional judgment given by the court, it is wrong, because he doth not bring his cause within the custom. Vide 2 Law. 925.

In aplein, &c. there was evidence given, that the debt was attached by the custom of London before the action brought, and that it was condemned there before the plea pleaded; and this evidence was given upon the general issue of aplein, and it being denied for the defendant, that this should relate to his user to defeat the plaintiff's action, it was adjudged, that where there is an attachment and condemnation before the action brought, it may be given in evidence upon the general issue, because there is an alteration of property; but if the attachment be only before the action, or the attachment and condemnation afterwards, the attachment may be pleaded in abatement, and the condemnation may be pleaded in bar, but shall not be given in evidence on the general issue, because the condemnation the property is altered, but not before. 1 Salk. 280, 281. M
ATTACHMENT.

Action of debt, &c. the defendant pleaded in bar, that there was a custom in London to attach the debt before the day of payment came; et per causam, such a custom may be good, but to have judgment to recover the debt before the day of payment is come, cannot be a good custom, because the debtor himself could not recover in such case, and therefore he who made the attachment shall not. This custom was pleaded, that the debtor in person, or by his attorney, may swear that the debt is due; but this cannot be as to the attorney: it was agreed, that debts might be attached by a foreign attachment, and that the value thereof ought to be found before judgment; but that this plea was not good, because the defendant did not over it, 

A sum of money was to be paid at Michaelmas, and it was attached before that day; adjudged, that a foreign attachment cannot reach a debt before it is due; therefore, though the judgment on the attachment was after Michaelmas, yet the money being attached before it was due, it is for that reason void. See Com. Dig. tit. Attachment, foreign Attachment.

Money due to an executor or administrator, as such, cannot be attached. It would give a simple contract creditor priority over judgments, &c. Fibre v. Lane and others, 3 T. R. 297. Nor trust-money in the hands of the garnisher. See Dugl. 438.

In an action on the case the plaintiff had judgment against the defendant, and he owing 60l. to one G. D. he entered a plaint against him in London, and attached the 60l. in the hands of the said defendant, against whom the plaintiff had recovered as aforesaid, and had execution according to the custom; afterwards the plaintiff brought a scire facias against the defendant, to show cause why he should not have execution upon the judgment which he had recovered, to which the defendant pleaded the execution upon the attachment; and upon demurrer to that plea it was adjudged against the defendant, because a duty which accrues by matter of record, cannot be attached by the custom of London; for judgments obtained in the king's courts shall not be defeated or avoided by such particular customs, they being of so high a nature, that they cannot be reached by attachment. 1 Leon. 29.

Debtor and creditor being both citizens of London, the debtor delivered several goods to the Exeter carrier then in London, to carry and deliver them at Exeter, and the creditor attached them in the hands of the carrier for the debt due to him from his debtor; adjudged, that the action should be discharged, because the carrier is privileged in his person and goods, and not only in the goods which are his own, but in those of other men, of which he is in possession, for he is answerable for them. 1 Leon. 183.

An executor submitted to an award, and the arbitrators awarded, that the defendant should pay the executor 350l. This money is not attachable in his hands by any creditor of his teather, though it is in his hands when recovered; because it was not due to the teather at the time the judgment was obtained, and the custom of foreign attachments extends only to such debts. 1 Vent. 111.

ATTACHMENT OF THE FOREST, is one of the three classes of attachment, and for this there is no other authority, but to recover the attachments of offenders against war and venefici, taken by the reft of the officers, and to enroll them, that they may be presented and punished at the next justices' fees. Marwood 93. And this attaches by three means: 1. By goods and chattels. 2. By the body, pledges, and mainpina. 3. By the body only. This court is kept every forty days. See Crompton, in his

ATTAINDER, attains and attainder.] The flain or corruption of the blood of a criminal capitally condemned; and the immediate incapable consequence, by the common law, on the pronouncing the sentence of death.

He is then called attaint, attainder, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man: for by an anticipation of his punishment, he is already dead in law.

This is after judgment; for there is great difference between a man convicted, and attainted; though they are frequently through inaccuracy confounded together; when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility of anything to be said in his favour. Upon judgment therefore of death, and not before, the attainted of a criminal commences: or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore either upon judgment of outlawry, or of death, treason or felony, a man shall be said to be attainted. 4 Com. 386. 1.

A man is attainted by appearance, or by process: attainder on appearance is by confession, or verdict. See Confession, when the prisoner upon his indictment being asked whether Guilty or Not guilty, answers Guilty, without putting himself upon his country; (and formerly confession was allowed before the coroner in sacrament; whereupon the offender was to abjure the realm, and this was called attainder by abjuration). Attainder by verdict is when the prisoner at the bar pleads Not guilty, and is found guilty by the verdict of the jury of life and death. And attainder by process, (otherwise termed attainder by default or outlawry,) is when the party shall, and is not found, until he hath been five times publicly called or proclaimed in the county, on the last whereof he is outlawed upon his default. Staneef. Pl. Co. 44. 122. 132. Also persons may be attainted by act of parliament.

Acts of attainder of criminals have been passed in several reigns, on the discovery of plots and rebellions, from the reign of king Charles I. when an act was made for the attainder of several persons guilty of the murder of king Charles I. to this time; among which, that for attainting Sir John Fenwick, for conspiring against king William, is the most remarkable; it being made to attain and convict him of high treason on the oath of one witness, joft after a law had been enacted, That no person should be tried or attain'd of high treason where corruption of blood is incurred, but by the oath of two lawful witnesses, unless the party confess, stand mute, &c. Stat. 7 E. W. 3. cap. 3. But in the case of Sir John Fenwick, there was something extraordinary; for he was indicted of treason, on the oaths of two witnesses; though
but one only was produced against him on his trial. It was alleged Sir John had tampered with, and prevailed on one of the witnesses to withdraw.

The consequences of attainder are forfeiture and corruption of blood; which latter cannot regularly be taken off by act of parliament. Co. Lit. 391. b.

As to forfeiture of lands, &c., by attainder. See this Dict. tit. Forfeiture. As to Corruption of Blood, this operates upwards and downwards, so that an attained person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture: and the person attainted shall also obstruct all defendants to his policy, wherever they are obliged to give a title through him to a remote ancestor. See tit. Tenur. Defent. Forfeiture.

This is one of those notions which our laws have adopted from the feudal constitutions, at the time of the Norman conquest, as appears from its being unknown in those tenures which are indiscriminably Saxons, or Gavelkind: wherein, though by custom, according to the ancient Saxon laws, the land is forfeited to the king, yet no corruption of blood, no impediment of descent ensues; and on judgment of mere felony, no escheat accrues to the lord. And therefore as every other oppressive mark of feudal tenures is now happily worn away in these kingdoms, it is to be hoped that the corruption of blood, with all its connected consequences not only of present escheat, but of future incapacities of inheritance even to the twelfth generation, may in process of time be abolished by act of parliament; as it stands upon a very different footing from the forfeiture of lands for high treason, affecting the king's person or government. And indeed the legislature has, from time to time, appeared very inelastic to give way to so equitable a provision; by enacting that, in certain treasons respecting the papal supremacy, Stat. 1 Edw. c. 1; and the public coin, Stats. 5 Eliz. c. 11: 16 Eliz. c. 1: 8 & 9 W. 3. c. 26: 15 & 16 Geo. 1. c. 28; and in many of the new made felonies, created since the reign of Henry the Eighth by act of parliament, corruption of blood shall be faved. But as in some of the acts for creating felonies (and those not of the most atrocious kind,) this saving was neglected, or forgotten to be made, it seems to be highly reasonable and expedient to anticipate the whole of this doctrine by one undistinguishing law especially as the Stat. of 7 Ann. c. 21, (the operation of which is postponed by St. 17 Geo. 2. c. 39,) after the death of the sons of the late Pretender, no attainder for treason will extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself; which virtually abhors all corruption of blood for treason, though (unless the legislature shall interpose,) it will still continue for many sorts of felony. 4 Comm. 283. 9.

In treason for counterfeiting the coin, although by the statutes corruption of blood is faved, yet the lands of the offender are forfeited immediately to the king on attainder, it being a distinct penalty from corruption of blood: for the corruption may be faved, and the forfeiture remain, &c. And accordingly it is provided by some statutes. 1 Salk. 85.

Attainders may be reversed or falsified, by writ of error, or by plea. If by writ of error, it must be by the king's leave, &c. and when by plea, it may be by denying the treason, pleading a pardon by act of parliament, &c. 3 Inf. 232.

By a king's taking the crown upon him, all attainders of his person are ipso factce purged, without any reversal. 1 Inf. 16: Finch L. 82: Wood 17. This was the declaration of parliament, made in favour of Henry the 7th. See 1 Comm. 248.

The Stat. 8 W. 3. c. 5, requires Sir George Bowes, major general Holmes, and other persons to surrender themselves to the lord chief justice, or secretaries of state; or to be attainted. By the 13 W. 3. c. 5, the pretended Prince of Wales is under attainder of treason, &c. And by 1 Geo. 1. c. 16, the Duke of Ormond and others are attainted. And besides these acts of attainder, bills for inflicting pains and penalties are sometimes past; as that against the bishop of Rochester; Stats. 9 Geo. 1. c. 17.

ATTAIN, attaint.] A writ that ish to enquire whether a jury of twelve men gave a false verdict; (Finch. 484;) that so the judgment following thereupon, may be reversed; and this must be brought in the life-time of him for whom the verdict was given, and of two at least of the jurors who gave it. This lay at the common law, only upon writs of afise; and seems to have been co-evol with that institution by king Henry the 2nd. at the instance of his chief justice Glanville: being probably meant at a check upon the vaft power then repose in the recognizances of afise, of finding a verdict according to their own personal knowledge, without the examination of witnesses. And even here it extended no further than to such instances, where the issue was joined upon the very point of afise (the heirship, defect, &c.) and not on any collateral matter; as villainage, bastardy, or any other disputed fact.

In these cases the afise was laid to be turned into an ingess or jury, (afisea writer in jurament,) or that the afise should be taken in special jurament, et non in modum afise; that is, that the issue should be tried by a common jury or ingass, and not by recognizances of afise: (Bradh. 14. tr. 1. 6. 34. § 2. 3. 4.—tr. 3. c. 17. tr. 5. c. 4. § 1. 2: Flett. 1. c. 22. § 8: Co. Ent. 61; bif. Booth. 213;) and then it seems that no attainlay against the ingass or jury that determined such collateral issue: Br. 4. 1. 34. 2. Flett. 1. c. 22. Neither is mention made by our ancient writers, of such a proceed obtaining after the trial by ingess or jury, in the old Norman or feudal actions prosecuted by writ of entry. Nor did any attainlay lie in trefpass, debt, or other action personal, by the old common law: because those were always determined by common ingesses or juries. Temp. B. 28. E. 3. 15. 17. Affl. Flett. 15. Flett. 5. 22. 16. At length the Acts of Westmin. 1 (3 E. 1. c. 38. allowed an attainlay to be sued upon inquests, as well as afise, which were taken upon any plea of land or of feehold. But this was at the king's discretion, and is so understood by the author of Plata, (L. 5. c. 22. § 8. and 15;) a writer contemporary with the statute; though Sir Ed. Coke, (2 Inf. 150. 237,) seems to hold a different opinion. Other subsequent statutes, (1 E. 3. fi. 1. c. 6. 5 E. 3. c. 7. 28 Ed. 3. c. 8.) introduced the same remedy in all pleas of trespass, and the Stat. 34 E. 3. c. 7. extended to all pleas whatsoever, personal as well as real; except only the writ of right, in such cases where the issue or issue is joined on the more
ATTAIN.

I. By an l against whom attain may be brought.

II. In what cases it will lie.

III. Of the proceedings in attain.

I. The party grieved may have writ of attain against the other party, (whether plaintiff or defendant) and against the jurors or either of them as shall be then living; it is laid any one that is hurt by the false verdict may bring this writ; and if the verdict be for matter of land the remedy commonly runs with the land, so that any party or privy, as an heir or executor may have it. P. N. B. 109: Co. Lit. 294: 1 And. 24. 5.

Where trespass is brought against a man and some, and the plaintiff recovers, the harm alone shall have attain, for it shall be brought according to the record. Br. Baron and Fome, pl. 22. Successors of a person shall have error or attain of judgment against the predecessor. Br. Attaint, pl. 110. Now shall have attain but he may be reprieved to the thing lost by the judgment; per Bragom. Ch. 1. Mar. 210. Reversioners may have an attain upon a false verdict, &c. against a particular tenant, who shall be restored to his possession, and the reversioner to his arrears, &c. 39 R. 2. c. 3. This action must be brought against the jurors, and the parties to the first suit; or, if the parties be dead, their heirs, or executors, or any other for the most part that recovered by the first judgment. Dyer 201. If all the jurors but one are dead, the action is gone, and no attain can be brought; and where any one dies depending the suit, it is gone; but not by the death of the defendant that recovered in the first action. Dyer 139: Hob. 227.

II. Attaint lies where a jury gives a verdict contrary to evidence: where a judge declares the law erroneously, judgment may be reversed; but in this case the jury shall be excused. Vaughan 145. Attaint lies not for that which is not given in evidence; nor upon an inquest of office, 21 Eliz. when a thing found is imperfect to the life, 21 Hob. 55: Co. Lit. 355. And no attain lieth where the king is sole party, and the jury find for him, 4 Leom. 45. alter where the suit is tem pro domino rege quos pro jisfe. 1 Leom. 45. An attain may be brought where any material falsehood is found, though some truth may be found with it; as where a jury shall find a man guilty of many trespasses, who is guilty but of one trespass. So if a jury find any thing against the common or statute law, that all men are to take notice of, this may make them chargeable in attain. Br. 44: Hob. 227.

The jury may be attained two ways; 1st, where they find contrary to evidence; 2dly, where they find out of the compass of the alleged. But to attain them for finding contrary to evidence is not easy, because they may have evidence of their own cognisance of the matter by them, or they may find upon present of the witnesses, or their own proper knowledge; but if they find upon evidence that does not prove the allegation, there it is easy to subvert them to an attain, because it is manifest that what is so found is an evidence not corresponding to their life, and this was the only curb they had over the jurors; for the judge being a servant of the allegation, if they did not follow his direction touching the proof, they were then liable to the danger of an attain; and therefore since the judges, from the difficulty of attaining the jury have granted new trials, whereby jurors have been freed.

The jury who are to try this false verdict, must be twenty-four, and are called the grand jury; for the law will not that the oath of one jury of twelve men should be attainted or set aside by an equal number, nor by less indeed than double the former. Bract. 1. 9. c. 4: 12 Hen. 6. c. 4: § 1. If the matter in dispute be of 40l. value in personal, or of forty shillings a year in lands and tenements, then by the Act. 15 Hen. 6. c. 5, each grand juror must have a freehold of the annual value of twenty pounds. And he that brings the attain can give no other evidence to the grand jury, than what was originally given to the petit: for as their verdict is now trying, and the question is, whether or no they did right upon the evidence that appeared to them, the law adjudged it the highest absurdity to produce any subsequent proof upon such trial, and to condemn the prior jurisdiction for not believing evidence which they never knew. But those against whom it is brought are allowed, in all manner of the first verdict, to produce new matter; (Fizhur. L. 489.) because the petit jury may have formed their verdict upon evidence of their own knowledge, which never appeared in court. If the grand jury found the verdict a false one, the judgment by the common law was, that the jurors should lose their libera lugens and become for ever infamous, should forfeit their goods and the profits of their lands, should themselves be imprisoned, and their wives and children thrown out of doors; should have their houses razed, their trees extirpated, and their meadows ploughed; and that the plaintiff should be restored to all that he lost by reason of the unjust verdict. But as the severity of this punishment had its usual effect, in preserving the law from being executed, therefore by the Act. 1. Hen. 7. c. 24. (revived by 23 Hen. 8. c. 3; and made perpetual by 13 Eliz. c. 25;) an attain is allowed to be brought after the death of the party, and a more moderate punishment was inflicted upon attainted jurors, viz. perpetual infamy, and, if the cause of action were above 40l. value, a forfeiture of 20l. a-piece by the jurors; or if under 40l. then 5l. a-piece, to be divided between the king and the party injured. So that a man may now bring an attain either upon the statute or at common law, at his election; (3 Tost. 164;) and in both of them may revive the former judgment. But the practice of setting aside verdicts upon motion, and granting new trials, has so superseded the use of both sorts of attains, that very few instances of an attain appear in our books later than the sixteenth century. Cro. Eliz. 520: Cro. Jac. 90.

It may be matter of some curiosity however, and perhaps of use, under this head, to state so much of the old law as tends further to explain,

right, and not on any collateral question. For though the attain seems to have been generally allowed in the reign of Henry the Second, at the first introduction of the grand jury, (which was then made by the consent of only twelve or recognizers, in case they were all unanimous;) yet subsequent authorities have held, that no attain lies on a false verdict given upon the mere right, either at common law or by statute; because that is determined by the grand assize, appealed to by the party himself, and now consisting of six men jurors. Bract. 290: 5. 227: Brit. 243 8: 12 Hen. 6. &c. Bror. tit. Attain 42: 1 Roll. Abr. 280.

The jury who are to try this false verdict, must be twenty-four, and are called the grand jury; for the law will not that the oath of one jury of twelve men should be attainted or set aside by an equal number, nor by less indeed than double the former. Bract. 1. 9. c. 4: 12 Hen. 6. c. 4: § 1. If the matter in dispute be of 40l. value in personal, or of forty shillings a year in lands and tenements, then by the Act. 15 Hen. 6. c. 5, each grand juror must have a freehold of the annual value of twenty pounds. And he that brings the attain can give no other evidence to the grand jury, than what was originally given to the petit: for as their verdict is now trying, and the question is, whether or no they did right upon the evidence that appeared to them, the law adjudged it the highest absurdity to produce any subsequent proof upon such trial, and to condemn the prior jurisdiction for not believing evidence which they never knew. But those against whom it is brought are allowed, in all manner of the first verdict, to produce new matter; (Fizhur. L. 489.) because the petit jury may have formed their verdict upon evidence of their own knowledge, which never appeared in court. If the grand jury found the verdict a false one, the judgment by the common law was, that the jurors should lose their libera lugens and become for ever infamous, should forfeit their goods and the profits of their lands, should themselves be imprisoned, and their wives and children thrown out of doors; should have their houses razed, their trees extirpated, and their meadows ploughed; and that the plaintiff should be restored to all that he lost by reason of the unjust verdict. But as the severity of this punishment had its usual effect, in preserving the law from being executed, therefore by the Act. 1. Hen. 7. c. 24. (revived by 23 Hen. 8. c. 3; and made perpetual by 13 Eliz. c. 25;) an attain is allowed to be brought after the death of the party, and a more moderate punishment was inflicted upon attainted jurors, viz. perpetual infamy, and, if the cause of action were above 40l. value, a forfeiture of 20l. a-piece by the jurors; or if under 40l. then 5l. a-piece, to be divided between the king and the party injured. So that a man may now bring an attain either upon the statute or at common law, at his election; (3 Tost. 164;) and in both of them may revive the former judgment. But the practice of setting aside verdicts upon motion, and granting new trials, has so superseded the use of both sorts of attains, that very few instances of an attain appear in our books later than the sixteenth century. Cro. Eliz. 520: Cro. Jac. 90.

It may be matter of some curiosity however, and perhaps of use, under this head, to state so much of the old law as tends further to explain,
ATTAIN. ATTORNEY.

freed from the fear of attain, they have taken a great liberty in giving verdicts; but since the attain is only dis-

affect, and not taken away, 'tis necessary that a certain matter should be brought before them; and in

ressents, the quantity and value of the thing dem-

manded must be so conveniently described, that if the

jury find damages beyond such quantities and value, it

may be apparently excepted; and they subject to the

attain, if on such contracts, they must be for forth to pre-
cisely, that if evidence be given of another contract, and

not in the allegations, and yet the jury find for the pla-
tiff, they may be subject to an attain; and were it other-

wise, if the plaintiff had a jury to his turn, and the judge

should direct that the plaintiff be non-fuit, yet if the

plaintiff would stand the trial, the judge must give positive
directions to find for the defendant; and there would be no
means of compelling the jury to find according to the di-
rection of the judge, if they were not under the terror of

an attain, if they did otherwise; for this is the only curb

that the law has put in the hands of the judges to refrain


III. The process to be issued is directed by 23 H. 3.
c. 3, already mentioned: and by the said statute if any of
the petit jury appear at the return of the writ of attain,
the plaintiff shall assign the falle oath of the verdict untruly
given. And if the defendant, or any of the petit jury appear
not on dillsire, the grand inquest shall be taken by default.

The petit jury can plead no plea, but such as may ex-
clude them of the falle oath. 1 Rol. Abr. 285.

In the court of King's Bench and Common Pleas, and
the court of King's Bench, no attain may be brought; and
the plaintiff setting aside the verdict, shall have resili-
tion, &c. But if the first verdict be affirmed, the plain-
tiff shall be imprisoned and fined. 11 H. 7. c. 21.

In attain the parties and the jury appeared and de-
demned after the record upon which the attain was founded,
which record being in the Common Pleas, they had it,
and thereupon the plaintiff affirmed the falle oath; the
defendants pleaded, that they made a good and lawful oath;
upon which they were at issue, and in the same
term the record was removed by a writ of error into the
King's Bench; adjudged, that notwithstanding it was thus
removed, the court of Common Pleas might proceed if
the process for the grand jury were returned. Dyce 284.

Attain was brought in the Common Pleas against a
jury, for a verdict given in the King's Bench, where-
on the record was removed from that court to the
Common Pleas, and there the verdict was affirmed; ad-
judged, that the plaintiff in the action shall have execution
according to the verdict, for the record is in the King's
Bench, and nothing but the error thereof in the Common
Pleas; but if the verdict had been set aside, and execution
had been had upon it before it was set aside, then the
court of Common Pleas might have awarded resiliion
unto the party grieved. Cr. Edin. 371.

A non-fuit in attain is preeminent: and no supersedeas
is grantable upon attain. Co Lit. 227.

An attain as well as a writ of error shall follow the
nature of the action upon which it is founded; so that if
summons and service lies in the first action, it shall do
so likewise in the attain, but this is not a supersedeas as
a writ of error is; adjudged likewise, if damages are re-
covered against several in a nation of conspiracy, all of
them must join in an attain, and the non-fuit of one of
them shall not hurt the rest. 6 Rep. 25.

In an attain the plaintiff shall recover against all the
juries, tenants, and defendants, the costs and damages,
which he shall sustain by delay or otherwise in that fult:
and if the defendant's plea in bar be found against him,
the plaintiff will have judgment to be referred to the court
he hath, with damages. 11 H. 6. c. 4. and 15 H. 6. c. 5.

ATTAINED. See ATTAINDER.

ATTACH ARMS, The term by which the inhabi-
tants and miners of Cornwall, call an old defunct mine,
that is given over, i. e. the leavings of the Saffrie, Saff-
sax, or Saxmon. Cowel.

ATTEGIA, From the Lat. ad and regn. A little house.

ATTENDANT, attendant. Signifies one that owes a
-duty or service to another, or is in some sort depends on
him. Where a wife is endowed of lands by a guardian; &c.
the shall be attendant on the guardian, and on the heir at
his full age. Term de Lys.

ATTERMINING, From the Fr. attérminer.} The
granting a time or term for payment of a debt. Ordinary
de librarionis perquirendis, ann. 27 Ed. 1. And see fi.
W. f. 2. c. 4.

ATTILE, Attitium, attilamentum.} The rigging or
furniture of a ship. Flea. lib. 1. c. 25.

A TORNARE REM. To attain or turn over money
and goods, &c. to affio or appropriate them to some
particular use or service. Kendall's Paroch. Antig. p. 293.

A TORNARO FACIENDO VEL RECIPIENDO,
A writ to command a sheriff or steward of a county-court,
or hundred court, to receive and admit an attorney, to
appear for the person that owes suit of court. F. N. B.
136. Every person that owes suit to the county-court,
court-baron, &c. may make an attorney to do his suit.
20 H. 3. c. 10.

ATTORNEY, attorney.} Is one that is appointed
by another man to do anything in his absence. Weft. Synth.
Compt. 1st and 2d ed. 150. An attorney is either publick, in
the courts of record, the King's Bench and Common Pleas,
etc. and made by warrant from his client: or private,
upon occasion for any particular business, who is com-
monly made by letter of attorney. In ancient times,
their of authority in courts had it in their power whether
they would suffer men to appear or sue by any other
but themselves: and the king's writs were to be obtained
for the admission of attorneys: but, since that, attorneys
have been allowed by several statutes. Attorneys may be
made in such pleas where appeal lieth not: in criminal
causes there will be no attorneys admitted. See 6 Stat.
Glouc. 6 Ed. 1. B. 1. c. 3. An infant ought not to appear by
attorney, but by guardian, for he cannot make an attorney,
but the court may appoint him a guardian; 1 Litt. Abr.
138. Infants, after they come to full age, may sue by
attorney, though admitted before by guardian, &c. In
action against baron and feme, the feme being within age,
the must appear by guardian; but if they bring an action,
the husband shall make attorney for both. 1 Danw.
Abr. 602. Where baron and feme are sued, though the
wife cannot make attorney, the husband may do it for
both of them. 2 Sand. 213. One was competent, being
within age, is to appear by guardian; but after he is of
age he must do it by attorney. Co Lit. 35. An infant is not
to appear by attorney, but in proper person. A corporation
cannot
ATTORNEY.

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

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

Before the statute of 13 Ed. 2. c. 10, [13 Ed. 1. A.D. 1285.] all attorneys were made by letters patent under the great seal, commanding the justices to admit the person to be his attorney. Their patents, where they were obtained, seem to have been enrolled by a proper officer, called the clerk of the warrants; and also the courts enrolled those patents on which any proceeding were. If such letters patent could not be obtained, the persons were obliged to appear each day in court in their proper persons. Gilb. H. C. P. 32, 33.

The said statute of 13 Ed. 2. c. 10, gives to all persons a liberty of appearing, and appointing an attorney, as if they had letters patent; and therefore the clerk of the warrants received each person's warrant, and upon the warrant it equally appeared to the court, that he had appointed such a one his attorney to the end of the cause, unless revoked; so that on each act there is no occasion of the plaintiff's and defendant's presence, as was used before that time. This authority continues till judgment, and for a year and a day, and afterwards to sue out execution, and for a longer time, if they continue execution; but if not, the judgment is supposed to be satisfied; and to make it appear otherwise, the plaintiff must again come into court, which he either does by a fine or by an action of debt on the judgment. Gilb. H. C. P. 33.

The attorneys of R. R. are of record as well as the attorneys of C. R. 1 Roll. 3. And it is now the common course for the plaintiff and defendant to appear by attorney. F. N. B. 25. D. But where the parties stand in contempt, the court will not admit him by attorney, but oblige him to appear in person. ib. 262. Outlawry is excepted by flat. 4 & 5 H. 2. & M. 21. 18, unless where the court orders special bail. By flat. 13 W. 5. c. 6, attorneys are to take the oaths to government under penalties and disability to practice. By flat. 1 H. 5. c. 4. "So sheriff, sheriff's clerk, receiver, nor sheriff's bailiff shall be attorney in the king's courts during the time he is in office with any such sheriff."

In Trinity Term 31 Geo. 3, a rule of court was made to prevent the admission of persons under irregular articles of clerkship, &c. chiefly to prevent the clerks of attorneys from acting as principals. See 4 Term Rep. 379.

Parties to fines as well demandant or plaintiff as tenants or defendants, that will acknowledge their right of lands unto others in pleas of annexure charge, &c. before the fines pass, shall appear personally, to that their age, idocy, or other default (if any he) may be discriminated: provided that if any, by age, impiotry, or casualty, is not able to come into court, one of the justices shall go to the party and receive his cognizance, and shall take with him a knight or man of good fame. Barons of the exchequer and justices shall not admit attorneys, but in pleas that pass before them, and where they are assignified. Referring to the Chancellor his authority in admitting attorneys, and to the Chief Justices. flat. 15 Ed. 2. flat. 1.

In respect of the several courts, there are attorneys at large, and attorneys special, belonging to this or that court only. An attorney may be a solicitor in other courts, by a special retaine: one may be attorney on record, and another do the business; and there are attorneys who manage business out of the courts, &c. flat. 4 H. 4. c. 18, was enacted, that the justices should examine attorneys, and remove the unskillful; and attorneys shall swear to execute their offices truly, &c. and by flat. 33 H. 6. c. 7, the number of attorneys in Norfolk and Suffolk were limited.

By flat. 3 1 Geo. 1. c. 7, attorneys, &c. shall not be allowed any fees laid out for counsel, or otherwise, unless they have tickets thereof signed by them that receive such fees; and they shall give in true bills to their clients of all the charges of suits, under their hands, before the clients shall be charged with the payment thereof. If they delay their client's suit for gain; or demand more than their due fees, and disbursements, the clients shall recover costs and treble damages; and they shall be for ever disbarred to be attorneys. None shall be admitted attorneys in course of record, but such as have been brought up in the said courts, or are well practised and skilled, and of an honest disposition; and no attorney shall suffer any other to follow a suit in his name, on pain of forfeiting 20l. to be disposed of between the king and the party grieved. This statute, as to fees to counsel, doth not extend to matters transacted in inferior courts, but only to suits in the courts of Wiltshire, Hall. Cant. 147.

By the flat. 18 Geo. 1. cap. 25, if any who hath been convicted of forgery, perjury, subornation of perjury, or common barratry, shall practise as an attorney or solicitor in any suit or action in any court, the judge where such action shall be brought hath power to transport the offender for seven years, by such ways, and under such penalties as felons.

The act 2 Geo. 2. c. 25, ordains, That all attorneys shall be sworn, admitted and enrolled, before allowed to sue out writs in the courts at Wiltshire; and after the first of December 1730 none shall be permitted to practise but such as have served a clerkship of five years to an attorney, and they shall be examined, sworn and admitted in open court; and attorneys shall not have more than two clerks at one time, &c. Every writ and copy of any process served on a defendant, and also every warrant made out thereon, shall be indorsed with the name of the attorney by whom sued forth; and no attorneys or solicitors shall commence any action for fees till a month after the delivery of their bills subscribed with their hands: also the parties chargeable may in the meantime get such bills taxed, and upon the taxation the sum remaining due is to be paid in full of the said bills, or in default the parties shall be liable to attachment, &c. And the attorney is to pay the costs of taxation, if the bill be reduced a fifth part. A penalty of 50l. inflicted, and disability to practise, for acting contrary to this statute.

By flat. 6 Geo. 2. cap. 27, Attorneys of the courts at Wiltshire may practise in inferior courts.

By 12 Geo. 2. c. 13, Attorneys, &c, that act in any county-court, without being admitted according to the statute 2 Geo. 2. c. 23, shall forfeit 20l. recoverable in the courts of record; and no attorney, who is a prisoner in any prison, shall sue out any writ, or prosecute suits; if he doth, the proceedings shall be void, and such attorney, &c. is to be struck off the roll. But suits commenced before them may be carried on. A quater serving a clerkship, and taking his solemn affirmation instead of an oath, shall be admitted an attorney.
ATTORNEY.

By the stat. 22 Geo. 2. c. 46. Persons found clerks to attorneys or solicitors are to cause affidavits to be made and filed of the execution of the articles, names and places of abode of attorney or solicitor, and clerk; and none to be admitted till the affidavits be produced and read in court: no attorney having discontinued business to take any clerk. Clerks are to serve actually during the whole time, and make affidavits thereof. Persons admitted sworn clerks in Chancery, or serving a clerkship to such, may be admitted solicitors. By the stat. 23 G. 2. c. 26. Any person duly admitted a solicitor, may be admitted an attorney, without any fee for the oath, or any stamp to be impressed on the parchment, whereas his admission shall be written, in the same manner as by stat. 2 Geo. 2. c. 23. § 20. Attorneys may be admitted solicitors.

By stat. 25 Geo. 3. c. 80. Every admitted attorney, solicitor, notary, proctor, agent or procurator, shall annually take out a stamp certificate [with a J. stamp if within the bills of mortality, and J. if elsewhere] from the courts in which they practice, on penalty of 50.1. Attorneys of courts, &c. shall not receive or procure any blank warrant for arrests from any sheriff, without writ first delivered, on pain of severe punishment, expulsion, &c. And no attorney shall make out a writ with a clause 'ac etiam altera, &c. where special bail is not required by law. P. 35. 15 Car. 2. See tit. Appearance. Action upon the land is a case for a client against his attorney, if he appear for him without a warrant; or if he plead a plea for him, for which he had not his warrant. 1 Litt. Abr. 160. But if an attorney appear without warrant, and judgment is had against his client, the judgment shall stand, if the attorney be responsible; contra, if the attorney be not responsible. 1 Saith. 88.

Action lies against an attorney for suffering judgment against his client by tali dictis, when he had given him a warrant to plead the general issue; this is understood where it is done by connivance. 1 Dem. 185. If an attorney makes default in a plea of land, by which the party loses his land, he may have a writ of sequestration against the attorney, and recover all in damages, Ibid. An attorney owes to his client secrecy and diligence, as well as fidelity; and if he take reward on the other side, or cause an attorney to appear and confess the action, &c. he may be punished. Ibid. 9.

But action lies not against an attorney retained in a suit, though he knows the plaintiff hath no cause of action; he only acting as a servant in the way of his profession. 1 Litt. 117; 1 Med. 209. Though, where an attorney or solicitor is found guilty of a gross neglect, the court of Chancery has in some cases ordered him to pay the costs. 1 P. Wm. 593. He who is an attorney at one time, is attorney at all times, pending the plea. 1 Dem. 809. And the plaintiff or defendant may not change his attorney, while the suit is depending, without leave of the court, which would reflect on the credit of attorneys; nor until his fees are paid. 1 Med. 14. Care must be taken to proceed properly following the death of an attorney therein; and not be delayed on that account. For if an attorney deth, the plaintiff or defendant may be required to make a new attorney. 2 Keble. 275.

Attorneys are liable to be punished in a summary way, either by attachment, or having their names struck out of the roll for ill practice, attended with fraud and corruption, and committed against the obvious rules of justice and common honesty; but the court will not easily be prevailed on to proceed in this manner, if it appears, that the matter complained of was rather owing to neglect or accident than design; or if the party injured has other remedy by act of parliament, or action at law. 1 Med. 551; 718; 440; 593; 657. 4 Med. 377.

If an attorney, defendant in an action, does not appear in due time, plaintiff may sign a writ for a continued process, which enables him to strike the defendant off the roll, and then he may be sued as a common person (stat. 2 H. 4. c. 8.) and cannot be proceeded against by bill. —On making satisfaction to the plaintiff, an attorney to be forejudged, may be restored. See Impey's Instructeur Clericalis C. P. 521.

Sometimes attorneys are struck off the roll on their own application, for the purpose of being called to the bar, &c. and in this case, they must be disbarred by their inn, before they are re-admitted attorneys. Doug. 144.

An attorney convicted of felony struck off the roll. Comp. 829.

They are also liable to be punished for base and unfair dealings towards their clients, in the way of business, as for protracting suits by little trifles and devices, and putting the parties to unnecessary expense, in order to raise their bills; or demanding fees for business that was never done; or for refusing to deliver up their client's writings with which they had been entrusted in the way of business; or money which has been recovered and received by them to their client's use, and for other such like gross and palpable abuse. 2 Haw. P. C. 1444; 8 Med. 306; 12 Med. 716.

In a criminal case the attorney for defendant may be his bail. Doug. 467. See tit. Bail.

Payment to the attorney, is payment to the principal. Doug. 625; 1 Black. R. 8.

An action lies against an attorney for neglecting to charge a person in execution at his client's suits, according to a rule of court; although it seems it was rather want of judgment than negligence, 3 H. 344; 55; —But the court will not proceed against him for it in a summary way. 4 Burr. 2600.

An attorney has a lien on the money recovered by his client, for his bill of costs: if the money come to his hands he may retain to the amount of his bill. He may keep it in trust if he can lay hold of it; if he apply to the court, they will prevent it being paid over until his demand is satisfied. If the attorney give notice to the defendant not to pay till his bill be discharged, a payment by the defendant after such notice, would be in his own wrong, and like paying a debt which has been allowed after notice. Doug. 236.

The court under circumstances, will entertain a summary jurisdiction over an attorney in obliging him to deliver up deeds, &c. on satisfaction of his lien, tho' they came into his hands as reward of a court or receiver of rents. 2 Term R. 275. See 1 Saith. 87; 1 Litt. 148; 3 Med. Cas. Law & Eq 300. The latter that an attorney cannot detain papers delivered to him on a special trust for money due to him in that very business. Attorneys have the privilege to be and be sued only in the courts at Westminster, where they practise: they are not obliged to put in special bail, when defendants; but when they are plaintiffs, they may put in special bail in all bailable cases. 1 Stat. 395. Word. Instr. 430. But an attorney of one court, may in that court, hold an attorney
of another court to bail. Attorneys shall not be chos'n into offices, against their wills. See tit. Abatement. Privilege.

ATTORNEY OF THE DUTCHY COURT OF LANCASTER, Attorneyus civis duce et dicti Lancastrensis.] Is the second officer in that court; and seems for his skill in law to be there placed as affessor to the chancellor, and chosen for some special trust reposed in him, to deal between the king and his tenants. Cowel.

ATTORNEY GENERAL, Is a great officer under the king, made by letters patent. It is his place to exhibit informations, and prosecute for the crown, in matters criminal; and to file bills in the Exchequer, for any thing concerning the king in inheritance or profits; and others may bring bills against the king's attorney. His proper place in court, upon any special matters of a criminal nature, wherein his attendance is required, is under the judges, on the left hand of the clerk of the crown: but this is only upon solemn and extraordinary occasions; for usually he does not sit there, but within the bar in the face of the court.

ATTORNAMENT, Attorneyamentum from the French tourner, to turn.] -Sir Martin Wright and many other writers have laid it down as a general rule, that by the old feudal law the feudatory could not alien the feu without the consent of the lord: nor the lord alien or sell his seignior without the consent of his feudatory. Wright's Tenures 30, 51. It is certain that this doctrine formerly prevailed in England; if not at least to equal extent in other countries.

This necessity of the consent of the tenant to the alienation of the lord gave rise to our old law to the doctrine of attornment; which at common law, signified only the consent of the tenant to the grant of the seignior, whereby he agreed to become the tenant of the new lord. But after the statute qua re terram (13 Ed. I. 51.) was passed, by which subinfeudation was prohibited, it became necessary that when the revocatio or remainder after an estate for years, for life or tail, granted his remainder or remainder, the particular tenant should attend to the grants. The necessity of attornment was, in some measure, avoided by the statute of uses; (27 H. 8. c. 26.) as by that statute the position was immediately executed to the use; and by the statute of Wills (34 & 35 Ed. 8. c. 5.) by which the legal estate is immediately vested in the devisee.

Attornaments however still continued to be necessary in many cases; but both their necessity and efficacy are now almost totally taken away; for by 8 Geo. 4. c. 19, it is enacted, That all grants and conveyances of lands, rents, reversion, or remainder, by sale, by demise, or otherwise, shall be good without the attornment of the tenant; but notice must be given of the grant to the tenant, before which he shall not be prejudiced by payment of any rent to the grantor; or for breach of the condition for non-payment. And by 11 Geo. 2. c. 19, attornaments of lands, &c. made by tenants to strangers, claiming title to the estate of their landlords shall be null and void, and their landlord's position not affected thereby; though this shall not extend to vacate any attornment made pursuant to a judgment at law, or with consent of the landlord; or to a mortgagee on a forced mortgage.

The principle of the statute, the doctrine of attornment was one of the most copious and abstruse points of the law. But the acts having made attornment both unnecessary and inoperative, the learning upon it may be

fived to have become near entirely useless. See 1 Sir. 509.

AVAGE, or Ariffe. A rent or payment by tenants of the manor of Wiltshire in Essex, upon St. Leonard's day, 6 November, for the privilege of pannage in the lord's woods, viz. for every pig under a year old, an half-penny; for every yearly pig, one penny; and for every hog above a year old, two-pence. Blount.

AUCTIONARII, Auctionarii, Sellers, traders, or retailers. Placit. Part. 18 Ed. I. But more properly brokers.

AUCTIONS and AUCTIONEERS, Under flats. 17 Geo. 3. c. 50: 19 Geo. 3. c. 25, 56: 21 Geo. 3. c. 47: 22 Geo. 3. c. 66: 32 Geo. 3. c. 11, every Auctioneer must take out an annual licence; paying within the bills of mortality £1, 3s. and without £5, 9s. and under these statutes and flats. 27 Geo. 3. c. 13, (explained by statutes 29 Geo. 3. c. 63: 30 Geo. 3. c. 26: 31 Geo. 3. c. 41, containing certain exceptions) duties are imposed on goods sold by auction; which duties are a charge on the auctioneer, not on the purchaser.

The practice of pannage, as it is called, at auctions was in Bessewell v. Christlie, (Comp. 355.) considered as illegal; but the legislature having enacted that property put up to sale at auction shall, upon the knocking down the hammer, subject the auctioneer to the payment of certain duties, unless such property can, by the mode prescribed by the act be flown to have been bought in by the owner himself, or by some person by him authorized, items indirectly to have given a function to this practice which may materially affect the authority of the decision in adder v. Gofigore, and the opinion in Bessewell v. Christlie, sec 2 S. c. C. R. 326. and the flat. 28 Geo. 3. c. 37. § 20. Poulalnou's Trustees of Equity, l. 215.

AUDIENCE COURT, Curia audiencei Contarciensis.] A court belonging to the archbishop of Cantarbury, having the same authority with the court of arches, though inferior to it in dignity and antiquity. It was held in the archbishop's palace; and in former times the archbishops went thither and determined a great many ecclesiastical causes in their own palaces; but before they pronounced their definitive sentence, they committed the matter to be argued by men learned in the law, whom they named to be their auditors: and so in time it grew to one special man, who at this day is called confuval regio ura and auditor officialis. And to the office of auditor was formerly joined the chancery of the archbishop, which meddles not with any point of contentious jurisdiction, that is, deciding of cases between party and party, but only such as are of office, and especially as are criminal jurisdiction; as the granting the custody of spiritualities, during the vacancy of bishoprics, institutions to benefices, determinations, &c. but this is now distinguished from the audience. The auditor of this court anxiously, by special commission was vicar general to the archbishop, in which capacity he exercised ecclesiastical jurisdiction of every diocese becoming vacant within the province of Canterbury, 4 S. c. 357. but now these great officers of official principal of the archbishop, dean or judge of the peculiar, and official of the audience are, and have been for a long time past, united in one person under the general name of Dean of the arches. John. 254.


AUDEO ET TERMINANS, See title Cypri and Fernerswy, Abbe, Palaeo.

AUDITA
AUDITA QUERELA. A writ whereby a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, [or on a statute-merchant, statute-able or recognizance,] may be relieved upon good matter of discharge, which has happened since the judgment: as if the plaintiff hath given him a general release; or if the defendant hath paid the debt to the plaintiff, without procuring satisfaction to be entered on the record. In these and the like cases where the defendant hath good matter to plead, but hath no opportunity of pleading it, (either at the beginning of the suit, or post derrum continuance,) which must always be before judgment, an audita querela lies, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is a writ directed to the court flating that the complaint of the defendant had been heard (audita querela defendantis,) and then, setting out the matter of the complaint, it at length enjoins upon the court to call the party before them, and, having heard their allegations and proofs, to cause justice to be done between them. Finch, l. 480: F. N. B. 101. It also lies for Bail, when judgment is obtained against them by feire facias to answer the debt of their principal, and it happens afterwards that the original judgment against their principal is reversed: for here the bail, after judgment had against them, have no opportunity to plead this special matter, and therefore they shall have reliefs for audita querela; (1 Roll. Abr. 305;) which is a writ of a most remedial nature, and items to have been invented, left in any case there should be an oppressive defect of justice, where a party, who hath good defence, is too late to make it in the ordinary forms of law. But the indulgence now shown by the courts in granting a summary relief upon motion, in cases of such evident oppression, (Lord Raym. 439: 1 Salk. 95;) has almost rendered useless the writ of audita querela and driven it quite out of practice. 3 Comm. 406.

Some part of the old law on this subject is here stated; to give the student a general idea of this circuitous proceeding—If necessity to enter more at large into this learning, let him look into Viners Abatement, and Commentaries.

On a statute, the conunor or his heir may bring audita querela, before execution is sued out; but this may not be done by a stranger to the statute, or a purchaser of the land. 1 Dom. Abr. 630: 3 Rep. 13. If a lessee covenants for him and his assigns to repair, and the lessee affigns over, and the covenant is broken: if the lessor sues one of them and recovers damages, and then sues the other, he may bring audita querela for his relief. Bro. 74. And where a man hath goods from me by my delivery, and another man takes them from him, so that he is liable to both our suits: and one of us sue and recover against him, and then the other sues him, his remedy is by this writ. Kyer 23.2. One binds himself and his heirs in an obligation, if the obliger recover of the heir, and after sue the executors for the same cause, Sc. they may have the writ audita querela. Plowd. 439. If two joint and several obligors are sued jointly, and both taken in execution, the death or escape of one of them will not discharge the others, so as to give him this action: but if such obligors be prosecuted severally, and a satisfaction is once had against one of them, or against the sheriff upon the escape of one, the other may have it. Hob. 48: 5 Rep. 87. Judgment is had against a sheriff on an escape of a person in execution, and after the final judgment is reversed for error, the sheriff shall have relief by audita querela. 8 Rep. 142. If a plaintiff, that acts as administrator, and recovers judgment and pays execution, has his letters of administration revoked; the defendant must be relieved by audita querela. Style 417.

If A. being within age becomes bail for B. and after two fore days, and abit returned, judgment is given against A. Sc. he may have an audita querela, and avoid the recognizance, and to the judgment thereupon of confinement shall be avoided. Tel. 55.

But if A. being within age enters into a bond to B. who procures C. without any warrant, to appear for A. and confesses a judgment thereupon, yet A. shall not have an audita querela, but he must take his remedy by action of affix against the attorney. 3 W. 1. 694.

The writ of audita querela may be had, where a recognizance or statute entered into is defective, and not good; or being upon an usurious contract, by dures of imprisonment, or where there is a defraiture upon it, &c. Moir, Co. 1097: 1 Broww. 39: 2 Boll. 320. So upon showing an acquittance of the cognizer, on a suggestion that he had agreed to deliver up the statute: 1. Roll. 309. Where one enters into a statute, and after sells his lands to divers purchasers; or judgment is had against a man, who leaves land to several heirs, &c. and one of the purchasers, or one heir alone is charged, he may have this writ against the rest to contribute to him. 3 Rep. 44: 2 Boll. 15.

Where a statute or recognizance is acknowledged before one who hath not power to take it, and afterwards the cognizer makes a feuement of the land to another, and the cognizer taketh out execution, in such case the feuecent may have an audita querela, and avoid the execution. Dyer 27, 35.

If A. enters into a statute to B. and pays the money at the day assigned, upon which the statute is cancelled, and after B. forges a new statute in the name of A. in this case A. may relieve himself by audita querela, for the forged statute having all the essentials of a true one, the court was obliged to look on it as such till the contrary appeared; which the cognizer could not set forth before execution, having no day to appear judicially in court, and therefore is put to this writ to avoid the execution founded on the injustice of the pretended conuer. F. N. B. 104.

If upon an erit the sheriff takes an inquisition, and there are several lands found subject to the extent, and several values found, and the sheriff returns, that he has delivered some of the lands in particular for the moity, where it appears according to the values found, that an equal moiety is not delivered to the party who recovered, but more than a moiety; yet this is not void, nor is it a sufficient by the entry, but only voidable by audita querela, 1 Roll. Abr. 305.

If two executors sue execution for damages recovered by the tenant, where one hath released, an audita querela lies against both. 1 Roll. Abr. 312.

If A. cognizor of a statute relieves to the tenant all right, interest, and demand, together with all suits and executions, and afterwards pays execution, the tenant shall have an audita querela to set aside this execution. 1. Eliz. 45: 1 And. 132.
AUD

So in trespass or other action, if it be found for the plaintiff by moj prie, and after, before the day in bank, the plaintiff releases to the defendant, and after judgment is given for the plaintiff, the defendant shall have an auditia querela, upon this matter; because he could not plead the release at the day in bank. 1 Ed. Abr. 357.

In an auditia querela, the process is a centum facias, distincti, alias, plerices: and if non inventus be returned, or that he hath nothing, the plaintiff shall have a cognitio against the defendant. F. N. B. 104: Dyer 297. b.

If an auditia querela is founded on a record, or the person bringing it is in custody, the process upon it is a feire facias; but if found on matter of fact, or the party is at large, then the process is a venire. 1 Salk. 92.

And if there be a default by the defendant upon a feire facis, or two nihilis returned, the plaintiff shall have judgment. 1 Salk. 93. But, where an auditia querela is sued quia ties, and the party is at large, there shall never be a feire facias. 1 Salk. 92: 1 B. 100. n.

An auditia querela shall be granted out of the court, where the record upon which it is founded remains, or it may be removable in the same court. F. N. B. 105. b. And therefore if a man recover in B. R. or C. B. the defendant, having a release after judgment, and before execution, shall sue the auditia querela out of B. R. or C. B. where the record is. F. N. B. 105. So, if a recognition be acknowledged in C. B. and execution be sued upon it after release, the defendant shall sue the auditia querela out of C. B. F. N. B. 105. But an auditia querela may be by original; and upon a judgment in C. B. it goes out of chancery returnable in C. B. F. N. B. 105.

The writ of auditia querela shall be allowed only in open court. 1 B. J. 140: 2 B. J. 97: 2 Slo. 240.

Upon auditia querela brought, a superfedeas shall go to stay execution: and if the judgment in this action is, to be discharged of execution. H. 2. If an auditia querela be unduly gotten, upon a false surmise, it may be quashed. 1 B. J. 140. This writ lies not after judgment upon a matter which the party might have pleaded before. C. Eln. 35. A bare surmise is not sufficient to avoid a judgment; but generally some specialy must be shown. C. Juc. 579. Upon a release or other deed pleaded, no superfedeas shall be granted till the plaintiff in the auditia querela hath brought his witnisses into court to prove the deed: and if execution be executed before, bail is to be put in by allowance of the court. 1 Litt. Abr. 151.

Upon a motion for an allowance of an auditia querela, it was held, that bail must be given in court and not elsewhere; unless in cases of necessity, to be allowed by the court, and then it may be put in before two judges. Palm. 422.

A man nonsuited in an auditia querela, may have a new writ, F. N. B. 104. When lands are extended on any statute, &c. before the time, auditia querela 23, 46 B. 3. A writ in the nature of an auditia querela, has been made out returnable in B. R. on a special pardon, setting forth the whole matter. T. K. C. 100.

AUDITOR, Lat. An officer of the king, or other person or corporation, who examines yearly the accounts of all under-officers, and makes up a general book, which shews the difference between their receipts and charge, and their several allowances, commonly called allocations: as the auditors of the exchequer take the accounts of those receivers who collect the revenues. 4 Inst. 106.

Receivers general of lease-farm rents, &c. are also termed auditors, and hold their audit for adjusting the accounts of the said rents at certain times and places appointed. And there are auditors attainted by the court to audit and settle accounts in actions of account, and other causes, who are proper judges of the cause, and pleas are made before them, &c. 1 Broun. 29. See tit. Account.

AUDITORS OF THE RECEIPTS, An officer of the exchequer, that files the tellers' bills, and having made an entry of them, gives the lord treasurer, &c. weekly, a certificate of the money received; he makes debentures to the tellers, before they pay any money; and takes their accounts: he also keeps the book of receipts, and the treasurer's key of the treasury, and finds every teller's money locked up in the treasury, 4 Inst. 107.

AUDITORS, the same with auditors, i. e. the chancellors, or those who were newly inducted in the mysteries of the Christian religion before they were admitted to baptism; and auditorium was that place in the church where they were baphtised, and were instructed, now called the choir of the church: and in the primitive times, the church was so stricly in keeping the people together in that place, that the person who went from thence in seclusion time was excommunicated. Rh. 1.

AUDITORS OF THE IMPREST, Officers in the exchequer, who formerly had the charge of auditing the great accounts of the king's customs, naval and military expenses, &c. But who are now superseded by the Commissioners for auditing the public accounts. See title Accounts Publick.

AVENAGE, from the Lat. avena. A certain quantity of oats paid by a tenant to his landlord as a rent, or in lieu of some other duties. Bl. 1.

AVENOR, avenerius, from the Fr. avoine, oats.] An officer belonging to the king's stables, that provided oats for his horses; mentioned Stat. 13 Car. 2, cap. 8.


AVENTURE, (properly adventure). A misfortune causing the death of a man: as where a person is suddenly drowned, or killed by any accident, without felony. Co. Lit. 391.

AVER, quaestio vera, from the Fr. avare and ouvrage, velut operagium.] Signifies a day's work of a ploughman, formerly valued at 8 d. It is found in Doomsday. 4 Inst. 269.

AVERAGE, averagium.] Is said to signify service which the tenant owes to his lord by horse or carriage: but it is more commonly used for a contribution that merchants and others make towards their loyces, who have their goods call into the sea, for the safeguard of the ship, or of the other goods and lives of those persons that are in the ship, during a voyage. It is in this sense called average, because it is proportioned and allotted after the rate of every man's goods carried. See title Injunction.

Aver is likewise a small duty, paid to masters of ships when goods are sent in another man's ship, for their care of the goods, over and above the freight.

AVERAGE OF CORN FIELDS, The stubble or remainder of straw and grals left in corn fields after the harvest is carried away. In Kent it is called the gratten, and in other parts the roughings, &c.
AVER CORN, Is a reserved rent in corn, paid by farmers and tenants to religious houses: and signifies, by Somer, corn drawn to the lord's granary, by the working of the cattle of the tenant. "It's supposed that this custom was owing to the Saxon prude laws, &c. &c. corn brought to the priest regularly after St. Martin's day, as an obligation for the first-fruits of the earth; under which title the religious had corn-rent paid yearly; as appears by an inquisition of the estate of the abbey of Glastonbury. A.D. 1210.

AVER LAND, Seems to have been such lands as the tenants did plough and manure, corn averis suis, for the proper use of a monastery, or the lords of the soil. Mon. Angl.

AVER PENNY, (or average penny). Money paid towards the king's average or carriages, or to be freed thereof.—Refusal.

AVER SILVER, A custom or rent formerly so called. Credul.

AVERIA, Cattle: Spratius deduces the word from the Fr. aviser, to work, as if chiefly working-cattle; though it seems to be more probably from averir, to have or possess: the word sometimes including all personal estate, as cattle did all goods and chattels. This word is used for oxen or horses of the plough; and in a general sense, any cattle. — Averia domestica; see Elongate.

AVERIS CAPTIS IN WITHERAM. A writ for the taking of cattle to his use, who hath cattle unlawfully detained by another, and driven out of the county where they were taken, so that they cannot be reprieved by the sheriff. Reg. Ord. 82. See tit. Difpens.

AVERMENT, verificatis, from the Fr. averir, i. e. verificare, testiori.] Is an offer of the defendant to make good or justify an exception pleaded by him in abatement or bar of the plaintiff's action: and it signifies the act, as well as the offer, of justifying the exception; and not only the form, but the matter thereof. Co. Litt. 362. Averment is either general, or particular; general, which concludes every plea, &c. containing matter affirmative, and ought to be with these words, and this he is ready to verify, &c. Particular averment is when the life of tenant for life, or of tenant in tail, &c. is averred. Ibid. As to general averments see tit. Pleading. With respect to particular averments, the following quotations may serve as examples. — See further Fin. Abr. tit. Averment.

He that claims eject from tenant for life, or, in distress, or from parson of a church, ought to aver his life. Br. Estates, pl. 18.

Where one thing is to be done in consideration of another, on contracts, &c. there must be an averment of performance, but where there is promise against promise, there needs no averment; for each party hath his action, 1 Lev. 87. The use of averment being to ascertain what is alleged doubtfully, deeds may sometimes be made good by averment, where a person is not certainly named; but where the deed itself is void for uncertainty, it cannot be made good by averment. 5 Rep. 155. Averment cannot be made against a record, which imports in itself an uncontrollable verity. Co. Litt. 26: 1 Tuck. 252.

Where a statute is recited, there one may not aver that there is no such record; for generally an averment, as this is, doth not lie against a record; for a record is a thing of solemn and high nature, but an averment is but the allegation of the party, and not so much credit in law to be given to it. Lit. P. R. 155.

AVERMENT. Averment lies not against the proceedings of a court of record. 2 Howel. P. C. c. 1, sect. 4. Nor shall it be admitted against a will concerning lands. 3 Rep. 68. And an averment shall not be allowed where the intent of the testator cannot be collected out of the words of the will. 4 Rep. 44. One may not aver a thing contrary to the condition of an obligation, which is supposed to be made upon good deliberation, and before witnesses, and therefore not to be contradicted by a bare averment. 1 Lit. Abr. 156.

An averment of a wicked and unlawful consideration of giving a donor, may well be pleaded, though it doth not appear on the face of the deed; and any thing which shews an obligation to be void may well be averred, although it doth not appear on the face of the bond. Adjudged on demurrer, after two arguments in the case of Collins and Blantner, C. B. 171, 7 Geo. 3: 2 Wilso. 347.

If an heir is sued on the bond of his ancestor, it must be averred, that the heirs of the obligor were expressly bound. 2 Sam. 156. In declaring you knew that the obligor bound his heirs. Another consideration that is mentioned in a deed, may be averred, where it is not repugnant or contrary to the deed. 1 Dyer 140. But a consideration may not be averred, that is against a particular express consideration; nor may averment be against a consideration mentioned in the deed, that there was no consideration given. 1 Rep. 175: 8 Rep. 157. If an estate is made to a woman that hath a husband, by fine or deed, for her life; in this case it may be averred to be made to her for her joinder, although there be another use or consideration expressed. 4 Rep. 4. Averment may be of a use upon fine, or common recovery; though not of any other use than what is express in it: it may be received to reconcile a fine, and the indenture to lead the uses. 1 Dyer 311: 2 Bali. 235: 1 And. 312.

If one has two mansons known by the name of W. and levies a fine or grants an annuity out of his manor of W. he shall by averment affermare which of them it was, on par. 6 Med. 235: Obs. Abr. 138.

If a piece of ground was ancienly called by one name, and of late is called by another, and it is granted to me by this new name; an averment may be taken that it is all one thing, and it will make it good. 1 Dyer 57: 44. No averment lies against any returns of writs, that are definitive to the trial of the thing returned; as the return of a sheriff upon his writs, &c. But it may be where such are not definitive; and against certificates upon commissions out of any courts; also against the returns of bailiffs of franchises, that the lords be not prejudiced by it. 1 Dyer 348: 3 Rep. 121: 2 Co. 13.

As to averments in actions on the case for words, See tit. Action II. 1.

A special averment must be made upon the pleading of a general pardon, for the party to bring himself within the pardon. Ho. 67. A person may aver he is not the same person on appeal of death in favour of life. 1 Nelf. Abr. 305.

Where a man is to take a benefit by an act of parliament, there in pleading he must aver, that he is not a person excepted; but where he claims no benefit by it, but only to keep that which he had before, in such case it is not necessary to make such averment. Plow. Com. 87, 488.

N 2

Plea
Plea merely in the negative, shall not be avered, because they cannot be proved: nor shall what is against premition of law, or any thing apparent to the court.

Co. Litt. 564. 373. By statute 4 & 5 Will. i. 14, no exception or advantage shall be taken upon a demurrer, for want of averment of an apparent fact, &c. except the same be specially set down for cause of demurrer. See tit. Amendment.

ATTLE. To carry goods in a wagon, or upon loaded horses, a duty required of some customary tenants. Car. xij. Glash. Ms. f. 4.

AVUGA. A cistern for water. Reg. Excl. Will. MS.

AVUGMENTATION. Augmentation.] The name of a court created 27 H. 8. for determining suits and controversies relating to monuments and abbey lands. The intent of this court was, that the king might be justly dealt with touching the profits of such religious houses, as were given to him by act of parliament. It took its name from the augmentation of the revenues of the crown, by the suppression of religious houses: and the office of augmentation, which hath many curious records, remains to this day, though the court hath been long since dissolved. Terms of Lex 68.

AVISAMENTUM. Advice, or counsel.—De avisamento & consilia consilii suijus consilii, &c. was the common form of our ancient kings' grants.

AULIA, i.e. A court-baron, aula ibidem tenet die, &c. Aula ecclesiae is that which is now termed monia ecclesiæ. Eadn. lib. 6. p. 141.

AULNAGE. See ALNAGE.

AUMONE, Fr. aumône, aumon.] Tenure in aumône is where lands are given in alms to some church, or religious house, upon condition that a service or prayers shall be offered at certain times for the repose of the donor's soul. Brit. 164. Vide Franklumage.

AUNCUL or AUSEL-WEIGHT, or load, sale-weight, or from angus, the handle of the balance.] An ancient manner of weighing, by the hanging of scales or hooks at each end of a beam or staff, which by lifting up in the middle with one's finger or hand, discovered the equality or difference between the weights at one end and the thing weighed at the other. This weighing, being subject to great deceit, was prohibited by several statutes, and the even balance commanded in its stead. But notwithstanding, it is still used in some parts of England: and what we now call the fiddles, a sort of hand-weighing among butchers, being a small beam with a weight at one end, (which shews the pounds by certain notches) seems to be near the same with the auncel-weight.—See tit. Weights and Measures.


AVOIDANCE. In the general signification, is when a benefit is void of an incumbent; in which sense it is opposed to plenary. Avoidances are either in fact, as by death of the incumbent; or in law: and may be by cession, deprivation, resignation, &c. See tit. Advouso.

AVOIDUPOIS, or avoirdupois. Fr. avar du poids, i.e. avar of weight, ant justif e poudre.] A weight different from that of trove-weight, which contains but twelve ounces in the pound, whereas this hath sixteen ounces; and in this respect it is probably to be called, because it is of greater weight than the other. It also signifies such merchandizes as are weighed by this weight; and is mentioned in divers statutes. See tit. Weights.
courts at Westminster, the defendant making suggestion in the nature of an answer for rent, the court on prayer shall award a writ to inquire of the sum in arrear, and the value of the distress, &c. upon return whereof the defendant shall recover the arrear, if the distress amounts to that value, or else the value of the distress with costs; and where the distress is not found to the value of the arrears, the party may dispair for the residue. See titles Distress and Replevin.

ADURUM REGIÆ. The queen's gold.—This is a royal revenue belonging to every queen-consort during her marriage, from every person who hath made a voluntary offering or fine to the king, of ten marks or upwards, in consideration of any grants, &c. by the king to him; and it is due in the proportion of one-tenth part more, and over and above the entire fine to the king.

AUSCULTARE. Formerly persons were appointed in monasteries to hear the monks read, and direct them how, and in what manner they should do it with a graceful tone or accent, to make an impression on their ears, which was required before they were admitted to read publicly in the church; and this was called auscultation. See Lanfrancus in Decretis pro ordine Benedict.

5. AUSTURCUS, and Oftorus. A goshawk; from whence we usually call a falconer, who keeps that kind of hawks, an offinger. In ancient deeds there has been a reserve, as a rent to the lord, unaustorium.

AUTER DROIT. An expression used when persons sue or are sued in another's right; as executors, administrators, &c.

AUTERFOITS ACQUIT, is a plea by a criminal that he was heretofore acquitted of the same treason or felony: for one shall not be brought into danger of his life, for the same offence more than once. 3 Inst. 213. Except by appeal of death which is a private suit. See tit. Appeal. There is also plea of auferots convolat, and auferots attainted; that he was heretofore convicted, or attainted, of the same felony. In appeal of death, auferots acquit, or auferots attainted, upon indictment of the same death, is no plea. H. P. C. 244. But in other cases where a person is attainted, it is to no purpose that he should be attainted a second time. And conviction of manslaughter, where clergy is admitted thereon, will bar any subsequent prosecution for the same death.

AUSTURCUS, and Oftorus. A goshawk; from whence we usually call a falconer, who keeps that kind of hawks, an offinger. In ancient deeds there has been a reserve, as a rent to the lord, unaustorium.

AUTER DROIT. An expression used when persons sue or are sued in another's right; as executors, administrators, &c.

AUTERFOITS ACQUIT, is a plea by a criminal that he was heretofore acquitted of the same treason or felony: for one shall not be brought into danger of his life, for the same offence more than once. 3 Inst. 213. Except by appeal of death which is a private suit. See tit. Appeal. There is also plea of auferots convolat, and auferots attainted; that he was heretofore convicted, or attainted, of the same felony. In appeal of death, auferots acquit, or auferots attainted, upon indictment of the same death, is no plea. H. P. C. 244. But in other cases where a person is attainted, it is to no purpose that he should be attainted a second time. And conviction of manslaughter, where clergy is admitted thereon, will bar any subsequent prosecution for the same death.

AUTER DROIT. An expression used when persons sue or are sued in another's right; as executors, administrators, &c.

AUTERFOITS ACQUIT, is a plea by a criminal that he was heretofore acquitted of the same treason or felony: for one shall not be brought into danger of his life, for the same offence more than once. 3 Inst. 213. Except by appeal of death which is a private suit. See tit. Appeal. There is also plea of auferots convolat, and auferots attainted; that he was heretofore convicted, or attainted, of the same felony. In appeal of death, auferots acquit, or auferots attainted, upon indictment of the same death, is no plea. H. P. C. 244. But in other cases where a person is attainted, it is to no purpose that he should be attainted a second time. And conviction of manslaughter, where clergy is admitted thereon, will bar any subsequent prosecution for the same death.

AUTER DROIT. An expression used when persons sue or are sued in another's right; as executors, administrators, &c.

AUTERFOITS ACQUIT, is a plea by a criminal that he was heretofore acquitted of the same treason or felony: for one shall not be brought into danger of his life, for the same offence more than once. 3 Inst. 213. Except by appeal of death which is a private suit. See tit. Appeal. There is also plea of auferots convolat, and auferots attainted; that he was heretofore convicted, or attainted, of the same felony. In appeal of death, auferots acquit, or auferots attainted, upon indictment of the same death, is no plea. H. P. C. 244. But in other cases where a person is attainted, it is to no purpose that he should be attainted a second time. And conviction of manslaughter, where clergy is admitted thereon, will bar any subsequent prosecution for the same death.

AUTER DROIT. An expression used when persons sue or are sued in another's right; as executors, administrators, &c.

AUTERFOITS ACQUIT, is a plea by a criminal that he was heretofore acquitted of the same treason or felony: for one shall not be brought into danger of his life, for the same offence more than once. 3 Inst. 213. Except by appeal of death which is a private suit. See tit. Appeal. There is also plea of auferots convolat, and auferots attainted; that he was heretofore convicted, or attainted, of the same felony. In appeal of death, auferots acquit, or auferots attainted, upon indictment of the same death, is no plea. H. P. C. 244. But in other cases where a person is attainted, it is to no purpose that he should be attainted a second time. And conviction of manslaughter, where clergy is admitted thereon, will bar any subsequent prosecution for the same death.

AUTER DROIT. An expression used when persons sue or are sued in another's right; as executors, administrators, &c.
AUTHORITY.

The one by an authority, and the other by an interest, the law will attribute it to the interest. But where an interest and authority meet, if the party declare, that the thing shall take effect by virtue of his authority, there it shall prevail against the interest. 6 Rep. 17.

In many cases authorities must be strictly executed according to the power given.

If a man devise, that his executors shall fill his lands, this gives but a naked authority; and the lands, till the sale is made, descend to the heir at law, and in this case all must join in the sale; and if one die, it being a bare authority, cannot survive to the reil. 4 Co. Lit. 112 b; 113 a: 181 b.

But if a man by will give land to executors to be sold, and one of them die, the survivors may sell; for the trust being coupled with an interest, shall survive together with it. 4 Co. Lit. 113 b: 181 b.

If a letter of attorney be to make livery upon condition, so as to make a conditional feoffment, and the attorney delivers feoff absolutely, the livery is not good: because the attorney had no authority to create an absolute fee-simple; and therefore such absolute feoffment shall not bind the feoffor, because he gave no such authority. 2 Rolls Abr. 9.

If a warrant of attorney be given to two jointly to take livery, and feoffor makes livery to one in the absence of the other, in the name of both, this is void; because they being appointed jointly to receive livery, are to be considered but as one. 4 Co. Lit. 49 b: 2 Rolls Abr. 8.

But if a letter of attorney be made to three conjunction & division, and two only make livery, this is not good, because not pursuant to their authority; for the delegation was to them all, or to each of them separately: yet if the third was present at the time of the livery made by two, though he did not actually join with them in the act of livery, yet the livery is good; because when they all three are upon the land for that purpose, and two make livery in the presence of the third, there is his concurrence to the act, though he did not join in it actually, since he did not dissent to it. 1 Dyer 67: 1 Rol. Abr. 329: 4 Co. Lit. 181 b: 1 Rol. Rep. 299: 1 Gres 26.

If a letter of attorney be given to &. to make livery of lands already in lease, the attorney may enter upon the lease in order to make livery; because, whilst the lease continues in possession, the attorney cannot deliver seisin of it; and therefore, to execute the power given him by the letter of attorney, it is necessary he should have a power to enter upon the lease. 3 Co. Lit. 52: 2 Poth. 103: 1 Dyer 131 a: 329 a.

If a sheriff makes a warrant to four or three, or a companion jointly or severally to arrest one, two of them may arrest the party, for the greater expedition of justice. 4 Co. Lit. 181: 1 Cmb 52: 2 Rol. Rep. 137.

So if the lord gives licence to a copystarfor life, to lease the copystfor five years, if the copystfor tenant therein, and he leaves it for five years generally without limitation, this is a good execution, and pursuant to the licence; for the lease is determinable by his death, by a limitation in law; and therefore as much is implied by law, as if he had made an actual limitation. 1 Rol. Abr. 333: 334: 2 Cmb 173: 1 Gres 196: 2 Dyer 133 b: 318 a.

Awards.

Autumn. The decline of the summer. Some computed the years by autumn; but the English Saxons by winters. Tacitus says, that the ancient Germans knew the other divisions of the year, but did not know what was meant by autumn.

Autumnalia. Those fruits of the earth which are ripe in autumn or harvest.

Aurilium ad filium militem faciendum et filiam maritandum. A writ formerly directed to the sheriff of every county, where the king or other lord had any tenants, to levy them of an aid towards the knightage of a son, and the marrying of a daughter. F. N. B. 2: 2 See tit. Aid, Tenant.

Aurilium curiae. A precept or order of court for the citing or convening of one party, at the suit and request of another, to warrant some thing. Kembet's Paroch. Antiq. 477.

Aurilium facere aliqui in curia Regis. To be another's friend and solicitor in the king's courts; an office undertaken for and granted by some courtiers to their dependants in the country. Paraleo. Antiq. 126.

Aurilium Regis. The king's aid, or money levied for the king's use, and the public service; and where taxes are granted by parliament. See title Aid, Taxe.

Aurilium viccomiti. A customary aid or duty, ancestrally payable to sheriffs, out of certain manors, for the better support of their offices. See Sm. Angl. Law. 2. p. 245. An exemption from this duty was sometimes granted by the king; and the manor of Stratton in Warkworth was freed from it by charter. 14 H. 3. M. 4.

Auat. Seems to signify what we now call paying, or lying in wait to execute some mischief. By flat. 13 R. 2. 2. 2. c. 1. It is ordained that no charter of pardon shall be given before any justice for the death of a man slain by await, or malefic prepened, &c.

Aurial, from the Fr. Agard.] Perhaps because it is imposed on both parties to be observed by them. Dicitum good ad faciendum fei observandum partibus impositor.

That act by which parties refer any matter in dispute between them, to the private decision of another party (whether one peron or more) is called a Subsidium: the party to whom the reference is made is called an Arbitrator or Arbitrators: when the reference is made to more than one, and provision made, that in case they shall disagree, another shall decide, that other is called an Uniprizo. The judgment given or determination made by an arbitrator or arbitrators is termed an Award; that by an umpire an Uniprizo. See Antiq. of Awards, and the plan of Kyd's Treatise on the Law of Awards, 8 vo. 1791.

The subject may be conveniently distributed under the following heads:

I. The
AWARD I. II.

I. The Submission.
II. The Parties thereto.
III. The Subject of the Reference.
IV. The Arbitrators and Umpirage.
V. The Award or Umpirage.
VI. The Remedy to compel Performance, on an Award or Umpirage properly made.
VII. Of the Means of procuring Relief against it, when improperly made. And
VIII. The Effect, in precluding the Parties from taking on the original Cause of Action, or Subject of Reference.

I. THE SUBMISSION may be purely by the act of the parties themselves; or it may be by their act, with the interposition of a court of justice: in either case it may be either verbal or in writing: the general practice, as well as the most safe is to prefer the latter.

When the submission is in writing, it is most commonly by mutual bonds, given by the parties each to the other, in a certain sum penal, on condition, to be void on performance of the award; but such bonds may be given to a third person or even to the arbitrator himself (Comb. 100); and they may be given by other persons than the parties themselves, who will incur the forfeiture if the parties do not perform the award. The submission may also be by indenture, with mutual covenants to stand to the award. 2 Mod. 73.

It is usual in articles of co-partnership, to insert a provision, that all disputes between the partners shall be referred to arbitration. This has so far the effect of a submission, that one of the parties cannot sue another either at law or in equity, for any matter within the terms or meaning of the proviso, without having first had an actual reference, which has proved ineffectual, or a proposal by the plaintiff to refer, and a refusal by the defendant. See 2 Keb. 185, (526): 2 Brevett. c. 336.

All the cases of awards reported in the books, for a long series of years, appear to have been made on submissions, by the act of the parties only; but when mercantile transactions came to be frequently the subject of discussion in the courts, it was found, that a judge and jury were very unfit to unravel a long and intricate account; and it therefore became a practice, in cases of that kind, and others, which seemed to be proper for the same tribunal, to refer the matters, by consent of parties, under a rule of nisi prius; which was afterwards made a rule of that court, out of which the record proceeded, and performance of the award was enforced by process of contempt. This practice does not appear to have begun before the reign of Charles II. for the reports of that period shew, that it was not before the latter end of that reign, that the courts granted their interference without reluctance. Their utility, however, was at length so well understood, that by Stat. q. & r. W. 3, c. 15, it was enacted, "That it shall and may be lawful to and for all traders and merchants, and others, desiring to end by arbitration, any controversy, suit or quarrel, for which there is no other remedy, but by personal action, or suit in equity, to agree that their submission of their suit to the award or umpirage of any person or persons, should be made a rule of any of his Majesty's Courts of record; and to insert such their agreement in their submission, or the condition of the bond or pledges whereby they oblige themselves respectively; which agreement being so made and inserted, may on producing an affidavit thereof, made by the witnesses theretounto, or any one of them, in the court of which the same is agreed to be made a rule, and on reading and filing the said affidavit in court, be entered of record in such court; and a rule shall thereupon be made by the said court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage, which shall be made concerning them, by the arbitrators or umpire, pursuant to such submission; and in case of disobedience to such arbitrator or umpirage, the party neglecting or refusal, shall be subject to all the penalties of containing a rule of court."—On this statute, and awards made in consequence, see 1 Sta. 1, 2: 2 Sta. 1178: 10 Mod. 332, 3; Brevett 55, 8: 1 Salk. 72; Campus 114: 1 Cr. 664.

The extent of the submission may be various, according to the pleasure of the parties; it may be of one particular matter only, or of many, or of every subject of litigation between them.

It is proper to fix a time, within which the arbitrators shall pronounce their award: but where the submission limits no time for the making of the award, that shall be understood to be within convenient time; and if in such a case the party request the arbitrators to make an award, and they do not, a revocation of the authority afterwards will be no breach of the submission. 2 Keb. 19, 20.

The submission, being the voluntary agreement of the parties, the words of it must be so understood, as to give a reasonable construction to their meaning, and to make their intention prevalent: and where there is a repugnancy in the words of the submission, the latter part shall be rejected, and the former stand. Poth. 15, 16.

It has been said, that as all authority is in its nature revocable, even though made irrevocable, therefore a submission to an award may be revoked by either of the parties; such as least was the determination under the old law as reported in the year-books, and ancient reporters, but now it may reasonably be supposed, that the courts would sustain an action on the case, for countermanding the authority of the arbitrator. A case is reported in two books, one being evidently nothing more than a loose note: 1 Sid. 283; the other report is at length, and the manner of the pleadings distinctly given; the breach being alleged in a discharge by the defendant of the arbitrators from making any award; and the judgment of the court without much hesitation in favour of the plaintiff. 2 Keb. 19, 20, 24.

This applies only, however, to the case of an express revocation; not to that which must necessarily be implied by construction of law from another act of the party. Thus, if a woman while sole, submit to arbitration, and marry before the making of the award, or before the expiration of the time for making it, the marriage operates as a revocation. W. Jones 388: 3 Keb. 9745.

II. Every one who is capable of making a disclaimer of his property, or a release of his right, may make a submission to an award; but no one can, who is either under a natural or civil incapacity of contracting. Therefore a married woman cannot be party to a submission, whatever may be the subject of dispute, whether
AWARD III.

arising before or after her marriage; but the husband may submit for himself and his wife. Str. 351.

On the principle that an infant cannot bind himself for anything but necessaries, it is clear he cannot be party to a submission; whether the matter in dispute be an injury done to him, or an injury done by him to another, but a guardian may submit for an infant, and bind himself that he shall perform the award. See Comy. 318, Roberts v. Needham; which established this principle, in contradiction to former determinations.

An executor or administrator may submit a matter in dispute between another and himself, in right of his testator and intestate; but it is at his own peril; for if the arbitrator do not give him the same measure of justice as he would be entitled to at law, he must account for the deficiency to those interested in the effects. See Dyer 216 b; 217 a: Com. Dig. Admin. (1. i.): 2 Leon. 53; and Barry v. Reeds, 1 Term Rep. 691.

So the assignee of a bankrupt may submit to arbitration any disputes, between their bankrupt and others, provided they pursue the directions of the statutes. 5 Geo. II. c. 50. § 54; on the construction of which see 1 Abk. 91.

These only who are actually parties to the submission shall be bound by the award. —For the case of partners see 2 Mif. 228.—Of co-partniers, Madi v. Ofan, Litt 30.

So, in general, a man is bound by an award, to which he submits for another, Alpay v. Senior, 2 Kebl. 707, r. 18. And see Bacon v. Dibarry; the case of an attorney submitting for his principal without authority from him. 1 Ed. Raym. 246; See Kyd on Awards, p. 27; and Calway v. Child, 1 Rep. Ch. 104; 1 Ca. Ch 85.

But if a man authorizes another on his behalf, to refer a dispute, the award is binding on the principal alone. Dyer 216 b; 217, unless the agent binds himself for the performance of the principal. 1 Will. 18, 58.

When there are several claimants on one side, and they all agree to submit to arbitration, and join only enter into a bond to perform the award, the award binds the real. Wood \& al. v. Thompson \& al. M. 24 Car. B. R.: Rot. Abr. the 20th. F. 7.

Where there are two on one side, though they will not be bound the one for the other, yet if the award be general, that they shall do one entire thing, both shall be bound to perform the whole. Coa. Car. 434.

If the husband and wife submit to arbitration, anything in right of the wife, the wife shall after the death of the husband, be bound by the award. Lamby v. Hut ten, 1 Rep. 248, 9.

An award creates a duty which survives to executors or administrators; they shall therefore on the one hand be compelled to the performance it made against their testator or intestate; and on the other may take advantage of it, if made in his favour. 2 Venf. 249: 1 La. Raym. 248.

And it is a general rule, that all those who would be bound by an award may take advantage of it.

Generally speaking, a submission of all matters between the parties, when there are more persons than one, either on one or both sides, is the same as a submission of all matters between the parties, any or either of them. Comys. 328. and therefore on submission by A. and B. on the one side, and C. and D. on the other, the award may be of matters between A. and C. alone, or between A. and B. together, with C. alone, or vice versd; and money may be awarded to be paid accordingly. This rule however may be controlled by the words of the submission, in which it is in this case more particularly requisite to be very exact. See Kyd on Awards 121: 8 Ed. 398 a: Harri. 309: 1 Venf. 259: Comys. 427: Rot. Abr. tit. Arbitr. D. 5, and O. 8.

III. Thouf on the courts have at all times manifested a general disposition to give efficacy to awards, yet there are some cases in which they have refused them their protection, because the subjects on which they were made were not the proper objects of such reference.

The only motives which can influence a man to refer any subject of dispute to the decision of an arbitrary judge, is, to have an amicable and easy settlement of something which in its nature is uncertain. An award therefore is of no avail when made of debt on a bond for the payment of a sum certain, whether it be single or with a condition to be void on the payment of a less sum; nor if made of debt for arrears of rent ascertained by a lease; nor of covenant to pay a certain sum of money; Blake's Case, 6 Ed. 473. 4: nor of debt on the arrear of an account as formerly taken before auditors in an account of account; 1 Lev. 293: nor of damages recovered by a judgment; Goldby 91, 2, for in these cases the demand is ascertained. But see Lamby v. Hotton, Rot. Abr. tit. Arbitr. B. 8 and Cathay v. Sharpe, 1 Venf. 937; as it seems that when joined with other demands of an uncertain nature, those which are certain may also be submitted; even in the case of a verdict and judgement.

But in general where the party complaining could recover by action only uncertain damages, the subject of complaint may be the object of a reference to arbitration; as any demand not ascertained by the agreement or contract of the parties though the claimant demand a sum certain; as a claim of 51. for different expenses in the service of the other party, Swyer v. Brownfield, Cev. Eliz. 422. So an action of account may be submitted; for till the account be taken, the sum remains uncertain. Rot. Abr. tit. Arbitr. R. 4.

It is said, and it appears judicious, that all kinds of personal wrong, the compensation for which is always uncertain, depending on the verdict of a jury, may be submitted to arbitration; where the injury done to the individual, is not considered, by the policy of the State, as merged in the public crime, which latter can never be the subject of arbitration.

In the case of deeds when no certain duty accrues by the deed alone, but the demand arises from a wrong or default subsequent, together with the deed, as in the case of a bond to perform covenants, or covenant to repair a house, there the demand, being for damages for a breach, may be submitted to award. Blake's Case 6 Ed. 474: Cev. Far. 59. However in all cases where the demand arises on a deed, he submission ought also to be by deed; because a speciality cannot be answered but by a speciality. Lamby v. Hotten, before quoted.

Much doubt and uncertainty seems ancienlly to have prevailed on the question, " How far a dispute concerning land could be referred to an arbitrator; and how far, on an actual reference, the parties were bound by his award." But it appears that the real difficulty was how to enforce an award made on a reference of a dispute concerning land; for whenever the submission was by bond, it
it was almost universally held, that the party who did not perform the award forfeited the bond. 

It has been formerly held that the parties might by their own act have transferred real property, or exercised any act of ownership with respect to it, they may refer any dispute concerning it to the decision of a third person, who may order the same acts to be done, which the parties themselves might do by their own agreement.” Knight v. Burton, 6 Mod. 231; Travis v. Aheuron, Co. El. 223; Dyer, 183, in marg. 

As real property cannot be transferred by the parties themselves without deed, wherever that makes a part of the dispute, the submission as well as the award, (and whatever act, is by the award, directed to be performed by the parties, as to real property,) must also by be deed. 

IV. Every one whom the law supposes free, and capable of judging, whatever may be his character for integrity or wisdom, may be an arbitrator or Umpire; because he is appointed by the choice of the parties themselves, and it is their folly if they choose an improper person. 

An infant cannot be an arbitrator; nor a married woman; nor a man attainted of treason or felony. But an unmarried woman may be an arbitratrix. Dav. 170; Suffolk’s cafe, 6 E. 4. 1: Br. 37. 

It is a general rule of law, founded on the first principles of natural justice, that a man cannot take on himself to be judge in his own cause; but should he be nominated an arbitrator, by or with the consent of the opposite party the objection is waived; and the award shall be valid. Matthews v. Allerton, Cond. 218: 4 Mod. 226: Hunter v. Bennison, Harr. 45. 

The nomination of the Umpire is either made by the parties themselves, at the time of their submission, or left to the discretion of the arbitrators. Where two arbitrators (as is most frequently the case) have this power, the law provides that the choice shall be fair and impartial, and that it shall not be left to chance, an election being an act of the will and understanding. 2 Vern. 485. 

There is no part of the law relative to awards in which so much uncertainty and confusion appear in the reported cases, as on this respecting the Umpire. The time when the power of the Arbitrators ceases, and that of the Umpire begins; the time when the Umpire may be nominated; and the effect of his nomination have, each in its turn, proved questions of sufficient magnitude to exercise and distract the genius of the lawyers. The time limited for the Umpire to make his umpirage, has sometimes been the same with that limited for the Arbitrators to make their award. It is now however most usual, and certainly more correct to prolong the time beyond that period. 

In this case of a prolongation of time, the authority of the Arbitrators is determined, and that of the umpire immediately begins on the expiration of the time specified to be allowed to the Arbitrators. Lincoln v. Hatton. 

The point on which, on all the forms of submission, the greatest difficulty has been felt, has been to decide whether any conduct of the arbitrators can authorize the Umpire to make his umpirage before the expiration of the time limited for their making their award. 

On this head the following seems to be undeniably the clearest and most accurate opinion. If the Arbitrators do in fact make an award within the time allowed to them, that shall be considered as the real award; if they make none, then the umpirage shall take place; and there is here no confusion as to the concurrence of authority with respect to the time. The Umpire has no concurrence absolutely, but only conditionally, if the arbitrators make no award within their time. This applies equally to the case where the Umpire is confined to the same time with the arbitrators, and to that where a further time is given him. Chol. v. Dare, Sir T. Jones 168: see also, Godb. 241: 1 Lev. 174, 285: 1 Ld. Raym. 671: 12 Mod. 512: Litt. 541, 4: Cr. Car. 263: 14 Mod. 274: Sir T. Raym. 205: 1 Sail. 71. 

It is now finally determined that the Arbitrators may nominate an Umpire before they proceed to consider the subject referred to them; and that this is so far from putting an end to their authority, that it is the fairest way of choosing an umpire. 2 Term Rep. 645. And it is in fact not unusual for the parties to make it a condition in the submission that the umpire shall be chosen by the Arbitrators, before they do any other act. They may also, when a further day is given to the Umpire, and the choice left to them in general terms, choose him at any time after the expiration of their own time, provided it be before the time limited for him. 3 Est. 387: Freem. 378: 2 Mod. 169. 

From the opinion that the arbitrators having once elected an Umpire had executed their authority, it has been thought to follow as a necessary consequence, that if they elected one who refused to undertake the business they could not elect another. This opinion has been supported by two Chief Justices, but overruled (fully with propriety) by determinations of the Court. 3 Lev. 263: 2 Vern. 115: Palm. 289: 2 Sound. 129: 1 Sail. 701: 1 Ld. Raym. 222: 12 Mod. 120. 

When the per son to whom the parties have agreed to refer the matters in dispute between them has consented to undertake the office, he ought to appoint a time and place for examining the matter, and to give notice of such appointment to the parties or to their attorneys; if the submission be by rule of reference at nisi prius, the witnesses should be sworn at the bar of the court, or afterwards, (if neglected) before a judge. 

The parties must attend the arbitrators, according to the appointment, either in person or by attorney, with their witnesses and documents. The arbitrators may also, if they think proper, examine the parties themselves, and call for any other information. 

Where a time is limited for making the award, it cannot be made after that time, unless it be prolonged. When the submission is by the mere act of the parties, that prolongation may be made by their mutual consent; otherwise a rule of court is necessary for the purpose. 

The law has secured each of the parties against the voluntary procrastination of the other, by permitting the arbitrator on due notice given to proceed without his attendance. Walker v. King, 9 Mod. 63: 2 Eq. Abr. 92. c. 3; or the willing party may prefer his opponent by rule of court to attend the arbitrator, who on failure may make his award without such attendance. Hol. v. Hol. in Scot. 1789. 

It has been formerly held that an Umpire cannot proceed on the report of the arbitrators, but must hear the whole matter anew; but there seems to be no good reason for such a practice.
son why the Umpire, if he think proper, may not take those points on which the arbitrators agree to be as they report them. The nature of his duty is only to make a final determination on the whole subject of dispute, where the arbitrators cannot do it, and, by adopting their opinion as far as they agree, and incorporating it with his own on the other points, he effectively makes that final determination. And in this manner Umpires do usually act: and they are justified in so doing unless requested to examine the witnesses. 4 Term Rep. 79.

Though the words in the submission which regulate the appointment of an Umpire, be not perfectly correct; but might from the grammatical order seem to imply that the Arbitrators and the Umpire, should all join together to make an award, yet an award made by the arbitrators without the participation of the umpire, will be considered as satisfying the terms of the submission. Rot. Abr. cit. Arbitr. p. 6.—And on the other hand, an umpire made by the umpire jointly with the arbitrators is good; their approbation, shown by joining with him, being mere surpluse, does not render the instrument purporting to be his umpire in any degree less the act of his judgment. Saun.fy v. Hodgson, 2 Macq. 465.

Unless it be expressly provided in the submission, that a less number than all the arbitrators named may make the award, the concurrence of all is necessary; and where such a proviso is made, all must be present, unless those who do not attend had proper and sufficient notice, and are wilfully absent. Barnes 57.

As to the necessity imposed on the arbitrators or umpire of giving notice of their award, the following are the clearest determinations. If the award be made before the day limited in the submission, the parties shall not be bound by any thing awarded to be done before that day, unless they have notice; but they must take notice at their peril of any thing ordered at the day. 8 E. 4: 1 Br. 37: Kelway 175: Coo. 28. 132, 3.

It has been the practice to guard against the consequences of the want of notice, by inferring a proviso in the condition of the arbitration bond not only that the award shall be made, but that it shall be delivered to the parties by a certain day; and then the bond will not be forfeited by non-performance, unless the party not performing had notice; and the award ought to be delivered to all the persons who are parties on either side. Halsted’s Case. 5 Cr. 103: Coo. El. 885: Mo. 642.

The object of every reference is a final and certain determination of the controversies referred. A reference of any point for the future decision of the arbitrator, or of a power to alter the award, is inconsistent with that object; and therefore it is established as a general rule that such a reference is void: but the referrment of a more ministerial act, as the measuring of land, or the calculation of interest at a rate settled, &c. does not vitiate the award. 2 Med. 139: 2 Ro. Rep. 189, 214, 215: Palm. 110, 146: Coo. Jac. 315: Hamb. 218: Lusai. 550: Hardw. 43.

The submission to the decision of an individual, arises from the confidence which the parties repose in his integrity and skill; and is merely personal to him; it is therefore inconsistent that the arbitrators or umpire should delegate any part of their authority to another; and such delegation is absolutely void. But it was decided in the case of Linga v. Ende, 2 Abk. 501, (515,) that arbitrators where they award the substance of things to be done, may refer it to another to settle the manner in which it shall be put in execution.

Since the introduction of references at nisi prius, there can be no question, but the arbitrator has a jurisdiction over the subject of the action, as well as over the subject of the action itself; unless some particular provision is made to the contrary by the form of the submission. Instead of ascertaining the costs, the arbitrator may refer them to be taxed by the proper officer of the court, but to no one else. 2 Abk. 504. (519): 1 Stal. 73: 6 Mod. 165: Hardw. 191: Barnes 56, 8: 1 Sid. 358: Str. 737, 755: Com. 320. When it is agreed that costs shall abide the event, it means the legal event. See 3 Term Rep. 139. And also as to awarding the costs of the arbitration. 2 Term Rep. 645; And the arbitrators may award damages to either party, though in point of law there was no cause of action. 2 Vent. 253. If the arbitrator takes no notice of the costs, but awards mutual releases, it shall be presumed to be meant that each party shall pay his own costs. See Kyd, 143.

V. Every Award should be consistent with the terms of the submission; the whole authority of the arbitrators being derived from thence.—Therefore,

1. The Award must not extend to any matter not comprehended in the submission; thus if the submission be confined to a particular subject of dispute, while there are other things in controversy between the parties, an award which extends to any of these other things is void as far as it respects them. 2 Blyn. 309.

If two submit to the award of a third person all demands between them; without more; the word, demands, implies all matters between them concerning the lands of both parties which are the subjects of variance. 1 Ed. Raym. 115: Kelso. 99.

If the submission be, “of all causes of action, suits, debts, reckonings, accounts, sums of money, claims and demands,” an award, “to release all bonds, specie, judgments, executions and extents,” is within the submission; for as all debts are submitted, of course a release may be awarded of the securities for them. 2 Sound. 190.

Where the submission is, “of all debts, trepasses and injuries,” an award “to release all actions, debts, duties and demands,” does not exceed the submission; the word injuries comprehending demands. 3 Busk. 312.

The rule however is not so strictly interpreted as to extend to every thing literally beyond the submission; if the award be of any thing depending on the principal, it is good. Rot. Arb. B. 2: C. 45, 5, 6.

Thus if the submission be of all trespasses, and the award be, “that one shall pay to the other 10s. and that he shall enter into a bond for the same,” this is good, because it only renders the award more effectual. Kyd. 66.

In like manner if it can reasonably be presumed that nothing is in reality awarded beyond the submission it has in general been supported. 10 Co. 131, 2: Jek. 264: Rot. Arb. 21: Bly. 6 Mod. 232.

On the submission of a particular difference when there are other matters in controversy, though an award of a general release is void; yet the proof of such other disputes existing is thrown on the party objecting. 2 Mod. 309.
This was held to be a
ion:rs, whethn
for the
fuits
miffion
the
This head).
ence,
of
performance of the award, no
and if the !!ranger will not accept 1he money awarded
in difpute
in that
in difpute made
in this case the arbitrator may undoubtedly
If an award be made of all matters except a bond,
and if it be awarded that it shall remain, the award is
good; for it shall be presumed there was no cause to
If arbitrators award for one thing, and say that they
will not meddle with the rest, all is void; because they
have not pursued their authority. Cro. El. 838; see Dy.
216, 217.
Where a submission is of certain matters specifically
named, with a provisional clause "so that the award be
made of and upon the premises," the arbitrator ought to
make his award of all, otherwise it will be void. 8 Co.
But where the submission is general of all matters in
difference between the parties; though there should
tend to be many subjects of controversy between them, if
only one be specified to the arbitrator, he may make his
award of that; he is, in the language of Lord Coke,
in the place of a judge, and his office is to determine accord­
ing to what is alleged and proved. It is the business of
the parties supposed, who know their own particular
grivances, to signify their causes of controversy to the
arbitrator; for he is a stranger, and cannot know any
thing of their disputes but what is laid before him. 8 Co.
98 b: 1 Browd. 63: 2 Browd. 309.
In the case of such a general submission, if an award
concerning one thing only be made, it shall be presumed
(all the contrary be shown by the party objecting) that
nothing else was referred. Cro. Jac. 200, 355: 1 Burr.
274 et seq. But the arbitrators ought to decide on all
matters laid before them, or they cannot do complete
justice. And it is said that on a reference by rule of a
court of equity, the award ought to comprehend all the
matters referred. 1 C. C. 39, 186.
It is however no valid objection to an award that the
arbitrator had notice of a certain demand, and that he
made no award of that, if in other respects the award be
good; as, though the sum in question may not be men­tioned
in the award, the arbitrator may have flown his opinion
that the demand was unfounded; as, by ordering
general releases, etc. See 1 Sound. 52.
An award of one particular thing for the ending of an
hundred matters in difference is sufficient, provided it
concludes to them all. 1 Keb. 738: 1 Lev. 132, 5.
4. If an award be to do any thing which is against law, it is void, and the parties are not bound to perform it. Rel. Arbitr. 1 St. 12: 1 Pet. 245. So also is an award of a thing which is not physically or morally possible, or in the power of the party to perform: as that he shall deliver up a deed which is in the custody or power of a person, over whom he has no control.

12 Mod. 585; and see Rel. tit. Arbitr. And an award that the defendant shall be bound with forfeitures such as the plaintiff shall approve, is void; for it may be impossible to force the approbation of the plaintiff. 3 Mod. 272, 3. But in this case the parties should enter into a bond himself and tender it to the plaintiff.

Where an award is that one of the parties shall procure a stranger, to do a thing, there is a distinction taken between the case where he has no power over the stranger, to compel him, and where he has power either by the common law or by bill in equity. In the former case the award is void, for so much as concerns the stranger. In the latter it is good. Rel. Arbitr. i. 1: 248 a. 11: March. 18: 1 Mod. 9.—(See ante Division 2.)

Neither make an award be to do a thing unreasonable; nor by the performance of which the party awarded to do the act may subject himself to an action from another. Rel. Arbitr. 2: 3; 1: 10: 2 Balif. 39: 1 Keb. 91: 1 Eq. Rep. 65; 3 Cr. Car. 235: 3 Lea. 155.

What shall or shall not be unreasonable, is however matter of construction in the cases, in which the cases differ considerably. See Rel. Arb. B. 12: 1: 4: 5: 2 Mod. 704.

An award must not be of a thing which is merely nugatory, without any advantage to the parties. Rel. Arb. J. 10—15. And if a man and a woman submit to arbitration, and it be awarded that they shall inter marry, this is said not to be binding (I. 16.) for one reason among others, that it cannot be presumed to be advantageous to them. Mutual releases are advantageous, and therefore an award of them is good. Flem. 51.

5. The Award must be certain and final. As the intention of the parties in submitting their disputes to arbitration, is to have something ascertained, which was uncertain before, it is a positive rule that the award ought to be so plainly express, that the parties may certainly know what it is they are ordered to do. 5 Co. 77 b: 78 a.

On the construction of certainty and uncertainty the cases are multifarious; and it may be observed, that they principally depend on such circumstances as are peculiar to each case, and very seldom form any general precedent. The rule therefore serves better to regulate the conduct of arbitrators, than the numerous exceptions: as it is the interest of the party against whom the award is made to be ingenious in finding out objections, an award cannot be too particular or precise in laying down what is to be done by the parties, and the manner, time and place of their doing it. Though the two latter have been deemed immaterial (St. 505,) yet it is false to specify them.

Awards are now so liberally confirmed, that trifling objections are not suffered to prevail against the manifest intent of the parties. See 1 Burr. 277: and p8 Division 6.

6. In favour of the equitable jurisdiction of the arbitrators, if that, to which the objection of uncertainty is made, can be ascertained either by the context of the award, or from the nature of, and circumstances attend-
there his: 2d. That a release to the time of the sub-
misjon is a good performance of an award, ordering a re-
lease to the time of the award; not because the mean-
ing of the arbitrators is so, but because their meaning
must be construed so as far as it is void, by construc-
tion of law. 10 Mod. 241; 6 Mod. 33, 5; 2 Ld. Raym. 645; 5:
1 Ld. Raym. 116, sec 12 Mod. 8, 116, 589; 2dib. 164, 5; 2 Kib. 42; 1 Sdr. 595.

Formerly, when only one part of an award was void, the
whole was considered so; now however, it is the rule of
the courts, in many cases, to enforce the performance
of that, which had it stood by itself, would have been
good, notwithstanding another part may be bad. 12 Mod.
534: but if that part of the award, which is void, be so
connected with the rest, as to affect the justice of the case
between the parties, the award is void for the whole.

Cra. jac. 584.

When, from the tenor of the award, it appears that
the arbitrator has intended that his award should be mu-
tual, awarding something in favour of one of the parties
as an equivalent for what he has awarded in favour of
the other; if then that which is awarded on the one side, be
void, so that performance of it cannot be enforced, the
award is void for the whole, because that mutuality,
which the arbitrator intended, cannot be preferred.


If one entire act awarded to be done on one side, pre-
cludes several things, for some of which it would be
good, and for others not, the award is bad for the whole,
because the act cannot be divided. Cra. jac. 639.

When it appears clearly that both parties have the
full effect of what was intended them by the arbitrator,
though something be awarded which is void; yet
the award shall stand for the rest. 1 Ld. Raym. 114:
Lutw. 545: and see 12 Mod. 538.

An award ought regularly to be made in writing,
signed and sealed by the arbitrators, and the execution
properly witnessed: it may however be made by parole,
if it is so expressly provided in the submission.

7. It is not in all cases absolutely necessary that per-
formance should be exactly according to the words of
the award; if it be substantively and effectually the same,
it is sufficient. 3 Bulst. 67. And if the party, in whose
favour the award is made, accept of a performance dif-
faring in circumstances from the exact letter of the
award, that is sufficient; for confluentiatit argorem. 3 Bull.
67.

Where the concurrence and presence of both parties
is not absolutely necessary to the performance, each
ought to perform his part without request from the other,
1 Ld. Raym. 253; 4; and see Rot. Arb. Z. 6. If an
award order that the defendant shall re-align the
plaintiff, certain mortgaged premises, it will be a breach
if he do not re-align without request. 1 Ld. Raym. 254.

If the award be to pay at, on or before a particular day,
payment before the day is equivalent to payment on the
day. 3 Kib. 675; 6.

A considerable number of years having elapsed since
the making of the award, is no objection to the parties
being called upon to perform it. Finch. Rep. 384; nor
can the statute of Limitations (21 Jac. 1, c. 16, § 3) be
pleaded in bar. 2 Snd. 64.

On an award, that one party shall enter into a se-
curity for money, (note, bond, &c.) the giving the sec-
urity is a performance of the award; and on non-pay-
ment, the person to whom it is given can only pro-
ceed against the other on that security, and not on
the submission or arbitration bond. Brind. 15; Str. 903.
1082.

VI. THE REMEDY TO COMPEL PERFORMANCE OF AN AWARD IS
various, according to the various forms of the submis-
sion.

Though the submission be verbal, an action may be
maintained on the award, whether it be for the pay-
ment of money, or for the performance of a collateral
act. 1 Ld. Raym. 122; and see ante Division I.

Where the award is either verbal, or in writing, for
the payment of money, and made on a submission, either
by parol or by deed, the action on the award may be
an action of debt: it may also be an action of affournisn;
and in all other cases on a parol submission, an affoun-
nis is the only species of action that can be maintained.
1 Leon. 72: Cra. jac. 354.

In all actions on the award, it must necessarily be
shewn, in direct unequivocal terms, that the parties
submitted; before the award can be properly introduced;
2 Str. 293. the submission too must be so stated as to
correspond with the award, and to support it. 2 Lev.
235: 2 Show. 61.

When the action is on a mutual affournis, to pay a
specific sum on request, if the defendant should not
mention it to the award; an actual request to pay that sum,
before the action brought, must be positively stated.
1 Sound. 33: 2 Kib. 126.

When the submission is by bond, if the award be for
payment of money, an action of debt on the award lies,
as well as an action on the bond; but the latter is
the action most usually brought; in this the order of plead-
ing commonly observed is, that the plaintiff declares on
the bond, as in ordinary actions on a bond; the
defendant then prays for the condition, which, being
set forth, he pleads that the arbitrators or the umpire
made no award; then the plaintiff replies, not barely
alleging that they did, but setting forth the award at
large, and shewing the breach by the defendant: (as
to which see post. and Winch. 131: Pals. 24, 78, 153:
1 Ld. Raym. 114, 123; 2 Vint. 221; 3 Lev. 293:) and
on the whole question arises as on an original de-
claration.—The defendant then either rejoins, that they
made "no such award," (Tulk. 116: Cra. jac. 290:
Pals. 511,) on which the plaintiff takes issue—on
demurrer, and the plaintiff joins in demurrer. Vid.
Str. 29: Freeman. 410, 415: 1 Snd. 370: 3 Barr. 1719, 30:

Every thing necessary to shew that the award was
made according to the terms of the submission, must be
stated by the plaintiff. Lutw. 535: 2 Ld. Raym. 899,
176. Where also by the terms of the award, perform-
ance on the part of the plaintiff, is a condition precedent
to that on the part of the defendant; there the plaintiff
must shew that he has done every thing necessary to en-
title him to call on the opposite party.—But tender by
the plaintiff, and refusal by the defendant, will be suf-
ficient, unless the thing to be done by the plaintiff
may be done without the concurrence of the other. Haw.
43; 44.

A material variance between the real award and that
set forth in the pleadings, will be fatal to the plaintiff; and
and if on the trial the jury doubt whether the variance is material or not, a special verdict may be taken for the opinion of the court. 1 Salk. 72; 1 Ed. Remy. 715, S. C.; 1 Burr. 278.

In an action on the award, the defendant may plead that he did not submit; but in an action on the bond such a plea is not good. 1 Sid. 290: 2 Str. 523.

More especially is required in setting forth a written than a verbal award—in the former nothing must be alleged by inducement. 2 Vent. 243. The breach must also be alleged, with such precision, as to shew that the award was made of the thing in which the breach was alleged. 1 Rot. Rep. 8: 33 S. F. 539; 2 Dolk. 93, and in an action on the assumpsit, to perform the award, the plaintiff may allege several breaches. 34 Id. 355. But in an action on the arbitration bond, where several things are ordered to be done by the defendant, it is not necessary to allege breaches of every matter, because the breach of any one is a forfeiture of the penalty of the bond; and when the plaintiff has once recovered, then he can never maintain another action on the same bond, to recover the penalty again on a second breach. 2 Wils. 276, 9, and vide 3d. 253. S. P.

If the defendant set forth the award, and allege the performance generally, and then on a breach being alleged in the replication, he rejoins and files a special performance, this will be a departure. 1 Ed. Remy. 234.

It has several times happened, that the defendant by setting forth an award, partially, has imposed considerable difficulty on the plaintiff how to answer it. (See 1 Keb. 568: 1 Sum. 326: 4 Lev. 165: 1 Lutw. 525. In this case if the plaintiff demand more of the award, and have it set forth at full length, alleging a breach in the same manner as if the defendant had pleaded no award, he will be free against any objection from the manner of pleading. Lutw. 451: and see Comb. 255: 1 Rot. Rep. 6.

If from the default of the defendant no award has been made within the time limited, the plaintiff may, to the plea of no award, reply that default of the defendant. See 9 Ca. 81.—On a submission by bond, providing that the award shall be made within a limited time, though that time is enlarged by mutual consent, and the award made within the enlarged time, an action cannot be maintained on the bond to recover the penalty for non-performance. 3 Term Rep. 529. And as to such enlargement of time, see 2 Term Rep. 643, 4: 3 Term Rep. 601.

On the practice obtaining, of references at Nisi Prius, performance of the award was consequently enforced by means of an attachment, and the following is the present course of proceeding to obtain that remedy.—The award must be tendered to the party bound to perform it, and on his refusal to accept it, affidavit must be made of the due execution of the award, and of such tender and refusal; and on that, application made to the court to make the order of Nisi Prius a rule of court; a copy of this rule must be personally served on the party, and if he still refuse to accept the award, an affidavit must be made of such service and refusal; on which the court will grant an attachment of court. 1 Compt. Plead. 264. When the award is accepted, but the money being demanded is not paid, an affidavit must be made of such refusal, and of the due execution of the award.

Where there is any dispute as to the proper performance of an award, it is discretionary in the court to grant or refuse an attachment. 1 Stra. 695: 1 Barr. 278.

When an award is not for the payment of money, but for the performance of any collateral act, it may sometimes be enforced by a bill in equity, on which the court will decree a specific performance. See 1 Atk. 74, (102): 1 Eq. Ab. 51; 1 C. R. 261: 3 C. R. 20: 3 Term. 34: 3 P. Wms. 187: 9, 190. But though a court of equity may afford a plaintiff to procure the execution of an award, it will not compel a defendant to discover a breach by which he may charge himself with the penalty of a submission bond. Bisp. v. Bishop, 1 C. P. See the next Division.

VII. RELIEF may be obtained against an award, made contrary to the prescribed rules of law, when the award is put in suit. But when the submission is by the mere act of the parties, the defendant is not permitted to impeach the conduct of the arbitrators, at law; so as to make it a defence to an action on the award or submission bond. See 1 Sum. 327: 2 Wils. 149. In such cases the only relief is in equity. 2 Vesc. 515. But a court of equity will not interfere to set aside an award, where the submission is voluntary, or by order of Nisi Prius, 1 C. C. 146: 1 Term. 157; except for corruption or improper conduct in the arbitrators: or where the award appears on the face of it to be contrary to the rules of equity; as, to the prejudice of an infant, etc. 1 C. C. 276, 279, 280: 3 Hals. 529, (495): 2 Eq. Ab. 63, 4: 3 C. R. 49: Amb. 245.

In bills to have an award set aside for corruption or partiality, it is usual to make the arbitrators defendants; together with the party in whose favour the award is made. Finch. Rep. 141: 3 Ex. 644, 397. The arbitrators may plead the award in bar; but they must shew themselves impartial, or the court will make them pay costs. 2 Atk. 396, (412).

Where the submission is by order of Nisi Prius, or under the flat. 9 & 10 W. 3: a court of equity will not entertain a bill to set aside an award for corruption or partiality, unless the court of law has not afforded relief, on an application; or the time for complaining at law under the statute is elapsed. 2 Atk. 353, (162), 396, (412): 2 Vesc. 316, 7: See Bank. 265.

By the flat. 9 & 10 W. 3, c. 4, 15, it is enacted, That "any arbitration or umpirage, procured by corruption, or undue means, shall be void; and accordingly let aside by any court of law or equity, so as complaint be made to the court, where the rule for submission is made, before the last day of the next term after such arbitration made and published to the parties." See 1 Stra. 301: 2 Barr. 705: Barn. 55, 7. But it seems that a court of equity may relieve, on manifest grounds, after the time required, by the act, for complaint at law, though no such complaint is made at all in the common law courts. Bank. 265: 1 Barr. K. B. 75, 155.

Where the submission is by reference at Nisi Prius, there is no time limited for making an application to set aside an award for any cause. 2 Atk. 153: 162: Str. 301: 2 Barr. 701. When the submission is according to the statute, no application can be made to have the award set aside till the submission be actually made a rule of court, which may be either before or after making the award. 1 Stra. 301: 2 Vesc. 317: 2 Str. 1178: 3 P. Wms. 502.
The most frequent subject of complaint against an award, arises from some imputed misconduct of the arbitrators, and when the complaint is made out, it is generally successful: as if one of the arbitrators unjustly exclude the rest from the award; or hold private meetings with one of the parties. 2 Term. 515; or appoint an umpire by lot. Id. 485; or manifest any other undue partiality. Id. 101, 251: 3 P. Wms. 162: 2 Term. 216, 8: 1 Term. 317.

If it appear that the arbitrators went on a plain mistake, either as to the law or in a point of fact, that is an error appearing on the face of the award, and sufficient to set it aside. 2 Term. 705. – So if the arbitrators appear to have an interest in the subject of reference. 2 Term. 251. So also where any circumstance is suppressed or concealed from either of the arbitrators, and the arbitrator declares that had he known the circumstance, he would have made a different award. 1 Atk. 77, (64).

Where the submission is under the statute, or by reference at Nisi Prius, the court will on some occasions send back the award to be re-considered, on suggestion that the arbitrator had not sufficient materials before him, and perhaps too to rectify any trifling or apparent mistake; but such application must be made in the former cause within the time prescribed by the statute. 2 Term Rep. 781.

VIII. An Award may be pleaded in bar to every action brought, for a cause or complaint which had been referred to the arbitrators, on which the award was made. See 4 Term Rep. 145.

The award thus pleaded, must have all the qualities necessary to constitute a good award; and must be such, if it be pleaded without performance, that the plaintiff may have a remedy to compel performance: but if performance be alleged, as it may be (See 1 Ro. Rep. 7, 8; Cr. Jec. 339; 2 Bull. 93; Rot. Arbitr. F. 2: 11. 86: 3 Lom. 627) even a void award may frequently be a good bar. An award however which is in itself uncertain, and cannot be ascertained by avertment, cannot be pleaded in bar. 2 Scond. 292: 2 Kcb. 735.

The cases which have determined an award not to be pleaded in bar, where it does not create a new duty, seem irreconcilable to the present state of the law on the subject—particularly as they allow that an action may be maintained on the submission, whether that is by bond or otherwise. 1 Ld. Raym. 248: 12 Moz. 130: Comb. 445: 1 Salk. 65: Lues. 50, 7.

An award however which does not extend to the whole of the thing demanded, is reasonably not a good plea to an action on the demand. 51: 1 Ld. Raym. 612: See Lues. 51. And in order to make an award a good plea, it must appear that both parties were equally bound by it.

Where the plaintiff lays several counts in his declaration, and the award from the terms of it, can only be a bar to one of them; if in reality they are all for the same cause, the best way of pleading seems to be, to plead the award to that count to which it is answerable in terms; and the general issue to the rest. Kyd. 245.

There were antiently some distinctions in the manner of pleading an award, with respect to the necessity of alleging performance of the thing awarded, which are not now essential, for instance where the award is void, and consequently the plaintiff could not enforce it. 1 Ld. Raym. 122.

Form of an Award; or a Submission.

To all people to whom this present writing is directed of Award shall come greeting. Whereas there are several accounts depending, and diverse controversies and disputes hereunto arisen between A. B., &c. Gent. and C. D. &c. all which controversies and disputes are chiefly touching and concerning, &c. And Whereas, in the putting an end to the said differences and disputes, they the said A. B. and C. D. by their several bonds or obligations bearing date, &c. are bound each to the other of them in the several sums of, &c. to stand to and abide the award and final determination of us E. F. G. H. &c. so as the said award be made in writing, and ready to be delivered to the parties in difference or before, &c. next, as by the said obligation, and the condition thereof may appear. NowKnow, That we the said Arbitrators, whose names are hereunto subscribed, and sealed affixed, taking upon us the burden of the said award, and having fully examined and duly considered the proofs and allegations of both the said parties, do, for the settling amity and friendship between them, and make and publish this our award, by and between the said parties, in manner following, that is to say; First, We do award and order, that all actions, suits, quarrels and controversies whatsoever had, moved, arisen or depending between the said parties in law or equity, for any manner of cause whatsoever, touching the said award, &c. to the day of the date hereof, shall cease and be no further prosecuted; and that each of the said parties shall pay and bear his own costs, and charges, in any suit relating to or concerning the said premises. And we do also award and order that the said A. B. shall pay, or cause to be paid to the said C. D. the sum of, &c. within the space of, &c. And also at his own costs and charges, &c.

The Reader is thus presented with a complex abridgment of the law on this subject. Were it accurately attended to, and were the arbitrators influenced by motives of partiality, arbitration would be a very desirable way to put an end to many suits, instead of affording grounds of new proceedings, as they now too frequently do. As it is, the subject most proper for arbitration seems to be (in the words of the author, to whom we have confessed ourselves so much indebted on this subject) “Long and intricate accounts—Disputes of trifling a nature, that it is of little importance to the parties in whose favour the decision may be given, provided at all events there be a decision—and—questions on which the evidence is so uncertain, that it is much better to have a decision whether right or wrong, than that the parties should be involved in continual litigation.”
AWM

AWM, or auum, (Teut. obu, i.e. cadus vel mensura) A measure of Rhenish wine, containing forty gallons; mentioned in some statutes. This word is otherwise written auume.—The road of Rhenish wine of Dordrecht is ten auum, and every auum 50 gallons: The road of Antwerp is fourteen auum, and every auum 35 gallons.

AWHNINDE. See Third-night-aum-hinde.
AYLE. See All.
AZALDUS, A poor horse or jade. Claus. 4 Ed. 3.

B.

BACA, A hook or link of iron, or staple. Conspectus. Domus de Fereaudum, ms. f. 20.

BACINNIIUM, or Bacinius, A bason or vessel to hold water to wash the hands. Simon Dunelm. anno 1126. Mon. Angl. tom. 3, p. 191: Petrus filius Petri Picti tenet meditatum Heculem per fieriantum feriendii de bacini.—This was a service of holding the bason, or waiting at the bason, on the day of the king's coronation. Lib. Rabi. Sec accor. f. 137.


BATCHELOR, Baccalaurius, from the Fr. baccalaurier, viz. 1200, a learner: In the universities there are baccalaurii of arts, &c., which is the first degree taken by students, before they come to greater dignity. And those that are called bachelors of the companies of London, are such of each company, as are springing towards the estate of those that are employed in council, but as yet are inferiors; for every of the twelve companies consists of a master, two wardens, the lieutenants, (which are assistants in matters of council, or such as the assistants are chosen out of), and the bachelors, in other companies called the yeomanry. The word bachelor is also used and signifies the same with knight-bachelor, a simple knight, and not knight bannerman, or knight of the Bath. The name of batchelor was also applied to: that species of esquire, ten of whom were retained by each knight bannerman on his creation. Ann. 28 E. 3, a petition was recorded in the Tower, beginning thus: A main Seigneur le Roy monstre notre simple batchelor, Johan de Bauen, &c. Batchelor was anecdotally attributed to the ambassadors of England, if he were under the degree of a baron. In Pat. 3 R. 2, we read of a baccalaurius regis. Touching the further etymology of this word, See Spelman.

The term bachelor also denotes in law a man who has never been married; and at such, taxes have at times been levied, or the taxes laid on others increased, if paid by batchelors: as in the case of the duty on servants under lat. 25 Geo. 3, c. 43.

BACKBERINDE, Sex.] Bearing upon the back, or about a man. Bratton used it for a sign or circumstance of theft apparent, which the civilians call fortun manifestum; Bract. lib. 3, trat. 2, cap. 32. Manwdd remarks it as one of the four circumstances or cases, where in a forrester may arrest the body of an offender against vert or venison in the forest: by the affile of the forest of Lancashire (says he) taken with the manner, is when one is found in the king's forest in any of these four degrees, stabile, strom, dira, sedile, and boreale. Manw. 2 part, Forest Laws.

BACO, A bacon hog, used in old charters. Blount.

BACITLIE, A candelsticke properly so called, when formerly made ex baccus of wood, or a stick. Chandling Hift. Duniel. apud Winteri Ang. Soc. 7, 1723.

BADGER, From the Fr. bagasse, a bundle, and thence is derived bagager, a carrier of goods. One that buys corn or victuals in one place, and carries them to another to sell and make profit by them; and such a one was exempted in the lat. 5 & 6 Ed. 6, c. 14, from the punishment of an intruder within that statute. But by 5 Eliz. c. 12, Badgers are to be licensed by the justices of peace in the townships; whose licences will be in force for one year, and no longer; and the persons to whom granted must enter into a recognizance that they will not by colour of their licences forestall, or do any thing contrary to the statutes made against forestallers, ingrossers, and registrators. If any person shall act as a Badger without licence, he is to forfeit 5l. one moiety to the king, and the other to the prefecturer, leviable by warrant from justices of peace. &c. Vide 5 Eliz. c. 25, sect. 20.

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


BAGAVEL, The citizens of Exeter had granted to them by charter from K. Edw. 1, the collection of a certain tribute or toll, upon all manner of wares brought to that city to be sold, towards the paving of the streets, repairing of the walls, and maintenance of the city, which was commonly called in old English bagavel, be-thyngavel, and chippingsgavel. Andiq. of Exeter.

BAHADUM, A cheef or cffer. Fleas, lib. 2, c. 31.


BAIL,
BAIL I.

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

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

By Stat. 23 Hen. 6. c. 9, Sheriffs, &c. are to let to bail persons by them arrested by force of any writ, in any personal action, &c. upon reasonable sureties, having sufficient within the county to keep their days in such place, &c. as the writings require.

Bail and mainprize are often used promiscuously in our law books, as signifying one and the same thing, and agree in this notion, that they have a man from imprisonment; his friends undertaking for him before certain persons for that purpose authorized, that he shall appear at a certain day, and answer whatever shall be objected to him, in a legal way. 2 Hawk. P. C. c. 13, § 289; 4 Inst. 180. The chief difference is, that a man's main-prizers are simply his sureties, and cannot imprison him themselves to secure his appearance, as his bail may, who are looked upon as his gaols, to whose custody he is committed, and therefore may take him up on a Sunday, and confine him until the next day, and then render him.

6 Mod. 231; Ed. Raym. 706; 12 Mod. 275.

Special bail are two or more persons who undertake generally or in a few certain, that if the defendant be convicted, he shall satisfy the plaintiff, or render himself to the custody of the marshal; generally there are but two persons who become bail for a defendant.

Where the defendant has been arrested or discharged out of custody, upon giving a bail-bond to the sheriff, he must at the return of the writ, to discharge such bond, appear thereto, namely, by putting in special bail, or as it is termed, bail above, as called, in contradistinction to the sheriff's bail, or bail below, nor can he render himself in discharge of such bond, without first putting in bail above. 5 Burr. 2063.

By rule M. 1654, no attorney shall be bail for a defendant in any action; nor his clerk. Coop. 228 n. Vide Doyl. Rep. 456, that an attorney may be admitted as bail in a criminal case.

No sheriff's officer, bailiff, or other persons concerned in the execution of process, shall be permitted to be bail in any action or suit depending in K. B. nor persons outlawed after judgment. R. M. 14 Cro. 2. The keeper of the Penitentiary Comptroller was rejected. Doug. 456.

I. OF BAIL IN CIVIL CASES—In actions of battery, trespass, slander, &c. though the plaintiff is likely to recover large damages, special bail is not to be had, unles by order of court, and the process is marked for special bail: nor is it required in actions of account, or of covenant, except it be to pay money; nor against heirs or executors, &c. for the debt of the tenant, unless they have warded the tenant's goods. 1 Dea. Abr. 681.

If baron and feote are sued, the husband must put in bail for both, but if the husband does not appear upon the arrest, the wife must file common bail before she can be discharged; for otherwise the plaintiff could not proceed to obtain judgment. 4 Ed. 3; Co. Eliz. 370; C. C. 445; Style. 1475; 1 Mod. 8; 6 Mod. 17, 105.

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

In all actions brought in B. R. upon any penal law, the defendant is to put in but common bail. Yelv. 53. In actions where damages are uncertain, bail is to be at the discretion of the court: on a dangerous assault and battery, upon affidavit of special damages, a judge's hand may be procured for allowance of an ac tiam in the writ; and in action of scandalum magnatum the court on motion ordered special bail. Raym. 74. When bail is taken by the chief justice, or other judge on a habeas corpus, the bail taken in the inferior court is dishonored; though the bail be not filed presently, nor till the next term.

Yelv. 162, 121. Yet it has been held, where a cause is removed out of an inferior court by habeas corpus, if the bail below offer themselves to be bail above, they shall be taken, not being excepted against below, unless the cause comes out of London. Forthe sufficiency of the bail there is at the peril of the clerk, and he is responsible to the plaintiff: so that the plaintiff had not the liberty of excepting against them, and the clerk is not responsible for their deficiency, in the court above, though he was in London. 1 Selk. 47.

In London it is laid, special bail is to be given in action of account, &c. But on removal by habeas corpus into B. R. the court will accept common bail. 2 Keb. 404.

There is not only bail to appear, &c. on writs of error; but also an audit quezula, a reognition of bail must be acknowledged; and upon a writ of attainder, to prosecute, &c. Finc. Cen. 129.

By the 5 Jac. 1, c. 8, No execution shall be delayed by any writ of error or supercincus thereupon, unless bail shall be given, in double the sum adjudged, to prosecute the writ of error with effect; and also to satisfy the debt, damages, and costs adjudged, &c.

If a cause removed from an inferior court, be remanded back by procedendo the same term, the original bail in the inferior court are chargeable, but not if removed in another term. C. R. 3; 5 Ed. 3. One taken on a writ of execution is not bailable by law; except an audit quezula be brought; but where a writ of error is brought and allowed, if the defendant be not in execution, there shall not be an execution awarded against him, at the request of the bail, though he be present in court. 1 Nelf. Abr. 351. The bail ought not to join with the principal, nor the principal with the bail, in a writ of error to reverse the judgment against either. 6 Cro. 584.

On capias ad quodam faciendum against the defendant returned non est inventus, seize factum is to issue against the bail, or an action may be brought. Where a defendant re-
renders his body in discharge of the bail, the plaintiff is by the rules of the court to make his choice of proceeding in execution, whether he will charge body, goods or lands. 1 Litt. 183. And if the principal after judgment renders not himself in discharge of his bail, it is at the election of the plaintiff to take out execution either against him or proceed against his bail: but if he takes the bail in execution, though he hath not full satisfaction, he shall never after take the principal; and if the principal be taken, he may not after middle with the bail.

Where two are bail, although one be in execution, the plaintiff may take the other. Cro. Jac. 320: 2 Bully. 68. If a principal render himself, and there is none to require his commitment, the court is ex offer to commit him; and if the plaintiff refuse him, he shall be discharged, and an entry made of it upon the record. More, Conf. 1249: 1 Leav. 59: Sec Hob. 210.

There must be an exorcist entered, to discharge the bail. If the defendant dies before a capias ad satisfaciendum be entered against him, returned and filed, the bail will be discharged, 1 Litt. 177.

The bail upon a writ of error cannot render the party in their discharge; because they are bound in a recognizance that the party shall prosecute the writ of error with effect, or pay the money if judgment be affirmed. 1 Litt. Abr. 173: 2 Cro. 402: 3 Mod. 87. Nor can the Bail in such case surrender the principal, though he become a bankrupt pending the writ of error. 1 Term Rep. 624.

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

If the bail mean to acquit themselves of their recognizance entirely, then they must render him in their discharge, before the return of the capias facias; as the death of the principal afterwards will not discharge them. 2 Wiff. 67: 2 Cro. 165: 1 Poo. 130: Str. 511. But if they do not, then they have until then the return day, (if the proceedings be by bill) sedente curia, of the first facias facias, if it be returned facias facias but if a bill is returned thercon, then until the return day, sedente curia of the second facias facias. N. 1 R. E. 5 Goo. 2. And if the proceedings be by original, they have till the quarta die post of the return of the first facias facias if it is returned facias facias; if not, then till the quarta die post of the return day of the second. 4 Bou. 2424: 1 Wiff. 570. If an action be brought then eight days in full term after the return. R. Trin. 1 An.—See further Impey's and the other books of practice.

If Bail surrender the principal at or before the return of the second facias facias it is good, although there be not immediate notice of it to the plaintiff; and if, through want of notice, he is at further charge against the bail, that shall not vitiate the surrender, but the bail shall not be delivered till they pay such charges: if at any time, after the return of the capias, the bail surrender the principal at a judge's chamber, and he thereupon is committed to the jail, from whom he escapes, &c. this will not be a good surrender: but if he be before or on a capias returned, it is otherwise, the one being an indulgence, and the other matter of right. Mod. Conf. 238.
**BAIL I.**

In the latter case they ought to be justified again in term, and upon that the defendant is compelled to accept a declaration to go to trial at the assizes, if it be an invariable term; and upon putting in bail, it is not enough to give notice of their being put in, but it ought to be of their names, places of abode, and trade or occupation, that the plaintiff may know how to enquire after them. G. Mod. 24. 25.

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

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

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

Generally, bail are opposed upon five grounds with effect: 1st. That there is some mistake in the notice to justify; namely, that it should have been given two days previous, instead of one; 2dly. That the bail have assumed names that are either forged, or belong to other persons, contrary to the Stats. 21 Jac. 1: and 4 & 5 W. & M. But the court will not vacate the proceedings against the party imprisoned, until the offender be convicted. 1 Vent. 391; nor can a conviction take place, until the bail-piece be filed. 2 Sed. 99: 3d. A third ground of opposing bail is, that they are not house-keepers; if they be, the rent paid is immaterial, though under 10l. Left 149; nor is it necessary they should have been affixed to the poor's rate. Ibid 328. 4thly. They may be opposed on the grounds of their not being worth double the sum found, after payment of all their debts. Under this head may be ranked bankrupts, who have not obtained their certificates; or such as have been twice bankrupts, and not paid 15s. in the pound. M. 24 Geo. 3. Left 3. After the expiration of the rule to bring in the body. Left 439: M. 26 Geo. 3.

If the bail do not justify at the day given (being the last day) they are out of court. Nor can they justify after the rule upon the sheriff, to bring in the body is expired; without leave of the court. Left 585.

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

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

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

Pending a rule to set aside proceedings for irregularity, and to stay the proceedings, plaintiff took an assignment of the bond in the meantime; the court agreed that the proceedings were totally suspended, by an act of the court, and made the rule absolute to set aside the assignment of the bond, as having been made too soon. 4 Term Rep. 175.

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

When a sheriff hath taken good bail of the defendant, he will on a rule return a cept, and assign the bail bond to plaintiff, which may be done by indorsement without stamp; so as it be stamped before action brought thereon; and then the defendant and bail may be sued on the bond, by the plaintiff in his own name, i.e. as assignee of the sheriff. Stent. 4 & 5 Ann. c. 15. The action must be brought in the same court, where the original writ was issued out. 3 Burr. 1923: 1 Burr. 642. The venue may be laid in any county. Sir. 727: 2 Ld. Raym. 1455. But if the plaintiff takes an assignment of the bail bond, though the bail is insufficient, the court will not arrest the sheriff. 1 Salk. 99.

In case the defendant does not put in bail, the attorney for the plaintiff is to call on the sheriff for his return of the writ; and so proceed to an attachment against the sheriff. If on a cept corpus no bail is returned, a rule will be made out to bring in the defendant's body. Though a defendant, with leave of the court, may deposit money in court instead of bail; and in such case the plaintiff shall be ordered to waive other bail. Lill. Abr. Trin. 23 Car. B. R.

If more damages, &c. are recovered than mentioned in the plaint, or than the sum wherein the bail is bound, the bail will not be liable for the surplus. 1 Salk. 102.

A bail cannot be witness for the defendant at the trial; but the court, on motion, will discharge the bail, upon giving other sufficient bail. Wood's Inst. 582. Bail-pieces are written on a small square piece of parchment, with the corners cut off at the bottom.—For further matter see the books of practice.

**BAIL II.**

As to BAIL for CRIMES. At common law bail was allowed for all offences except murder. 2 Ingl. 109. And if the party accused could find sufficient sureties, he was not to be committed to prison; for all persons might be bailed till convicted of the offence. 2 Ingl. 186. But by statute it was after enacted, that in case of homicide the offender should not be bailed: and by our statutes, murderers,
BAIL II.
derers, out-laws, house-burners, thieves openly defamed, &c. are not bailable; but where persons are accused of larceny, as accessories to felony, or under light suspicion, they may be admitted to bail. Stat. 3 Ed. 1. c. 15.

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

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

One indicted for burglary may be bailed. 29 Aff. 44.

One indicted on suspicion of robbery was outlawed, and taken in the outlawry, and brought into court, and being brought to B. R. by habeas corpus, prayed to be bailed, and took two exceptions to the indictment; viz. That he was in prison, and knew nothing of the outlawry; 2dly. That the charge is too general, and no body prosecuted; but per Rull Ch. 1. He cannot be bailed. Str. 418. But see Stat. 4 & 5 W. & M. c. 18, which enacts, that persons outlawed, except for treason or felony, may appear by attorney and reverse the same without bail; except special bail shall be ordered by the court; and that persons arrested upon any capias ulterius, except for treason or felony, may be discharged by an attorney's engagement to appear; and to cases where special bail is required, the sheriff may take bond with sureties.

By the common law the sheriff might bail persons arrested on suspicion of felony, or for other offence bailable; but he hath lost this power by the Stat. 1 Ed. 4. c. 2. Justices of peace may let bail persons suspected of felony, or others bailable, until the next sessions: though where persons are arrested for manslaughter or felony, being bailable by law, they are not to be let to bail by justices of peace but in open sessions, or where two justices (quorum usum) are present; and the same is to be certified with the examination of the offender, and the accusers bound over to prosecute, &c. 3 H. 7. c. 3: 1 & 2 P. & M. c. 13. § 3: not to restrain justices in London and Middlesex, and towns corporal. 1 & 2 P. & M. c. 13. § 6. If a person be dangerously wounded, the offender may be bailed till the person is dead; but it is usual to have assurance from some skilful surgeon, that the party is like to do well. 2 JSlf. 186. A man arrested and imprisoned for felony, being bailable, shall be bailed before it appears whether he is guilty or not; but when convicted, or if on examination he confesseth the felony, he cannot be bailed. 4 JSlf. 178.

It is to be observed, that the Stat. Wib. 1. 3 Ed. 1. c. 15. above mentioned, doth not extend to the judges of B. R. &c. only to sheriffs and other inferior officers. H. P. C. 98. 99.—Likewise, justices of gaol delivery not being within the restraint of the statute of Wib. 1. may bail persons convicted before them of homicide by misadventure, or self defence, the better to enable them to purchase their pardon. Comp. 154 a. H. P. C. 101. P. & Ed. 21. 6. 3 P. C. 15.

Also it seems that in discretion they may bail a person convicted before them of manslaughter, upon special circumstances; as if the evidence against him were slight, or if he had purchased his pardon. H. P. C. 101. Comp. 153.

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

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

And therefore if a person be attainted of felony, or convicted thereof by verdict general or special, or notoriously guilty of treason or manslaughter, &c. by his own confession or otherwise, he is not to be admitted to bail; without some special motive to induce the court to grant it. Relyng 90: Dyer 79: 1 Bajt. 97: 2 Hawk. P. C. c. 15. § 80.

Upon a commitment of either house of parliament, when it stands indifferent on the return of the habeas corpus, whether it be legal, or not, the court of B. R. ought not to bail a prisoner. Leach's Hawk. P. C. ii. c. 15. 753. But if it be demanded in case a subject should be committed by either of the Houses for a matter manifestly out of their jurisdiction, what remedy can he have? I answer (says the learned and cautious Serjeant Hankey) as this is a case which I am persuaded will never happen, it seems needless over nicely to examine it. See Leach's notes, 2 Hawk. P. C. cap. 15. § 73. from the cases cited there (viz. The Hon. Alex. Murray's, 1 Wib. 993. John Wilkes's, 2 Wib. 158: Erick v. Corrington, 1 St. Tr. 317: Brails Grothy's, 3 Wib. 188: 2 Blackf. 753.) it appears that the courts in Westminster Hall have been positively of opinion, "that they have no power to decide on the privileges of Parliament; that the rights of the House of Commons are paramount to the jurisdiction of those courts; that the Commons are the exclusive arbiters of their own peculiar privileges; that their power of commitment is inherent in the very nature of their constitution; and finally that their adjudication is tantamount to a conviction, and their commitment equal to an execution; and that no court can discharge a prisoner committed in execution by another court."

However, a person committed for a contempt, by order of either House of Parliament, may be discharged by B. R. after a dilution or prorogation, which determine all orders of parliament: also it is said on an impeach-ment, when the parliament is not sitting, and the party has been long in prison, B. R. may bail him. The court of B. R. hath bailed persons committed to the Fleet Prison by the Lord Chancellor; when the crime of commitment was not mentioned, or only in general terms, &c. 2 Hawk. P. C. c. 15. § 78.

And B. R. having the control of all inferior courts, may at their discretion bail any person unjustly committed by any of those courts. In admitting a person to bail in the court of B. R. for felony, &c. a several recognizance
BAIL.

is entered into the king in a certain sum from each of the bailiff, that the prisoner shall appear at a certain day, &c. And also that the bail shall be liable for the default of such appearance, body for body. And it is at the discretion of the justices of the peace, in admitting any person to bail for felony, to take the recognizance in a certain sum, or body for body; but where a person is bailed by any court, &c. for a crime of an inferior nature, the recognizance ought to be only in a certain sum of money, and not body for body. 2 Haw. c. 15. § 83. And the bail are to be bound in double the sum of the criminal. Where persons are bound body for body, if the offender do not appear, whereby the recognizance is forfeited, the bail are not liable to such punishment to which the principal would be adjudged if found guilty, but only to be fined, &c. Wood's Inj. 618. If bail is refused the prisoner will fly, they may carry him before a justice to find new sureties; or to be committed in their discharge. 1 Rep. 99.

The courts of King's Bench, Common Pleas and Exchequer, in term time, and the Chancery in term or vacation, may bail persons by the habeas corpus act; see title Habeas Cor. u.

To refuse bail when any one is bailable on the one hand; or on the other to admit any to bail who ought not by law to be admitted, or to take flender bail, is punishable by fine; &c. 2 Inj. 29: H. P. C. 97. And see further, 3 Edw. 1. c. 15: 27 Edw. 1. St. 1. c. 3: 4 Edw. 3. c. 2: 1 & 2 P. & M. c. 13: & 31 Car. 2. c. 2.

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


But justices must take care, that under pretence of demanding sufficient surety, they do not make so excessive a demand, as in effect amounts to a denial of bail; for this is looked upon as a great grievance, and is complained of as such by 1 W. & M. St. 2. c. 2, (the bill of rights); by which it is declared, that excessive bail ought not to be required. 2 Haw. P. C. c. 15.

If where a felony is committed, one is brought before a justice on suspicion, the person suspected is to be bailed, or committed to prison; but if there is no felony done, he may be discharged. H. P. C. 98, 109.

Parties committed for treason or felony, and not indicted the next term, are to be bailed. 31 Car. 2. c. 2.

§ 7. Where bail may have writ of detainer against the prisoner, See 1 H. 3. 2. c. 6. § 3.

Justices of peace are required to bail officers of customs and excise, who kill persons relieving. 9 Ges. 2. c. 35.

§ 35.

BAILIFF.

The court of King's Bench and Justiciary in Scotland, not restrained from bailing persons committed for felonies, against the laws of customs or excise, 9 Ges. 2. c. 35. § 18: 19 Geo. 2. c. 34. § 12.

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

Bailiff, bailiff, &c. From the French word bailli, that is, præfectus provinciae, and as the name, to the office itself was answerable to that of France, where there were eight parliaments, which were high courts from whence there lay no appeal, and within the precincts of the several parts of that kingdom which belonged to each parliament there were several provinces to which justice was administered by certain officers called bailiffs: and in England we have several counties in which justice hath been, and still is, in small suits, administered to the inhabitants, by the officer whom we now call sheriff or wifecount; (one of which names descends from the Saxons, the other from the Normans;) and though the sheriff is not called bailiff, yet it is probable that was one of his names also, because the county is often called bailiwick: as in the return of a writ, where the person is not arrested, the sheriff faith, lea a nominius A. B. son of inventus in bailiwick, &c. Kitch. Ret. Evid. fol. 285. and in the statute of Magna Charta, cap. 28, and 14 Ed. 3. c. 9, the word bailiff seems to comprise as well sheriffs, as bailiffs of hundreds.

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

Of the ordinary bailiffs there are several sorts, viz.

bailiffs of liberties; sheriffs' bailiffs; bailiffs of lords of manors; bailiffs of husbandry, &c.

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

Bailiffs of liberties and franchises, are to be sworn to take diligences, truly impanel jurors, make returns by indentures between them and sheriffs, &c. and bail be published for malicious diligences, by fine and treble damages, by ancient statutes. Vide 12 Ed. 2. St. 1. c. 5: 14 Ed. 3. St. 1. c. 9: 20 Ed. 3. c. 61: 1 Ed. 3. St. 1. c. 5: 2 Ed. 5. c. 4: 5 Ed. 3. c. 4: 11 H. 7. c. 15: 27 H. 8. c. 24: 3 Geo. 4. c. 17. § 10.

The bailiff of a liberty, may make an inquisition and extent upon an elegit. The sheriff returned on a writ of elegit, that the party had not any lands but within the liberty of St. Edmund's, and that J. S. bailiff there had the execution and return of all writs, and that he inquired
A B L I A I F F.

Aquired and returned an extent by inquisition, and the bailiff delivered the money of the lands extended to the plaintiff, who by virtue thereof entered, &c. This was held a good return. Cro. Car. 319. These bailiffs of liberties cannot arrest a man within a warrant from the sheriff of the county: and yet the sheriff may not enter the liberty himself, at the suit of a subject, unless it be on a quo warranto, or capias ulterius) without clause in his writ. Now omitted proper aliqua libertates, &c. If the sheriff, &c. enters the liberty without such power, the lord of the liberty may have an action against him: though the execution of the writ may stand good. 1 Vent. 403; 2 Inst. 573.

Sheriffs' bailiffs are such who are servants to sheriffs of counties to execute writs, warrants, &c. Formerly bailiffs of hundreds were the officers to execute writs; but now it is done by special bailiffs, put in with them by the sheriff. A bailiff of a liberty is an officer which the court takes notice of; though a sheriff's bailiff is not an officer of the court, but only the sheriff himself. P2c. 27 Eliz. 2d. The arrest of the sheriff's bailiff is the arrest of the sheriff; and if any person be made of any person arrested, it shall be adjudged against the sheriff: as also if the bailiff permit a prisoner to escape, action may be brought against the sheriff. Ca. Lig. 61, 168. Sheriffs are answerable for misdemeanors of their bailiffs; and are to have remedy over against them. 2 Inst. 19.

The latter are therefore usually bound in an obligation for the due execution of their offices, and these are called bond bailiffs; which the common people have corrupted to a more humble appellation. There are thirty-six serjeants at mace in London who may be named bailiffs, and they give security to the sheriffs. By Stat. 14 Eliz. c. 3. c. 9, Sheriffs shall appoint such bailiffs for whom they will answer; and by Stat. 25 H. 8. c. 4, no sheriff's bailiff shall be attorney in the king's court. R. M. 1654.

Bailiffs of lords of manors are those that collect their rents, and levy their fines and amercements: but such a bailiff cannot distrain for an amercement without a special warrant from the lord or his steward. Crs. Eliz. 668. He cannot give licence to commit a trespass, as to cut down trees, &c. though he may licence one to go over land, being a trespass to the possession only, the profits whereof are at his disposal. Crs. Jac. 337. 377. A bailiff may by himself, or by command of another take cattle damage, leasant upon the land. 1 Don. Abr. 685. Yet amends cannot be tendered to the bailiff, for he may not accept of amends, nor deliver the distress when once taken. 5 Rep. 70. These bailiffs may do any thing for the benefit of their masters, and it shall stand good till the master discharges them, but they can do nothing to the prejudice of their masters. Lit. Rep. 70.

Bailiffs of couriers summons these courts, and execute the processes thereof; they present all pound breaches, cattle-strayed, &c.

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

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

B A I L I E N T.

An Appointment of a Bailiff of a Manor.

Know all men by these presents, That J. W. Esq. and J. G. Esq. lord of the manor of D. in the county of G. Have made, ordained, depited and appointed, and by these presents do make, ordain, depite, and appoint J. G. of, &c. my bailiff, for me and in my name, and to my use, to collect and gather, and to enforce, require, demand and receive of all and every my tenants, that have held or enjoyed, or now hold, or hereafter shall hold or enjoy, any messuages, lands, or tenements, from, by, or under me, within my said manor of D. all rents, and accruals of rents, herits, and other profits, that now are, or hereafter shall be, payable, due, owing or belonging to me, within the said manor; and, in default of payment thereof, to distrain for the same from time to time, and such distress or distresses to impound, detain and keep, until payment be made of the said rents and profits, and the arrears thereof. And I do further and more particularly bind and ordain the said J. G. to take care of and redress all and every my messuages, lands and tenements within the said manor, and to take an account of all debts, decay, waste, spoil, trespasses, or other mismanagements committed or permitted within my said manor, or in any messuages, lands or tenements there; and from time to time, to give me a just and true account in writing thereof; and further to all and do all other things that to the office of a bailiff of the said manor belong and appertain, during my will and pleasure. In witness, &c.

Bailwick, bailwa. It is not only taken for the county; but signifies generally that liberty which is exempted from the sheriff of the county, over which the lord of the liberty appointeth a bailiff with such powers within his precincts, as an under-sheriff exerciseth under the sheriff of the county; such as the bailiff of Wiltmifden, &c. Stat. 27 Eliz. cap. 2. Wood's Inst. 206.

Bailment, from bailerFr. to deliver. "A delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee: [the person to whom they are delivered.] 2 Comm. 451. which fee: to which Sir W. Jones adds, and the goods delivered as soon as the time or use, for which they were bailed shall have elapsed or be performed." Law of Bailments, p. 117.

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

1. A bare and naked bailment, to keep for the use of the bailor, which is called depotum; and such baille is not chargeable for a common neglect, but it must be gross one to make him liable. 2 St. 1599.

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

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

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

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

6. A delivery of goods to do some act about them (as to carry) without a reward, which is called by Bracton, mandatum, in English an acting by commission; and though he be to have nothing for his pains, yet if there were any neglect in him, he will be answerable, for his having undertaken a trust is a sufficient consideration; but if the goods be misused by a third person, in the way, without any neglect of his, he would not be liable, being to have no reward.


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

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

—10. Slight neglect is the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods and chattels. — 11. A naked contract is a contract made without consideration or recompense.

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

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

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

The cases cited and commented on by Sir Wm. Jones, besides the above of Cogg v. Bernard, and which lead to the whole law on this subject, are 1 Stu. 128, 145; 2 Stu. 109; Annu. 93; Fitz. Def. 59; (Bamton’s cafe, the earliest on the subject): 8 Rep. 32; 1 Wiff. 281; Burr. 230; 1 Vest. 121, 190, 238; Carrt. 48, 7; 2 Bulst. 280; 1 Ro. Ab. 2, 4, 213, 2 Ro. Ab. 507; 12 Mdn. 480; 2. Rey. 240; Moss. 462, 543; Owen 144; 1 Lom. 224; 1 Cev. 219; Bror. Ab. Ist. Bailment: Hol. 30; 2 Cev. 359, 667; Paln. 548; W. Jef. 159; 4 Rep. 83 b. (Southcote’s cafe): 1 Lef. 87 a. Many of them however more peculiarly applicable to carriers.

The following cases may serve to illustrate the above principles.

A man leaves a chest locked up with another to be kept, and does not make known to what is therein; if the chest and goods in it are stolen, the person who received them shall not be charged for the same, for he was not trusted with them. And what is said as to stealing is to be understood of all other inevitable accidents; but it is necessary for a man that receives goods to be kept, to receive them in a special manner, viz. to keep them as his own, or at the peril of the owner. 1 Litt. Abr. 193, 194. And vide 1 Rol. Abr. 338: 2 Shaw. pl. 166.

If I deliver 100l. to A. to buy cattle, and he blows 50l. of it in cattle, and I bring an action of debt for all, I shall be barred in that action for the money bestowed and charges, yet, but for the rest I shall recover. Hob. 207.

If one delivers his goods to another person, to deliver over to a stranger; the deliverer may countermand his power, and require the goods again; and if the bailee refuse to deliver them, he may have an action of account for them. C. Lit. 436.

If A. delivers goods to B. to be delivered over to C. C. hath the property, and B. hath the action against B. for B. undertakes for the safe delivery to C. and hath no property or interest but in order to that purpose. 1 Rol.

Abr. 606: see 1 Bulst. 63, 69, where it is said that in case of conversion to his own use the bailer shall be answerable to both.

But if the bailment were not on valuable consideration, the delivery is countermandable; and in that case, if A. the bailor bring trover, he reduces the property again in himself, for the action amounts to a countermand; but if the delivery was on a valuable consideration, then A. cannot have trover, because the property is altered; and in trover the property must be proved in the plaintiff. 1 Bulst. 63: see 1 Lem. 30.

And where a man delivers goods to another to be redelivered to the deliverer at such a day, and before that day the bailee doth sell the goods in market covert; the bailer may at the day feize and take his goods, for the property is not altered. Gold. 162.

If A. borrows a horse to ride to Dover, and he rides out of his way, and the owner of the horse meets him, he cannot take the horse from him; for A. has a special property in the horse till the journey is determined; and being in lawful possession of the horse, the owner cannot violently seize and take it away; for the continuance of all property is to be taken from the form of the original bargain, which in this case was limited till the appointed journey was finished. Vero. 172. But the owner may have an action on the cause against the bailee for exceeding the purposes of the loan; for so far it is a secret and fallacious abuse of his property; but no general action of trespass, because it is not an open and violent invasion of it. 1 Rol. Rep. 128.

As to borrowing a thing per liable, as corn, wine, or money, or the like, a man must, from the nature of the thing, have an absolute property in them; otherwise it could not supply the uses for which it was lent; and therefore he is obliged to return something of the same sort, the same in quantity and quality with what is borrowed. Dr. & S. 129.

But if one lend a horse, &c. he must have the same restored. If a thing lent for use be used to any other end or purpose than that for which it was borrowed, the party may have his action on the cause for it, though the thing be never the worse; and if what is borrowed be lost, although it be not by any negligence of the borrower, as if he be robbed of it; or where the thing is impaired or destroyed by his neglect, admitting that he put it to no more service then that for which borrowed, he must make it good; so where one borrows a horse, and puts him in an old rotten house ready to fall, which falls on and kills him, the borrower must answer for the horse. But if such goods borrowed perish by the act of God, (or rather, as Sir Wm. Jones says it ought more reverentially to be termed, by inevitable accident,) in the right use of them, as where the borrower puts the horse, &c. in a strong house, and it falls and kills him, or it dies by disease, or by default of the owner, the borrower shall not be charged. 1 Lef. 89: 29 Chl. 28: 12 H. 7, 11.

If one delivers a ring to another to keep, and he breaks and converts the same to his own use, or if I deliver my sheep to another to be kept, and he suffers them to be drowned by his negligence; or if the bailee of a horse, or goods, &c. kill or spoil them, in these cases action will lie. 3 Rep. 13: 15 E. 4. 20 4: 12 E. 4. 13.

If a man deliver goods to another, the bailer shall have a general action of trespass against a stranger, because he
BAILMAN. A poor insolvent debtor left bare and naked. citing Will. Reg. See cap. 17.

BANK. A covering of exile and ornament for a bench, or other seat; Monticole two. p. 122.

BANK, from the Sax. bas, a murder. J Signifies deflection or overthrow; as, I will be the base of him a man, is a common saying; to when a person receives a mortal injury by any thing, we say it was his base; and he who is the cause of another man's death, is said to be base, i.e. malefactor. Black. ib. 1 Tract. cap. 11.

BANKER, bancerum, m. condemn. Sir Thomas Smith. In hisounds and cap. 18, says, a bank made in the field, with the ceremony of cutting off the point of his standard, and making it as it was a banner, and accounted to honourable, that they are allowed to display their arms in the king's army as barons do, and may bear arms with supporters. See Camden and Spenlow, from whom it appears bancers are the degree between barons and knights. Spenlow in v. Bancer. It is said that they were called so by custom to parliament; and that they are next to the barons in dignity, appears by the flats. 5 R. 2. Stat. 2. cap. 4, and 14 R. 2. cap. 11. William de la Pue was created bancer by K. Edward the Third, by letter patent, Avoa Regia dia 13. And those barons who are created by writs, the writs are directed to the king on his behalf, and the times, accoated to certain regalia, in silver bells, &c. to judge of the rights, &c. of the court, and to take place of all barons, as we may learn by the letter patent for creation of baronets, 6. b. 6. Some maintain that knights bancers ought not to be made in a civil war; but Hen. 7, made divers bancers upon the Cornish commotion, in the year 1495; See Selden's Title of Honours, f. 792.

BANISHMENT. Fr. bannifereut; Elinion, abatimento, is a forfaking or quitting of the realm; and a kind of civil death, inflicted on an offender; there are two kinds of it, one voluntary and upon oath, called abatimento, and the other upon compulsion for some offence. Staines. Pl. Gr. c. 117. See this. Abatimento, Translation.

BANK, Lit. bannos, Fr. banque.] In our common law, is usually taken for a seat or bench of judgment; as Bank le Roy, the King's Bench, Bank le Common Pleas, the Bench of Common Pleas, or the Common Bench; called also in Latia Barons Regis, and Banes Commonion Pleitiae, Gramp. Jult. 67. g1. Tea Bant, or the privilege of the bench, was anciently allowed only to the king's judges; and is called leam administrtat jubilatwns; for inferior courts were not allowed that privilege.

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

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

The Bank of England is managed by a governor and directors, established by parliament, with funds for maintaining thereof, appropriated to such persons as were subscribers; and the capital stock, which is enlarged by divers taxes, is exempted from taxes, accounted a personal estate assignable over, not subject to forfeiture, and the company make dividends of the profits half yearly, &c. The funds are recedemable by the parliament, on paying the money borrowed; and the Company of the Bank.
BANKRUPT I.

Bankrupt is a person who is in debt, and is unable to pay his debts. The Bankruptcy Act of 1872 defines bankruptcy as the "failure to pay debts when they become due and payable.

The Bankruptcy Act of 1872 provides for the appointment of a trustee in bankruptcy to administer the assets of the bankrupt, and to distribute them among the creditors. The trustee is appointed by the court, and is under the supervision of the court.

The Bankruptcy Act of 1872 provides for the appointment of a committee of inspection to investigate the affairs of the bankrupt. The committee of inspection is appointed by the court, and is under the supervision of the court.

The Bankruptcy Act of 1872 provides for the appointment of a receiver to take charge of the assets of the bankrupt. The receiver is appointed by the court, and is under the supervision of the court.

Bankruptcy is a form of personal insolvency, and is not a form of corporate insolvency. The Bankruptcy Act of 1872 provides for the appointment of a trustee in bankruptcy to administer the assets of the bankrupt, and to distribute them among the creditors. The trustee is appointed by the court, and is under the supervision of the court.

The Bankruptcy Act of 1872 provides for the appointment of a committee of inspection to investigate the affairs of the bankrupt. The committee of inspection is appointed by the court, and is under the supervision of the court.

The Bankruptcy Act of 1872 provides for the appointment of a receiver to take charge of the assets of the bankrupt. The receiver is appointed by the court, and is under the supervision of the court.

Bankruptcy is a form of personal insolvency, and is not a form of corporate insolvency. The Bankruptcy Act of 1872 provides for the appointment of a trustee in bankruptcy to administer the assets of the bankrupt, and to distribute them among the creditors. The trustee is appointed by the court, and is under the supervision of the court.

The Bankruptcy Act of 1872 provides for the appointment of a committee of inspection to investigate the affairs of the bankrupt. The committee of inspection is appointed by the court, and is under the supervision of the court.

The Bankruptcy Act of 1872 provides for the appointment of a receiver to take charge of the assets of the bankrupt. The receiver is appointed by the court, and is under the supervision of the court.

Bankruptcy is a form of personal insolvency, and is not a form of corporate insolvency. The Bankruptcy Act of 1872 provides for the appointment of a trustee in bankruptcy to administer the assets of the bankrupt, and to distribute them among the creditors. The trustee is appointed by the court, and is under the supervision of the court.

The Bankruptcy Act of 1872 provides for the appointment of a committee of inspection to investigate the affairs of the bankrupt. The committee of inspection is appointed by the court, and is under the supervision of the court.

The Bankruptcy Act of 1872 provides for the appointment of a receiver to take charge of the assets of the bankrupt. The receiver is appointed by the court, and is under the supervision of the court.

Bankruptcy is a form of personal insolvency, and is not a form of corporate insolvency. The Bankruptcy Act of 1872 provides for the appointment of a trustee in bankruptcy to administer the assets of the bankrupt, and to distribute them among the creditors. The trustee is appointed by the court, and is under the supervision of the court.

The Bankruptcy Act of 1872 provides for the appointment of a committee of inspection to investigate the affairs of the bankrupt. The committee of inspection is appointed by the court, and is under the supervision of the court.

The Bankruptcy Act of 1872 provides for the appointment of a receiver to take charge of the assets of the bankrupt. The receiver is appointed by the court, and is under the supervision of the court.

Bankruptcy is a form of personal insolvency, and is not a form of corporate insolvency. The Bankruptcy Act of 1872 provides for the appointment of a trustee in bankruptcy to administer the assets of the bankrupt, and to distribute them among the creditors. The trustee is appointed by the court, and is under the supervision of the court.

The Bankruptcy Act of 1872 provides for the appointment of a committee of inspection to investigate the affairs of the bankrupt. The committee of inspection is appointed by the court, and is under the supervision of the court.

The Bankruptcy Act of 1872 provides for the appointment of a receiver to take charge of the assets of the bankrupt. The receiver is appointed by the court, and is under the supervision of the court.

Bankruptcy is a form of personal insolvency, and is not a form of corporate insolvency. The Bankruptcy Act of 1872 provides for the appointment of a trustee in bankruptcy to administer the assets of the bankrupt, and to distribute them among the creditors. The trustee is appointed by the court, and is under the supervision of the court.

The Bankruptcy Act of 1872 provides for the appointment of a committee of inspection to investigate the affairs of the bankrupt. The committee of inspection is appointed by the court, and is under the supervision of the court.

The Bankruptcy Act of 1872 provides for the appointment of a receiver to take charge of the assets of the bankrupt. The receiver is appointed by the court, and is under the supervision of the court.
Any person trading to England, whether native, denizen or alien, though never resident as a trader in England, may be a bankrupt, if he occasionally come to this country and commit an act of bankruptcy. Com. 398, seq. 2: Reg. 575: Solk. 110.

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

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


For the probable principle why the Legislature has subjected traders to the bankrupt laws, and not suffered other people to be included in them, See Post v. Taxton, 2 Wilf. 172.

More particularly, who may or may not be Bankrupts.

Alehouse-keepers, may. See ante 53: Cr. Car. 395.
Alum manufacturers, may. See ante. Co. 34: 46.
Bankers, may. Stat. 5 Geo. 2. c. 30.
Bakers, may. See ante *.
Brewers, may. See ante *.
Brokers, may. Stat. 5 Geo. 2. c. 30.
Brick-makers, may. 2 Wilf. 172: Brown Ch. Ca. 175.

See the case of Parker v. Wells, 1 Brown 494: 1 Term Rpt. 34: Co. B. L. c. 3. § 2.

In this case and that of alum-manufacturers, though they seem to differ, the same principle is recognized, viz.

"If a man exercises a manufacture upon the produce of his own land, as a necessary or usual mode of reaping and enjoying that produce, and bringing it advantageously to market, he shall not be considered as a trader, though he buys materials or ingredients—as in the case of cheese, cider, alum, and coal-mines and the like.—But where the produce of land is merely the raw materials of a manufacture, and used as such, and not as the mode of raising the produce of the land; in short, where the produce of the land is an insignificant article, compared with the expense of the whole manufacture, there in truth is, and ought to be considered as a trader.—As this distinction turns on the nature and manner of exercising the manufacture, and the motive with which it is carried on, it depends so much upon the light in which a jury sees the whole transaction, the law and the facts are so blended together, that it is hardly possible to distinguish them."
II. To learn what the particular Acts of Bankruptcy are, which render a man a bankrupt, the several statutes must be consulted, and the resolutions of the courts thereon — among these are to be reckoned:

1. To depart from the realm, or from his dwelling house, with intent to defraud or hinder his creditors. St. 15 Eliz. c. 7.

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

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

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

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

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

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

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

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

10. For a bankrupt to pay, satisfy, or secure the petitioning creditor his debt, in an act of bankruptcy which shall supersede that commission, and be sufficient on which to ground another; and such petitioning creditor shall lose his debt, to be divided among the other creditors. See Coke's B. B. c. 4. § 1: Stat. G. 2. c. 30. § 24.

11. Neglecting to make satisfaction for any just debt, to the amount of 200l. within two months after service of legal process, for such debt, upon any trader, having privilege of parliament, is an act of bankruptcy. Stat. 4 G. c. 3. c. 33.

The Legislature having thus by positive laws, declared what acts shall be considered as criterions of insolvency or fraud, whereon to ground a commission; none other can be admitted by inference or analogy. Therefore it is not an act of bankruptcy for a trader secretly to convey his goods out of his house, and conceal them, to prevent their being taken in execution, nor to give money for notice, when a writ should come into the Sheriff's office. 4 Lev. Rep. 723: Bull. N. P. 46. So if a trader procure his goods fraudulently to be taken in execution, or makes a fraudulent sale of them, is not an act of bankruptcy, though void against creditors. 4 Burr. 4728: C desarroll. 429.

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

The better to obtain a clear and comprehensive view of the decisions on this part of the subject, each act of bankruptcy on which any question appears to have been raised, shall be considered separately; premising that the statutes of bankrupts are local, and do not extend to acts done in foreign countries, or other dominions of Great Britain. Cocc. 398.

Departing the realm, will not be an act of bankruptcy unless done with a view of defrauding or delaying creditors; but if it appear that they are in fact delayed, by such absence, it will be the same as if the original departure was fraudulent. Bull. N. P. 57: Com. Dig. tit. Bankrupt (C. 1): 1 Ath. 155, 240: Cooke's B. L. Vernon v. Hawkes.

Beginning to keep house, or otherwise to abate himself, is an act of bankruptcy. And it is an act of bankruptcy defined by statute. Bull. N. P. 46: 1 Ath. 201: Cooke cites Hawkes v. Saunders, T. 24 G. 3.

Keeping in another man's house or chamber, having no house of his own, or on shipboard, is an act of bankruptcy; for a miller keeping his mill, Com. Dig. tit. Bankrupt.

Any keeping house for the purpose of delaying or defrauding a creditor, even for a very short time, will be an act of bankruptcy; notwithstanding the party afterwards goes abroad and appears in public. 2 Sten. 859: 2 Term Rep. 59.

A general denial will not be sufficient, but it must be a denial to a creditor who has a debt at that time due; for if he is only a creditor by a note payable at a future day, a denial to him will be no act of bankruptcy. 7 Fin. 0. pl. 14.

It frequently happens that traders in declining circumstances call their creditors together to inspect their affairs; and determine whether a commission shall lie against them or not; and if thought advisable, it is usual for the trader to deny himself to a creditor, for the purpose of making an act of bankruptcy. However it seems doubtful how far such concerted denial will be an act of bankruptcy to affect the interest of third persons. See 1 Black. Rep. 441: Bull. N. P. 59.

Departing from his dwelling house may become an act of bankruptcy or not, according to the motive by which the party is impelled: if it be done with a view of defrauding his creditors, or even delaying them, and his absence be for a single day, it will be an act of bankruptcy; and his very abstaining himself is sufficient prima facie evidence of an intention to defraud or delay his creditors; but it must be a voluntary abstaining and not by means of an arrest. 1 Sail. 110: 1 Burr. 484: 2 Staun. 809: Green 53.

Suffering himself to be outlawed. An outlawry in Ireland does not make one a bankrupt; but in the county palatine of Durham it does. However an outlawry does not appear to be an act of bankruptcy, unless he be suffering with intent to defraud creditors. Com. Dig. tit. Bankrupt: Sten. 124: Billing, 56: Godd. 23: 1 Lev. 13.

Yielding himself to prison, is to be intended of a voluntary yielding for debt; and if a person capable of paying, will notwithstanding, from fraudulent motives, voluntarily go to prison, it is an act of bankruptcy. Bill. 95: Godd. 25: Fin. ut. Creditor and Bankrupt 62.

Willingly
Bankrupt III.

Willingly or fraudulently procuring his goods to be attached or sequestered, which is a plain and direct endeavour to disappoint his creditors of their security. 2 Comm. 478. The attachment here meant, and which the legislature had in view, is that sort of attachment only by which suits are commenced; as in London and other places where that species of process is used. Co. 237. Making any fraudulent conveyance of his lands or goods. A fraudulent grant, to come within the meaning of the statute, must be by deed; therefore a fraudulent sale of goods not by deed, is no act of bankruptcy in itself; but being a scheme concerted at the eve of bankruptcy, to cheat innocent persons, in order to secure particular creditors, is such a fraud as shall render the sale void. 4 Burr. 2478.

A grant or conveyance fraudulent within Stat. 13 Eliza. c. 5, or 27 Eliza. c. 4, is an act of bankruptcy. Com. Dig.: Cohe.

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

Whether a transaction be fair or fraudulent, is often a question of law; it is the judgement of law upon facts and intents; but transactions valid as between the parties may be fraudulent by reason of covin, collusion, or con
cfideracy to injure third persons. 2 Burr. 827; 1 Burr. 497.

Nor will the case be different, if the assignment is made to indemnify a surety; for the inconvenience and mischief arising from an undue preference is the same. Cohe's B. L. 78: Doug. 282.

An equal distribution among creditors who equally give a general personal credit to the bankrupt, is anxiously provided for. ever since the act 21 Jac. 1. c. 10; therefore when a bankrupt, by deed, conveys all his effects to trudges to pay all but one creditor, it is fraudulent and an act of bankruptcy. 1 Burr. 477.

But though a conveyance by deed of all a bankrupt's effects, or so much of his stock in trade, as to disable him from being a trader, or all his household goods, is itself an act of bankruptcy; a conveyance of part is very different; that may be publick, fair and honest. As a trader may fall, so may he openly transfer many kinds of property by way of security. What assignment of part will or will not be fraudulent, must depend on the particular circumstances of the case; but a colourable exception of a small part of his estate or effects, will not prevent the deed being declared fraudulent; for the law will never suffer an evasion to prevail to take a case out of the general rule, which is to extend to justice. 1 Black. Rep. 441; 2 Black. Rep. 591, 595; 1 Burr. 477.

An assignment by deed of part of a trader's effects, will be good, if made bona fide, and possession delivered, and indeed the not delivering possession being only evidence of fraud, may be explained by circumstances. 1 Burr. 478, 484. But an assignment even of only part of a trader's effects, to a fair creditor, will if done in contemplation of bankruptcy itself become the very act. 3 Will. 47: Comp. 114.

Procuring any pretention except privilege of parliament. If any one be protected as the king's servant, it does not make him bankrupt. 31. 21. By Stat. 7 Ann. c. 12, § 5, declaring the privilege of ambassadors and their train, it is expressly enacted. That no merchant, or other trader whatsoever, within the description of any of the statutes against bankrupts, shall have any benefit of that act.

Being arrested for debt and lying two months in prison. The statute does not make the mere being arrested an act of bankruptcy. The most substantial trader is liable to be arrested; but the presumption of insolvency arises from his lying in prison two months without being able to get bail; nor will this presumption be obviated by a mere formal bail, put in for the purpose of changing from one custody to another. Where bail is really put in, the bankruptcy only relates to the time of the surrender; but where it is only formal bail, it will have relation to the first arrest. 1 Burr. 347; see Salk. 193: Bull. N. P. 58.

Escape out of prison on arrest for 100l. or more. The act clearly intends such an escape, as shews he means to run away and thereby to defeat his creditors; it must be an escape against the will of the sheriff, for a man shall not be made a criminal, where he has not the least criminal intention to disobey any law. 1 Burr. 429.

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

An act of bankruptcy if once plainly committed, can never be purged, even though the party continues to carry on a great trade. 2 Term Rep. 59. But if the act was doubtful, then circumstances may explain the intent of the first act, and shew it not to have been done with a view to defraud creditors. But if after a plain act of bankruptcy, a man pays off and compounds with all his creditors he becomes a new man. 1 Burr. 484: 1 Salk. 110.

III. The proceedings on a commision of bankrupt, depend entirely on the several statutes of bankruptcy; all which are blended together, and digested into a concise methodical order in 2 Comm. 480, and here adopted with additions.

1. There must be a petition to the Lord Chancellor by one creditor to the amount of 100l. or by two to the amount of 150l. or by three or more to the amount of 200l.; which debts must be proved by affidavit. (St. 3 Geo. 2. c. 30.) Upon which he grants a commission to fix different persons as to him shall seem good, who are then called commissioners of bankrupt. St. 13 Eliza. c. 7. Of these commissioners there are several existing lists, which take the commisions of bankruptcy in turn. The petitioners, to prevent malicious applications, must be bound in a bond to the Lord Chancellor for 200l. to make the party amend in case they do not prove him a bankrupt. And if, on the other hand, they receive any money or effects from the bankrupt, as a recompense for fixing out the commission, so as to receive more than their rateable dividends of the bankrupt's estate, they forfeit not only what they shall have to recover, but their whole debt. These provisions are made, as well to secure persons in good credit from being damned by malicious petitions, as to prevent knavish combinations between the creditors and bankrupt, in order to obtain the benefit of a commision. When the commision is awarded and issued,
In case the bankrupt absconds, or is likely to run away, between the time of the commission issued, and the last day of surrender, he may by warrant from any judge or justice of the peace be apprehended and committed to the county gaol, in order to be forth-coming to the commissioners; who are also empowered immediately to grant a warrant for seizing his goods and papers. Stat. 5 Geo. 2. c. 50; and 9 Geo. 1. A. 540.

When the bankrupt appears, the commissioners are to examine him, touching all matters relating to his trade and effects. They may also summon before them, and examine the bankrupt's wife; (Stat. 21 Geo. 1. c. 19; see 1 P. Wm. 510, 611.) and any other person whatsoever, as to all matters relating to the bankrupt's affairs. And in case any of them should refuse to answer, or shall not answer fully, to any lawful question, or shall refuse to subscribe such their examination, the commissioners may commit them to prison without bail, till they submit themselves and make and sign a full answer; the commissioners specifying in their warrant of commitment the question so refused to be answered. And any goather, permitting such person to escape, or go out of prison, shall forfeit 50l. to the creditors. Stat. 5 Geo. 2. c. 30.

The bankrupt, upon this examination, is bound upon pain of death to make a full discovery of all his estate and effects, as well in expectation as possession, and how he has disposed of the same; together with all books and writings relating thereto: and is to deliver up all in his own power to the commissioners; (except the necessity appears) of himself, his wife, and children;) or, in case he conceals or embroils any effects to the amount of 20l. or withholds any books or writings, with intent to defraud his creditors, he shall be guilty of felony without benefit of clergy; and his goods and estate shall be divided among his creditors. Stat. 5 Geo. 2. c. 30. And unless it shall appear, that his inability to pay his debts arose from some casual loss, he may, upon conviction by indictment for such gross misconduct and negligence, be set upon the pillory for two hours, and have one of his ears nailed to the same and cut off. Stat. 21 Geo. 1. c. 19.

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

After the time allowed to the bankrupt for such discovery is expired, any other person voluntarily discovering any part of his estate, before unknown to the assignees, shall be entitled to five per cent, out of the effects so discovered, and such further reward as the assignees and commissioners shall think proper. And any trustee wilfully concealing the estate of any bankrupt, after the expiration of the two and forty days, shall forfeit 100l., and double the value of the estate concealed, to the creditors. Stat. 5 Geo. 2. c. 30.

Hitherto everything is in favour of the creditors; and the law seems to be pretty rigid and severe against the bankrupt; but, in case he proves honest, it makes him full amends for all this rigor and severity. For if the bankrupt hath made an ingenious discovery, (of the truth and sufficiency of which there remains no reason to doubt), and hath conformed in all points to the directions of the law; and, if in consequence thereof, the creditors,
BANKRUPT III 2.

creditors, or four parts in five of them in number and value, (but none of them creditors for less than 20%) will sign a certificate to that purport; the commissioners are then to authenticate such certificate under their hands and seals, and to transmit it to the Lord Chancellor, and he, or two of the judges whom he shall appoint, on oath made by the bankrupt that such certificate was obtained without fraud, may allow the same; or disallow it upon cause shown by any of the creditors of the bankrupt. Stat. 5 Geo. 2. c. 30.

If no cause be shown to the contrary, the certificate is allowed of course, and then the bankrupt is entitled to a decent and reasonable allowance out of his effects for his future support and maintenance, and to put him in a way of honest industry. This allowance is also in proportion to his former good behaviour, in the early discovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For, if his effects will not pay one half of his debts, or ten shillings in the pound, he is left to the discretion of the commissioners and affignees, to have a competent sum allowed him, not exceeding three per cent. but if they pay ten shillings in the pound, he is to be allowed five per cent. if twelve shillings and six-pence, then seven and a half per cent. and if fifteen shillings in the pound, then the bankrupt shall be allowed ten per cent provided, that such allowance do not in the first case exceed 500l. in the second 250l. and in the third 50l. Stat. 5 Geo. 2. c. 30.

Besides this allowance, he has also an indemnity granted him of being free and discharged for ever from all debts owing by him at the time he became a bankrupt; even though judgment shall have been obtained against him and he lies in prison upon execution for such debts. And for that among other purposes, all proceedings in commissary of bankruptcy are, on petition, to be entered of record, as a perpetual bar against actions to be commenced on this account; though in general, the production of the certificate, properly allowed, shall be sufficient evidence of all previous proceedings. Stat. 5 Geo. 2. c. 30.

The allowing the certificate of a bankrupt, will not discharge his tenures; but if a bankrupt obtains his certificate before his bail are fixed, it will discharge them; but if not till after they are fixed, they will remain liable notwithstanding the certificate, for it has no relation back; and till allowed it is nothing. And if the creditor proves his debt, with intent to obstruct the certificate, it does not preclude him from pursuing his legal remedies; and even if he had received his debt, or part of it, under the commissary, he still might proceed to fix the bail who would be entitled to their remedy, so far as they are oppressed, by auditus quieta, or by motion. 1 Att. 56: 1 Burr. 244: 3 Burr. 716: 2 Black. 812.

However, the bankrupt’s certificate, obtained after judgment in an action upon a bail-bond against the bankrupt himself, will not discharge the bail-bond, although it discharged the original debt, for it is a new and distinct cause of action. 1 Burr. 435: 2 Stra. 1196: 1 Wiff. 41.

The certificate does not discharge a bankrupt from his own express collateral covenant, which does not run with the land. 4 Burr. 2143. Nor from a covenant to pay rent. 4 Term. Rep. 94.

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

If a bankrupt has his certificate, and an action be brought against him afterwards for a debt precedent to the commission, he may plead his certificate, or otherwise he is without relief. 2 Vern. 198, 697.

The common method of pleading is, generally, that he became a bankrupt within the intent and meaning of the statutes made and in force concerning bankrupts, and that the cause of action accrued before he became a bankrupt. This general plea is given by Stat. 5 Geo. 2. c. 30, sect. 7.

Though a creditor of a bankrupt under 20l. is excluded from action or relief to the certificate, yet as he is affected by the consequence of allowing the certificate, he has right to petition, and have any fraud against allowing the certificate. 7 Vin. Abr. 134, pl. 18.

No allowance or indemnity shall be given to a bankrupt, unless his certificate be signed and allowed; and also, if any creditor produces a fictitious debt, or is induced by money or notes to sign his certificate, and the bankrupt does not make discovery of it, but suffers the creditor to be imploved upon, he loses all title to these advantages. St. 24 Geo. 2. c. 57. see Dig. 216, 673. Neither can he claim them, if he has given with any of his children above 100l. for a marriage portion, unless he had at that time sufficient left to pay all his debts, or if he has lost at any one time 5l. in the whole 100l. within a twelvemonth before he became a bankrupt, by any manner of gaming or wagering whatsoever; or, within the same time his loss to the value of 100l. by Rock-jobbing.

Also to prevent the too common practice of frequent and fraudulent or careless breaking, a mark is set upon such as have been once cleared by a commission of bankruptcy, or have compounded with their creditors, or have been delivered by an act of insolvency. Persons who have been once cleared by any of these methods, and afterwards become bankrupts again, unless they pay full 15. in the pound, are only thereby indemnified as to the confinement of their bodies; but any future estate they shall acquire remains liable to their creditors, excepting their necessary apparel, household goods, and the tools and implements of their trades. Stat. 5 Geo. 2. c. 30. But money gained by his trade or profession for the necessary maintenance of himself and family, may be recovered by action by an unsecured bankrupt. Cheggard v. Tidbough, 8 B. & C. 1.

2. By the Stat. 13 Eliz. c. 17. The commissioners shall have full power to dispose of all the bankrupt’s lands and tenements, which he had in his own right at the time when he became a bankrupt, or which shall descend or come to him at any time afterwards, before his debts are satisfied or agreed for; and all lands and tenements which were purchased by him jointly with his wife or children to his own use, or (such inter est therein as he may lawfully part with,) or purchased with any other person, upon secret trust, for his own use, and made them be appraised to their full value, and to sell the same, by decem annuitatibus et irridentibus, or divide them proportionably among his creditors. This statute expressly included
not only freehold, but customary and copyhold lands; and the lord of the manor is thereby bound to admit the assignee, (See C. C. 568; 1 Atk. 95.) but did not extend to entails tail, farther than for the bankrupt's life; nor to equities of redemption on a mortgaged estate, wherein the bankrupt has no legal interest, but only an equitable reversion. Whereupon the statute 21 Jac. 1. c. 19. conveys, that the commissioners shall be empowered to sell or convey, by deed indented and enrolled, any lands or tenements of the bankrupt, wherein he shall be entitled of an estate in possession, remainder or reversion, unless the remainder or reversion thereof shall be in the crown; and that such sale shall be good against all such issue in tail, remainder-men and remainder-women, whom the bankrupt himself might have barred by a common recovery, or other means; and that all equities of redemption upon mortgaged estates, shall be at the disposal of the commissioners; for they shall have power to redeem the same, as the bankrupt himself might have done, and after redemption to sell them. And the commissioners may sell a copyhold entails by custom. Som. 149; Billing. 148. And also, by this and a former act, 1 Jac. c. 15, all fraudulent conveyances to defeat the intent of these statutes are declared void; but it is provided, that no purchaser bona fide, for a good or valuable consideration, shall be affected by the bankrupt's laws, unless the commissioners be sued forth within five years after the act of bankruptcy committed. See Coke's B. L. c. 8.

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

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

In case of a patron becoming bankrupt, the commissioners may sell the advowson of the living; or if the church be void at the time of the sale, the vendee shall not present to the void turn, but the bankrupt himself, because the void turn of a church is not valuable. 1 Barn's Soc. L. n. 220, 215.

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

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

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

When assignees are chosen under a commission, all the estate and effects of the bankrupt, whether they be goods in actual possession, or debts, contracts, and legacies, and other choses in action, are vested in them by assignment; (but until the assignment the property is not transferred out of the bankrupt;) and every new acquisition previous to the certificate will vest in the assignees; but as to future real estates, there must be a new assignment of them. 1 Atk. 255: Billing. 119: 1 P. Wms. 385, 6.

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

When the assignees are chosen or approved by the creditors, the commissioners are to assign every thing over to them; and the property of every part of the estate is thereby as fully vested in them, as it was in the bankrupt himself, and they have the same remedies to recover it. 12 Mod. 301.

The commissioners in England may sell the bankrupt's goods in Ireland; and, (notwithstanding a dictum of Lord Mansfield to the contrary, See Dean. 151.) it seems now decided, that, by the assignment of the commissioners, all the bankrupt's property, whether in England or abroad, is conveyed to the use of his creditors. See Hanger v. Pott. 1 Term Rep. 182, and Coke's B. L. c. 8. § 10.

If a man lends bills of exchange, or confiuges a cargo, and the person to whom he lends them, has paid the value before, though he did not know of the lending them at that time, the lending of them to the carrier, will be sufficient to prevent the assignees from taking these goods back, in case of an intervening act of bankruptcy. 4 Burr. 2259.

But if the goods were lent, in contemplation of bankruptcy, and to give a preference to a former creditor, if the act of bankruptcy is committed before the creditor receives the property, and attains to it, the commissioners may assign it, as part of the bankrupt's effects, and it will vest in the assignees. 4 Burr. 2235.

All questions of preference turn upon the action being complete, before an act of bankruptcy committed, for then the property is transferred; otherwise an act of bankruptcy intervening, veils the property in the hands and disposition of the law. If a man were to make a payment, but the evening before he becomes bankrupt, independant of the act of parliament, and in a course of dealing and trade, it would be good. Where an act is done, that is right to be done, and the single motive is not to give an unjust preference, the creditor will have a preference. Coop. 123.

If a merchant confiuges goods to a trader, and before their arrival, the confiugee becomes bankrupt, if the merchant can prevent the goods getting into the bankrupt's hands, the commissioners' assignment will not affect them. 2 Term. 203: 1 Atk. 248: Coop. 256.

The future profits arising from a bankrupt's personal labour are not subject to the assignment. Cumpden v. Tewenfian, T. 25 Gra. 3. B. R.

The property veiled in the assignees is the whole that the bankrupt had in himself, at the time he committed the first act of bankruptcy, or that has been veiled in him since, before his debts are satisfied or agreed for; therefore when the commission is awarded, the commission, and the property of the assignees, shall have a relation, or reference, back to the first and original act of bankruptcy. 4 Burr. 32. Infomuch that all transactions of
of the bankrupt, are from that time, absolutely null and void; either with regard to the alienation of his property, or the receipt of his debts, from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. Therefore even if a banker pay the draft of a trader keeping cash with him after knowledge of an act of bankruptcy, the assignees may recover the money. 2 Term Rep. 113; 3 Doro. C. R. 313; Vernon v. Hanks, and See 2 Term Rep. 237. And, if an execution be find out, but not served and executed on the bankrupt's effects, till after the act of bankruptcy, it is void as against the assignees. But the king is not bound by this fictitious relation, nor is within the flats of bankrupts; 1 Act. 26a. W. Head 222. 2 Show. 402; for, if, after the act of bankruptcy committed, and before the assignment of the bankruptcy, the goods are bound thereby. Vis. Abr; tit. Creditor and Bankrupt 104. Cook's B. L. c. 14. § 7.

Said acts of bankruptcy however may sometimes be secret to all but a few, and it would be prejudicial to trade to carry this notion to its utmost length, it is provided by Stat. 19 Geo. II. c. 32, that no money paid by a bankrupt to a bond fale to a real creditor, in a course of trade, to make after an act of bankruptcy done, shall be liable to be refunded. Nor (by Stat. 20 Geo. II. c. 15.) shall any debtor of a bankrupt that pays his debt, without knowing of his bankruptcy, be liable to account for it again. The intention of this relative power being only to reach fraudulent transfections, and not to disturb the fair trader.

Sale of goods by a bankrupt after an act of bankruptcy is not merely void, the contract is good between the parties; but it may be avoided by the commissioners or assignees at pleasure; therefore they may either bring for the goods, as supposing the contract may be void, or may bring debt or assumpsit for the value, which affirms the contract. 3 Salk. 59. pl. 2. 2 Term Rep. 143; 4 Term Rep. 216. 7.

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

The assignees may pursue any legal method of recovering the property vested in them, by their own authority; but cannot commence a suit in equity, nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them, in value, at a meeting to be held in pursuance of notice in the Gazette. 5 St. Geo. II. c. 30. § 38; See 1 Ack. 91, 107, 210, 253; Cook's B. L. c. 14.

When they have got in all the effects they can reasonably hope for, and reduced them to ready money, the assignees must, after 4, and within 12 months after the commission issued, give 21 days notice to the creditors of a meeting for a dividend or distribution; at which time they must produce their accounts, and verify them upon oath, if required: [and under 5 Geo. II. c. 30. § 6, by affidavit if living in the country, and if Quakers by affirmation.] And then the commissioners shall direct a dividend to be made, as to much in the pound, to all creditors who have before proved, or shall then prove their debts. This dividend must be made equally, and in a rateable proportion, to all the creditors, according to the quantum of their debts; no regard being had to the quality of them. Mortgages indeed, for which the creditor has a real security in his own hands, are entirely safe, for the commision of bankruptcy reaches only the equity of redemption. Finch. Rep. 163; 2 Rep. 25. So are also personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands or goods in execution. But, otherwise, judgments, and recognizances, (both which are debts of record, and therefore at other times have a priority,) and also bonds and obligations, by deed or special instrument, (which are called debts by specialty, and are usually the next in order,) these are all put on a level with debts by mere simple contract, and all paid pari passu. St. 21 Jac. I. 9. Now, to fast this matter carried, that, by the express provision of the Stat. 7 Geo. I. c. 31, (See St. 5 Geo. II. c. 30. § 22. Cook's B. L. c.) debts not due at the time of the dividend made, as bonds or notes of hand payable at a future day certain, shall be proved and paid equally with the rest, allowing a discount or drawback, in proportion. Ed. Rep. 1549; St. t. 949. 1211; L. W. Wins. 396; 3 Wifl. 17.

And, if an execution be sued out, but not served and executed on the bankrupt, though forfeited after the commission is awarded, shall be looked upon in the same light as debts contracted before any act of bankruptcy. St. 10 Geo. II. c. 31; also annuity-bonds though not forfeited at the time of the bankruptcy. Crop. 428; but see 2 Bla. R. 110, 6. — And Policies of Insurances for Life. Doug. (24 edit.) 166.

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

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

The Superfede is a writ issuing under the great seal, to supersede the commission, and this writ may be issued at the discretion of the Lord Chancellor, when the creditors of the bankrupt agree to supersede the commission; or because the party appears not to have been a trader; that the party had not committed an act of bankruptcy.
BANKRUPT IV. I. 2.

bankruptcy; that the commission was not opened till three months after it issued; or that he has paid all his creditors. 1 Atk. 154: 2 Ch. Ca. 192: Sid. Ca. Ca. 45: 1 Atk. 137: 1 Atk. 244: Ex parte Nott, 1 Atk. 102.

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

IV. 1. The acts of parliament relating to bankrupts, being made for the relief of creditors, none but a creditor could at any time have taken out a commission; and now he must have a legal demand to the amount specified in 5 & Geo. 2. c. 50. § 23. But a debt in equity will in no circumstances be a foundation for a commission; therefore if a legal demand is not in its own nature assignable, the assignee, notwithstanding his equitable claim, cannot be a petitioning creditor. Foref. 243: Ch. Ca. 191: Freeman. 276: 1 Atk. 147: 2 Ven. 407: 2 Stoa. 899: 1 P. Wm. 783.

It is generally understood, that the commission must issue on the petition of some creditor capable of claiming relief under it; and therefore if the debt of the petitioning creditor appears to have been contracted subsequent to a secret act of bankruptcy committed by the trader, no commission ought to be granted upon his petition. 2 Stoa. 744, 6: 1042: 1 Atk. 73.

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

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

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

If a creditor has his debtor in execution, he cannot petition for a commission of bankruptcy; for the body of the debtor being in execution, is a satisfaction of the debt, in point of law. Therefore where a commission had issued on the petition of a creditor who had the bankrupt in execution, it was upon that account superseded. 1 Wiff. 271: 1 Sira. 653.

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

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

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

If the creditor, before he proves his debt, proceeds at law against the bankrupt, he cannot be obliged to make his election till a dividend is declared. And where the creditor has already proceeded at law, he is not at liberty to come in, and prove his debt under the commission, without relinquishing his proceedings at law; unless by order from the great seal, for the purpose of affenting to, or dissenting from the certificate. See 1 Atk. 210: 2 Black. Rep. 1317.

But the modern determinations, supported by some of earlier date, have mostly put the creditor to his election before a dividend, provided a reasonable time is afforded the creditor to inform himself of the bankrupt's affairs. Cook's 5. L. c. 6. § 3.

The being chosen assignees, will not prevent the creditor from suing the bankrupt at law, if he has not proved his debt; for in that case he can only be considered as a creditor at large; and even if he has proved his debt and been himself assigned, he may still elect to proceed at law, and be discharged as a creditor under the commission. 1 Atk. 155, 221. But: a petitioning creditor has not this election; see ante 1.

A debt made void by statute, ought not to be permitted to be proved; as a debt on an usurious contract; and though the rule of the court of Chancery is, upon a bill to be relieved against demands of usurious interest, not to make void the whole debt, but to make the party pay what is really due; yet in a commission of bankruptcy, the assignees have a right to insist that the whole is void, as an usurious contract. And unless the assignees and creditors submit to pay what is really due, the Lord Chancellor has not power to order it; and applications of this nature have been frequently refused. 2 Ven. 489: 1 Atk. 126: see Doug. 316.

If the bankrupt's estate is in arrear for taxes, the collector, when he comes to prove the debt, must produce his authority, that the commissioners may judge of the legality of it. Corporations usually have a clerk or treasurer who is the person to prove them; as other creditors have; to produce his appointment under seal to the commissioners. Every security that a creditor has for his debt, must be produced at the time of his proving, when the commissioners will mark them as having been exhibited.
In the same manner, any person acting for another, must produce his authority to the commissioners and they will mark them as exhibits. Cooke's Bankrupt Law. One inhabitant of a parish may prove for himself and the other inhabitants. 1 Atk. 111: and see Cooke's B. L. c. 4. § 1.

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

Aliens as well as denizens may come in as creditors; for all statutes concerning bankrupts extend to aliens. Hob. 287: see Stat. 21 Geo. i. c. 19.

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

Lord Hardwicke, on a petition ex parte Winchester, (1 Atk. 117: Dav. 537,) fixed the distinctions of the several cases. The first head of cases is where a bond is given by a husband to pay a sum of money in his life-time to trustees, to be laid out in trust for himself and his wife, or children; and in case the husband survives, to the use of himself; if in this case the husband becomes a bankrupt, this being a debt due in his life-time, and before the bankruptcy, the court will let in the trustees to prove such debt, according to the trust.

The second head is, where a person gives a covenant to pay to trustees a sum of money for the benefit of the wife or children after his death; and also a judgment by way of collateral security to such covenant, and afterwards becomes bankrupt; this being a debt at law, may be proved under the commission.

The third is, where the father gives a bond to his intended son-in-law on the marriage of his daughter, to pay a sum of money after his death and interest in the mean time, on particular days and times, and there is a breach of the condition of the bond, and the father becomes bankrupt; this is a legal debt not depending upon a contingency, and therefore may be proved.

The fourth head is, where a man covenants in consideration of a marriage portion paid him, for his heirs, executors and administrators to pay to trustees a sum of money after his decease, in case his wife survives him. This case depending on a contingency, is materially different from the others; because in those there was a remedy at law before the commission issued; and it seems now to be settled, that on a contingent provision for a wife, she cannot be admitted as a creditor. 3 Wilf. 271: see 2 P. Wms. 497: 2 Ld. Raym. 1546: 7 Vern. 72: pl. 7: Dav. 254, 524: 1 Atk. 113, 115, 120.—And this though it be particularly conditioned or provided that such debt shall be proveable.—Ex parte Hill: ex parte Matthews: Cooke's B. L.

But notwithstanding the general rule seems to be thus established, the case will be different, if the assignees are obliged to come into equity to compel the performance of a trust; for then as they require equity, they shall be obliged to do equity, and secure the settlement to the wife. 1 Atk. 114: 2 Vern. 662.

4. Contingent debts are said not to be included in Stat. 7 Geo. 1. c. 31, because it being uncertain whether they will ever become due or not, it is impossible to make such abatement of 51. per cent, as that act directs, and therefore they cannot be within it. And this doctrine has been constantly followed and admitted as appears by the cases allowed, in the division (3) immediately preceding; the principle therefore, that contingent creditors cannot be admitted to prove their debts, where the act of bankruptcy is prior to the happening of the contingency, is clear and indisputable. 1 Atk. 118. But many questions have arisen as to what debts shall be said to be contingent within the meaning of the rule.

One having only a cause of action cannot come in and prove it as a debt; because the damages that may be given are considered merely as contingent; even in case of a bond of indemnity, where the condition is broken. 3 Wilf. 270: 2 Stew. 1160. And this though the surety is called upon and liable to pay the debt, if it is not actually paid. 1 Term Rep. 599.

So if a leassee plows up meadow ground, for which he is bound to pay the lessor a certain sum of money as a penalty, that penalty cannot be proved as a debt under the commission; nor if a man be bound in an obligation, in a certain sum to perform covenants, and the obligor before he becomes a bankrupt, breaks those covenants, the obligee cannot prove this as a debt. If a bond by a principal and surety has not been forfeited, before the surety became bankrupt, the debt cannot be proved under his commission, but he may be sued upon it notwithstanding his certificate. Dav. 155: 3 Wilf. 270. The bankruptcy of the leessee is no bar to an action on covenant (made before his bankruptcy) brought against him for rent due after the bankruptcy. 4 Term Rep. 94. But when judgment is obtained in any action, it then becomes such a debt as may be proved, and the judgment, when signed, relates to the verdict. 1b. 2 Black. 1317.

Where a man undertakes to pay a sum of money for another, his undertaking alone will not create a debt capable of being proved under a commission; and if an act of bankruptcy intervenes between the undertaking, and the actual payment, it can never be proved, and the creditor can only resort to the bankrupt personally. But if
the party engaging to pay the debt of another, is taken in execution for that debt, his imprisonment is considered as a payment and satisfaction of the debt sufficient to give him a right of proving under the commission. Comp. 5:7; 3 Will. 13.

If the party engaging to secure the debt of another himself becomes bankrupt before that debt is payable by the principal, the creditor cannot prove under his commission. Comp. 466.

Where a man becomes bail for another, it is considered as a contingent debt. And if the bail commit an act of bankruptcy before the judgment, it cannot be proved under the commission. 2 Stra. 1043; 3 Will. 462.

5. The general rule as to common annuities is, that where one is entitled to an annuity from another, which is not a rent charge on land, or on a specific part of the grantor’s estate, but personal, to be paid by him, who afterwards becomes bankrupt, it is only a general demand on him and his estate; and there is nothing a debt on his estate but the arrears of the annuity at the time of the bankruptcy, unless the penalty of the annuity-bond has become forfeited; for otherwise the payments accruing afterwards became a debt after the bankruptcy, and cannot be proved. But where there has been a forfeiture prior to the bankruptcy, in order to prevent the injustice of admitting the creditor only to prove the arrears, and the great inconvenience that would ensue if the annuity should be received from time to time, as an accruing debt on the estate, by which means the division of the estate would be perpetual, and there could be no final dividend during the annuitant’s life, the court of Chancery puts it in another shape of setting a value on the annuity, because it was only a general personal demand. And in setting this value, consideration must be had of the time the annuitant has enjoyed it. 2 Ves. 490; 1 Atk. 254; 2 Black. 1107.

In case of an apprentice where the master becomes bankrupt, commissioners recommend it to the creditors to allow him a gross sum out of the estate for the purpose of binding him to another master; as it would be hard to make him come in as a creditor under the commission; but this though it is equitable and just, must be considered as an indulgence, and not a right; for the court can only order him to be admitted as a creditor. 1 Atk. 149, 261.

A bond though it be not assignable at law, may be proved under the commission by the assignee; but the assignee must join in the deposition that he hath not received the debt or any part thereof, or any security or satisfaction for the same. Cooke’s B. L.

In bill of exchange and promissory notes, there is a double contract; the first between the principal debtor and creditor; and also an implied contract, that the principal debtor will indemnify the surety, so that if the creditor, the indorser, comes upon the surety the indorser, the indorsee or his assignees may come in against the original or principal debtor. This is the case between principal and surety, and is likewise the case where an indorsee is barely a surety, and no consideration is paid by the original drawer. 1 Atk. 123.

The holder of a bill of exchange is entitled to prove his debt under the commission against the drawer, acceptor and indorser, and to receive a dividend from each, upon his whole debt, provided he does not in the whole receive more than 20 shillings in the pound. 1 Atk. 107. But in this case if the creditor has actually received part of his debt under a commission, he can only prove the remainder under another. See 2 P. Wms. 86, 407: 1 Atk. 109, 120; 2 Ves. 114, 5.

Creditors are not allowed to prove interest on notes or bills, unless it is expressed in the body of them. But the creditor may prove the full sum for which the notes were given, notwithstanding he received 51 per cent. discount. Cooke’s B. L.: 1 Atk. 151.

A child living with the father and earning money for himself, may, if the father receives that money, be admitted creditor under the commission against him. 1 Ves. 675.

A landlord having a legal right to distrain goods while they remain on the premises, the issuing a commission of bankruptcy against the tenant, is not the messengers’s possession of the tenant’s goods, will not hinder him from distraining for rent; for it is not such a possession as an execution; and even there the law allows the landlord a year’s rent. And the assignment of the commissioners of the bankrupt’s estate and effects is only changing the property of the goods, and while upon the premises they remain liable to be distrained. 1 Atk. 102, 3, 4.

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

If an executor becomes bankrupt, as he acts in another, his bankruptcy does not take away the right of executorship; and the legatees or creditors of the testator cannot prove under the commission, unless the bankrupt has committed a delictus. But though a bankrupt executor may strictly be the proper hand to receive the affets, yet if his assignees have received any of the property, the Chancellor may appoint a receiver, with whom the assignees shall account. 1 Atk. 101: or direct the bankrupt himself to be admitted a creditor for what he may be entitled as executor, and order the dividend to be paid into the Bank. See Cooke’s B. L. c. 6. § 3. The effects poiffessed by a bankrupt as executor, are not liable to the assignment of the commissioners. 3 Burr. 1369.

Commissioners after a man becomes a bankrupt compute interest upon debts no lower than the date of the commission. And a special creditor cannot have interest beyond the penalty contained in his security; but a creditor by note carrying interest may receive the full amount. 1 Atk. 79, 80.

If a bankrupt is a factor, and goods are configned to him or his order, which come to his possession; though he has the power of immediately selling them, and taking the money, in which case the factor can only come as a general creditor upon his estate, yet notwithstanding the legal property the factor had in, and power over them, if they remain in facie in his hands, they shall be delivered to the principal, who has a lien upon
upon them as his own property; and the bankrupt only as agent and trustee for him. And even where the factor had sold the goods, and taken notes for them, it has been determined that the original owner had a specific lien upon, and was intitled to the notes. 2 P. C. 586: 1 Aik. 232.

6. If the assignees misbehave in the trust reposed in them, they may be removed by petition to the Chancellor. So if an assignee himself becomes bankrupt, that will be a sufficient ground for his removal. 3 Aik. 97: 7 Fin. abr. 77.—Or if the commissioners act improperly at the choice of assignees. When an assignee is removed he must join with the old assignee, and the commissioners in making an assignment to the new assignee. The common practice, where only one assignee is removed, is, to make him join with his companion in assigning to the new assignee, and to the one retained, whereby a man is made to convey to himself, which appears absurd. The most feasible plan seems for the old assignee to convey to a third person, in consideration of the creditors in the choice of assignees to employ an agent to receive or pay money, and he shall immediately re-convey to the old and new appointed assignee. See Cooke's B. L.

Assignees are in the nature of trustees, and where they employ an agent to receive or pay money, and he abuses this confidence, an assignee cannot be distinguished from any other trustee, who if his agent deceive him, must answer over to the vendue of trusts. For the chief consideration of the creditors in the choice of assignees is certainly the ability of the persons, that they may be responsible for the same they receive from the bankrupt's estate. 1 Aik. 88, 90.

But the negligence of one assignee shall not hurt another joint assignee, where he is not at all privy to any private and personal agreement entered into by his brother assignee. id. 78.

If an assignee becomes a bankrupt, and has applied any of the money received by him in that capacity, to his own use, the commissioners are to be considered as special creditors; because the assignees executed a counterpart of the assignment to them, and the agreement being under hand and seal, makes it in the nature of a specialty debt, and therefore they may come upon his real estate. 1 Aik. 89.

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

It was formerly the practice, where there were several partners, to take out separate commissions against each, as well as a joint-commisio; but this has been found discourteous, being the common course of the court upon petition, to make an order for the separate creditors to come in and prove their debts under the joint commissio; and that the assignees should keep distinct accounts of the several estates; and this may be done, because the assignment in the case of a joint commissio is of the whole estate. But on the other hand, where separate commissions are taken out against joint-traders, it seems to have been the opinion that joint-creditors could not prove their debts under the separate commissio, except for the purpose of allotting to, or defecting from, the certificate; but that they must proceed to take out a joint-commisio. Cooke's B. L. 1 Aik. 138. 98.

But it seems now to be considered that a joint-commisio cannot legally be supported while there is a separate one subsisting; because a trader having been declared a bankrupt, the whole of his property is assigned under the first commissio, and till he obtains his certificate he is incapable of trading or contracting for his own benefit. However it is certain that in practice joint-commisions are taken out after the parties have been declared bankrupts under separate commissions, by which means great expense is saved, and the joint effects disposed to better advantage; and therefore in a fair cause and where it can be made appear that the bankrupt's estate will be benefited by prosecuting a joint commissio, the Lord Chancellor, to make it valid, will supercede the prior separate one. Coop. 824: 1 Aik. 252: Cooke's B. L. c. 1. § 2.

Joint creditors are entitled to a distribution of the joint or partnership estate, without the separate creditors being permitted to participate with them; but notwithstanding separate creditors are not entitled to share the dividend of the joint-property, until the joint-creditors have received 20s. in the pound, yet they are upon petition, let in to prove their respective separate debts under the joint-commissio, paying contribution to the charge of it; and as the joint or partnership estate is in the first place to be applied to pay the joint or partnership debts, so in like manner the separate estate shall be in the first place applied to pay all the separate debts. This is settled as a rule of convenience; and it is resolved, that if there be a surplus of the joint-estate besides what will pay the joint-creditors, the same shall be allotted in due proportions to the separate estate of each partner, and applied to pay the separate creditors. And on the other hand, if there be a surplus of the separate estate, beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain to the joint-creditors. 1 Aik. 68: 2 Penn. 986: Dav. 373: 2 P. Wms. 501.

Where persons in trade [e. g. A. B. and C.] have been connected together in various partnerships, and a joint-commision taken out against them all, an order has been made for keeping distinct accounts of the different partners, as well as of the separate estates of each partner. But when there have been various partnerships [e. g. A. & B. and A. & C.] and a joint-commision is taken out against one firm, in which some of the parties were not engaged, there can be only the common order for keeping the distinct accounts of the joint and separate estate. Cooke's B. L. c. 6. § 11.

On a joint-debt, if separate commissions are taken out against the joint-debtor, the creditor may prove his whole debt, under each commissio, and receive a dividend as he does not obtain more than 20s. in the pound. Cooke's B. L.

Where there is a joint and several creditor, he must, according to the rule of the court now firmly established, make his election whether he will come in upon the joint or the separate estate; that is, which he will come in upon in preference; for which ever he may elect, he will be entitled to come in upon the surplus of the other, if there should be any. And in order to make his election, he must have a reasonable time to enquire into the estate.
BANKRUPT V.

An act of bankruptcy by one partner, is to many purposes a dissolution of the partnership, by virtue of the relation in the statutes, which avoids all the acts of a bankrupt, from the day of the bankruptcy; and from the necessity of the thing, all his property being vested in the assignees who cannot carry on a trade. But after a dissolution of partnership by agreement, by an execution, or by a bankruptcy, the party out of possession of the partnership effects, has the same lien, on any new goods brought in which he had upon the old. One partner has not, after a dissolution, a right to change the possession, or to make an actual division of the specific effects; for one partner may be a creditor of the partnership to ten times the value of all the partnership effects. The other partner in that case can only have a right to an account of the partnership, and to the balance due to him, if any, on that account; and no person deriving under the partner can be in a better condition than himself; his executor stands in the very same light. So the assignees under a commission of bankruptcy against one partner must be in the same state. They can only be tenants in common of an undivided moiety, subject to all the rights of the other partner. 4 Burr. 2170; Comp. 448.

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

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

So, where one partner has taken more than his share out of the joint-fund, the joint-creditors, as the rule seems to be now settled, cannot be admitted to prove against the separate estate of the partner who drew out the money, until his separate creditors are satisfied, unless it can be shewn that the partner acted fraudulently, with a view to benefit his separate creditors, at the expense of the joint-creditors. Cooke's B. L. c. 13; Sec. 137.

Partners.

One partner may be a creditor of another, and may, if he continues solvent; prove his debt under a separate commission. 1 Atk. 223; 2 C. R. 226; Cooke's B. L. c. 13.

If there be two partners, and one of them becomes bankrupt, and, on a separate commission being sued out against him, his certificate is allowed, this does not only discharge the bankrupt of what he owed separately, but also of what he owed jointly, and on the partnership account; because by the act of parliament, the bankrupt, upon making a full discovery, and obtaining his certificate, is to be discharged of all debts. 3 P. Wms. 24.

Where two partners are bankrupts, and a joint commissiion is taken out against them, if they obtain an allowance of their certificate, this will bar as well their separate as their joint-creditors. 3 P. Wms. 24.

Before the statute 10 Ann. c. 15, if there were two partners, and only one party became bankrupt, and a separate commissiion was taken out against him; there was no doubt but the discharge of that bankrupt, discharged him from all debts which he owed in his joint as well as private capacity; but the great question was, whether, by such discharge of the bankrupt, the partner of the bankrupt should likewise be discharged of such debts as he was discharged of; and therefore that statute has enabled, that the partner shall not be discharged.

V. Practical Notes, and Forms.

The first step to be taken towards procuring a Commission of Bankruptcy, is for the creditor to make an affidavit of his debt before a Master in Chancery; or if he resides altogether in the country, before a Master extraordinary there, to be filed in the Secretary of Bankrupts' Office in London, and exhibited to the commissioners at their first meeting.—The following is the form of an affidavit:

A. B. of, &c., makes oath that John Wilfon of Chelmsford, in the county of Essex, shop-keeper, is justly and truly indebted unto him, this deponent, to Thomas Abel his partner, in the sum of one hundred pounds, and upwards; for goods sold and delivered by this deponent, and his said partner, so and for the use of the said John Wilfon; and this deponent further saith, that the said John Wilfon is become a bankrupt, within the true intent and meaning of the said statute made, and now in force concerning bankrupts, at this deponent hath been informed and believes.

Sworn at the Public Office, the 14th day of September 1784, before me Peter Holford.

When the affidavit is sworn, it is carried to the Secretary of Bankrupts' Office, where the party suing for the commission enters into the bond. Sec. III. 1.

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

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

A Commission of Bankruptcy.

GEORGE the Third, by the grace of God, of Great Britain, France and Ireland, King, defender of the Faith, &c. in our true and well-beloved William Bampfleed, Henry Hunter, Henry Cowper, Henry Ruffell, Egerton, and Richard Hargrave, gentlemen, greeting. Where- as, we are informed that John Wilfon, of, &c. using and exercising the trade of a merchant by way of bargaining, exchange, barter, and conversion, &c. selling and buying goods, has become bankrupt within the value of two thousand pounds, &c. and other
The application to enlarge the time for the bankrupt's surrender, must be by petition to the great seal, six days at least before the last sitting appointed in the Gazette; this petition may be either in the name of the bankrupt, or of his assigns.

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

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

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

FORM OF A BANKRUPT'S CERTIFICATE.

To the Right Honourable the Lord High Chancellor of Great Britain,

WE whose names and seals are hereinunto subscribed and set, being the major part of the commissioners, named and authorized in and by a commission of bankruptcy, awarded and issued against John Thomas, Esq., &c. (as described in the commission) bearing date at Westminster, the 8th day of May, 1784, directed to William Bumpstead, Esq., do humbly certify to your Lordship, that the major part of the commissioners by the said commission authorized, having begun to put the said commission into execution, did find that the said John Thomas became a bankrupt, since the 10th day of May, 1784, and before the date, and for a space of time after the said commission, within the true intent and meaning of the statute made and now in force concerning bankrupts, in some of them; and did therefore declare and adjudge him a bankrupt accordingly. And we further humbly certify to your Lordship, that the said John Thomas being so declared a bankrupt, the major part of the commissioners by the said commission authorized, pursuant to the directions of the act of parliament made in the 5th year of the reign of his late Majesty King George II. intitled 'An act to prevent the committing of frauds by bankrupts, did cause due notice to be given and published in the London Gazette of such commission being instituted, and of the time and place of three several meetings of the said commissioners, within 42 days next after such notice (the last of which meetings, was appointed to be on the forty-second day); at which time the said John Thomas was required to surrender himself to the said commissioners named in the said commission, or the major part of them, and to make a full disclosure and discovery of his estate and effects; and the creditors of the said John Thomas, were deferved to come prepared, to prove their debts, and to effect, or differ from the making of this certificate. And we further humbly certify to your Lordship, that such three several meetings of the major part of the commissioners by the said commission authorized, were had pursuant to such notice so given and published; and that at one of those meetings the said John Thomas did surrender himself to the major part of the commissioners, by the said commission authorized, and did

J. Yorke.

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

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

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

So help you God.

All the depositions must be signed by the witnesses. If the party is a Quaker, then instead of swear, say, "I, in God's name, speak the truth, and nothing but the truth."

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

John Thomas, who are creditors for not less than 20l. respectively, and who have duly proved their debts under the said commission; and that it doth appear to us by due proof of affidavits in writing, that such several subscribing creditors, or some proof by them respectively duly authorized, did, before signing hereof, sign this certificate, and testify their consent to our signing the same, and to the said John Thomas having such allowance and benefit, as by the said last mentioned act are allotted to bankrupts, and to the said John Thomas being discharged from his debts, in pursuance of the same act. In witness whereof we have hereunto set our hands and seals, this — day of — in the — year of the reign of &c. and in the year of our Lord 1784.

We the creditors of the above-named John Thomas, whose names, or marks are hereunto subscribed, do hereby certify, that a commission of bankruptcy, under the great seal of Great Britain, grounded upon the several statutes made and now in force concerning bankrupts, bearing date at Westminster, the — day of June, &c. and directed to William Bumpstead, &c. whereby giving full power and authority to 4 or 3 of them to execute the same. And we do further certify, that we, being the major part of the commissioners, by the said commission authorized, have proceeded in the execution of the said commission, and have found upon the due examination of witnesses, and other good proof upon oath before us bad and taken, that the said John Thomas, before the date, and just before the said commission, became bankrupt to all intents and purposes within the compass, true intent, and meaning of the several statutes made and now in force concerning bankrupts, or within some or one of them, before the date, and just before the said commission. Given under our hands and seals at Searl's Coffee-House, Lincoln's Inn, in the county of Middlesex, this — day of June, in the year of our Lord 1784.

William Bumpstead, Henry Hunter, Henry Ruffell.

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

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

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

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

If no cause is shewn within the 21 days, against the allowance of the certificate, the Lord Chancellor will allow the same, by the following subscription on the said certificate:

"— day of — 1784.

WHEREAS the usual notice hath been given in the London Gazette, of — the — day of — 1784, and none of the creditors of the above-named John Thomas have shown any cause to the contrary: I do allow and confirm this certificate.

Thurlow, C.

Certificate for a Judge or Justice of Peace, to grant his Warrant for apprehending and committing a Bankrupt.

In the Matter of John Thomas, a Bankrupt.

We whose names are hereunto subscribed, and sealed, do hereby certify, that a commission of bankruptcy, under the great seal of Great Britain, grounded upon the several statutes made and now in force concerning bankrupts, bearing date at Westminster, the — day of June, &c. and directed to William Bumpstead, &c. whereby giving full power and authority to 4 or 3 of them to execute the same. And we do further certify, that we, being the major part of the commissioners, by the said commission authorized, have proceeded in the execution of the said commission, and have found upon the due examination of witnesses, and other good proof upon oath before us bad and taken, that the said John Thomas, before the date, and just before the said commission, became bankrupt to all intents and purposes within the compass, true intent, and meaning of the several statutes made and now in force concerning bankrupts, or within some or one of them, before the date, and just before the said commission. Given under our hands and seals at Searl's Coffee-House, Lincoln's Inn, in the county of Middlesex, this — day of June, — in the year of our Lord —

Witnsses, John Knight, William Bumpstead (L. S.), Henry Hunter (L. S.), Henry Ruffell (L. S.).

The execution of this certificate must be proved by the subscribing witnesses before the judge or justice, previous to his granting his warrant.

It is usual for the affixees to give notice of the time and place they intend to pay the dividends; if by the affixees, the Solicitor signs an authority for that purpose, to the following effect, viz.,

"Gentlemen, Please to pay Mary Comb the sum of — being her dividend of — shillings in the pound on her debt of — proved under the commission of bankrupt against Francis Gibbons, &c. &c.

Year's, &c. John Knight, 4th July 1786.

To Messrs. Partridge and Dennis, said bankrupt's affixees."
The assignees, upon receiving this authority, pay the creditor, and take a receipt in a book to the following purport, viz.

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

Mary Combes."

**Write of Supersedeas.**

**GEORGE the Third, by the Grace of God, of Great Britain, France and Ireland, king, defender of the faith, and so forth:** To our trusty and well-beloved William Bumpstead, Henry Hunter, Henry Ralph, Henry Cowper, esquires, and Richard Hargrave, gentleman, greeting:

Whereas we being informed that John Thomas, &c.,ting and exercising the trade of merchant, by way of bargaining, exchange, bartering, cheques, fetching his trade of loving by buying and selling, had become bankrupt within the several leases made against Bankrupts, to the intent to defraud and bind Charles Jones, &c. and others, his creditors, of their just debts and dues, to them due and owing; and, without the due execution of the several leases made against bankrupts, did, by our commissary, under the great seal of Great Britain, bearing date at Westminster, the — day of — in the — year of our reign, name, affix, appoint, constitute, and ordain you and our special commissary, thereby giving, &c. (here recite the original commissary, to "diligence and effect," then add)

Now forthwith as the said John Thomas, the bankrupt, by his humble petition, exhibited to our Lord High Chancellor of Great Britain, for the reasons therein contained, prayed that the said commission might be superseded, whereas we graciously inclining, do, by these presents, will and command you, and every of you, to stay and foreclose all further proceedings upon the said commission, and that you supersede the same accordingly, as our special trust is in you repose. Witness ourself at Westminster, the — day of — in the — year of our reign.

J. Yorke.

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

**BANKS.** See tit. Sea Banks.

**BANLEUGA.** Vide Bonnum.

**BANNIMUS.** The form of an expulsion of any member from the University of Oxford, by affixing the sentence in some public places, as a denunciation or pronouncement of it. And the word banning is taken for an exclamation against, or curbing of another.

**BANNITUS, or Bonnianus.** An outlaw, or banished man. Pat. Ed. 2.

**BANNUM vel BANLEUGA.** The utmost bounds of a manor, or town; so used 47 Hen. 3; 2 Rei. 44; &c. Banlega de Arundel is taken for all that is comprehended within the limits or lands adjoining, and so belonging to the castle or town. *Seld. Hist. of Tybists,* p. 75.

**BAR, See Barr.** Vol. 1.

**BARG.** See title Bargas.

**BARATRY.** See title Influence.

**BARBERS.** Were incorporated with the *surgeo of London;* but not to practice surgery, except drawing of teeth. *Est. 32 H. 8. 432;* but separated by 18 Geo. 2. c. 13; See Surgeon.

**BARBICAN, barbicanum.** A watch tower, or bulwark.

**BARBICANAGE.** barbicanagium. Money given for the maintenance of a barbican, or watch-tower; or a tribute towards the repairing or building a bulwark. *Cass. 17 Ed. 3; Monasticon, tom. 1, p. 976.

**BARCA, A barque:** Glozf. Sax. *Æstrixia, a fleet-ship.*

**BARCARUM, barcaria.** A barge, and sometimes used for a barge-boat. *MS. de Placit. Ed. 3; see Bercaria.*

**BARGAIN AND SALE.** Is an instrument whereby the property of lands and tenements is for valuable consideration granted and transferred from one person to another: it is called a real contract upon a valuable consideration, for passing of lands, tenements and hereditaments, by deed indented and enrolled. *2 Inst. 652.*

Since the introduction of *ufoes and trust* and the Stat. 27 H. 8. c. 10, for transferring the possession to the use, the necessity of *livery* of *feal* for passing a freehold in corporeal hereditaments, has been almost wholly superseded; and in consequence of it, the conveyance by *feoffment* is now very little in use. Before the statute of *ufoes,* equitable *estates* of freehold might be created through the medium of trust, without *livery;* and by the operation of the statute, *legal* *estates* of freehold may now be created in the same way. They who framed the statute of *ufoes,* evidently foresaw that it would render *livery* unnecessary to the passing of a freehold; and that a freehold of such things as do not lie in grant would become transferable by *parol* only, without any solemnity whatever. To prevent the inconveniences which might arise from a mode of conveyance so uncertain in the proof, and so liable to misconstruction and abuse, it was enacted in the same fection of parliament, that an *estate of freehold* should not pass by *barge* and *sale* only, unless it were by *indenture* enrolled in one of the courts at Westminster, or in the county where the lands lie; such enrollment to be made within 6 months after the date of the indenture. *Stat. 27 H. 8. c. 16; 2 Inst. 675; Dy. 229; Poph. 48; Dalb. 63.* The objects of this provision evidently were, first, to enforce the contracting parties to ascertain the terms of the conveyance by reducing it into writing; secondly, to make the proof of it easy, by requiring their seals to it, and consequently the presence of a witnesse; and lastly, to prevent the frauds of secret conveyances, by substituting the more effectual authority of enrollment, for the more antient one of *livery.* But the latter part of this provision, which if it had not been evaded, would have introduced almost an universal register of conveyances of the *freehold,* in case of corporeal hereditaments, was soon defeated by the invention of the conveyance by lease and release, which sprang from the omission to extend the statute to *bar­gains* and sales for terms of years: (See 8 C. 93: 2 R. A. 204; 4 Inst. 671) and the other parts of the statute were necessarily ineffectual in our courts of equity, because these were still left at liberty to compel the execution of trusts of the *freehold,* though created without deed or writing. The inconveniences from this insufficiency...
sufficiency of the statute of Inrollments are now in some measure prevented by Stat. 29 Ch. 2. c. 3. which provides against conveying any lands or hereditaments, for more than three years, or declaring trusts of them, otherwise than by writing. 1 Stat. 48 c. n. 3.

This may serve at present to illustrate the doctrine of Bargain and Sale; but to obtain a clear and distinct idea of this part of the Law, see further titles Conveyance, Deed, Pothesis, Lease and Release, Ufe, &c. and 1 Stat. by Hargrave and Buttre.

At present it may be fit to consider;

I. What Things may be bargained and sold.

II. By whom, to whom, and when.

III. If by Joint Tenants, a Bargain and Sale may be made.

IV. Of the Confidemtion, and

V. of the manner of describing Bargains and Sales.

I. All things, for the most part, that are grantable by deed in any other way, are grantable by bargain and sale; and lands, rents, adowmes, fites, &c. may be granted by it, in fee-simple, fee-tail, for life, &c. 1 Thob. 176: 12 dairy.

Any freehold or inheritance in possession, reversion or remainder upon an estate for years, or life, or in tail, may be bargained and sold, but the deed shall be inrolled.

2 B. 54: 2 Dair. 309: 2 Josh. 671.

But if tenant for life bargain and sells his land by deed inrolled, it will be a forfeiture of his estate. 4 Leam. 251.

But a man feised of a freehold may bargain and sell for years, and this shall be executed by the statute of Uses.

27 H. 8. c. 10.

A man posseffed of a term cannot bargain and sell it so as to be executed by the statute. 2 Bar. 35: 36: 2 Poth. 76.

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

A rent in efs may be bargained and sold, because this is a freehold within the statute; and before the statute a rent newly created might be bargained and sold, because when money, as an equivalent was given, and ceremonies or words of law were wanting, the Chancery supplied them; but it seems, that since the statute, a rent newly created cannot be bargained and sold, because there ought to be a freehold in some other person, to be executed in efs qui efs; but here can be no feftion of his rent in the bargainor, because no man can be feised of a rent in his own land, and consequently there can be no estate to be executed in the bargainee. 1 Kefw. 85: 1 Co. 126: 2 Thob. 37: 1 Josh. 179: Sed qn. de boc.

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

II. Some cases in which a bargain and sale is void.

II. 1. The King, and all other persons that cannot be seised to a use, cannot bargain and sell, for at common law, when a man had sold his land for money, without giving livery, the use only passed in equity, and this is now executed and becomes a bargain and sale by the statute; but antecedent to any such execution there must be a use

well raised, which cannot be without a person capable of being seised to a use, which the king is not, there being no means to compel him to perform the use or trust; for the Chancery has only a delegated power from the king over the confidences of his subjects; and the king is the universal judge of property, and ought to be perfectly indifferent, and not to take upon him the particular defence of any man's estate as a trustee. Bre. Pothesis in Cufm. 53: Hard. 668: Poth. 72.

If tenant in tail bargains and sells his land in fees, this passes an estate determinable upon the life of the tenant in tail; for at common law the use could not be granted of any greater estate than the party had in him; now tenant in tail had an inheritance in him, but he could dispose of it only during his own life; and therefore when he sold the use in fees, efs qui efs has a kind of an inheritance, yet determined within the compass of a life, and the statute executes it in the same manner as he has the use, and consequentlly he will have some properties of a tenant in fee, and some of a tenant for life only; but if tenant for life bargains and sells in fees, this passes only an estate for life, for he could not pass the use of an estate for life to the bargainee, and the statute executes the possession as the party has the use. 10 Co. 96, 98: 1 Sium. 266, 267: 1 Co. 14, 15: 1 Co. Lit. 151.

A man may bargain and sell to a corporation, for they may take a use, though the money be given by the governors in their natural capacity. 10 Co. 24, 34: 1 Brot. Aen. 741.

A man may bargain and sell to his son; but then the consideration of money ought to be expressed, and it ought to have all the other circumstances of bargain and sale; but this shall operate as a covenant to hand seised, if there be none but the consideration of natural love and affection expressed. 7 Co. 40: 2 Co. 24: Co. Est. 394: 1 Poth. 157: 1 Leam. 56. But if a son and heir bargain and sells the inheritance of his father, this is void, because he hath no right to transfer; the same law of a release, Kefw. 83: 2 Co. Lit. 267.

If an infant bargain and sells his land by deed indentured and inrolled, yet he may plead non-age; for notwithstanding the statute the bargainee claims by the deed as at common law, which was, and therefore is still defeasible by non-age. 2 Josh. 673.

If a husband seised of lands, in right of his wife, or tenant in tail bargains and sells the trees growing on the lands, and dies before severance, the bargainee cannot afterwards cut them down and take them away. 1 Co. 41. See tit. Baron and Female. IV.

If there be two jointtenants, and one of them makes a bargain and sale of his own estate in fee, and then the other dies, the other moiety shall survive to the bargainor: for since the freehold is in the bargainor the inheritance continues; but if such jointtenant had bargained and sold tiones plures jiones in fees, though he died before inrollment; yet, if the deed were afterwards inrolled, the moiety would not survive, but would pass to the bargainee. Co. Jac. 53: 2 Co. Lit. 186: 1 Brot. 5.

2. The very words bargain and sell are not of absolute necessity in this deed, for other words equivalent will suffice; as if a man seised of lands in fee sold the same to another, by the words alien or grant, the deed being made in consideration of money, and indentured and inrolled, will be an effectual bargain and sale: In short, whatever
whatever words upon valuable consideration would have raised an use of any lands, &c., at common law, the same would amount to a bargain and sale within this act; as if a man by deed, &c., for a valuable consideration covenants to land failure to the use of another, &c. 1 Inst. 672; Cro. Juc. 210; Ms. 34; Cro. Eliz. 160.

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

If a man in consideration of so much money to be paid at a day to come, bargains and sells, the use passes presently, and after the day the party has an action for the money, for it is a sale, the money paid presently or hereafter. Dor. 557 a. 2. If the deed of bargain and sale be not inrolled within six months, or seven days to the month, the day of the date taken exclusively, it is of no force; so that if a man bargains and sells his land to me, and the trees upon it, although the trees might be sold by deed without inrollment, yet in this case if the deed be not inrolled, it will be good neither for the trees nor the land. Dor. 90: 2 Repl. 40: 2 Bullst. 8. A bargain and sale of a manor to which an advowson is appendant by indenture not inrolled, will not pass the advowson or the manor, for it was to go as appendant. Bro. Cap. 240.

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

If two bargains and sales are made of the same land, to two several persons, and the last deed is first inrolled; if afterwards the first deed is also inrolled within six months, the first buyer shall have the land; for when the deed is inrolled, the bargainee is seised of the land from the delivery of the deed, and the inrollment shall relate to it. Inst. 163; Wood's Inst. 239. Neither the death of the bargaining or bargainee, before the inrollment of the deed of bargain and sale, will hinder the passing of the estate to the bargainee: but the estate of freehold is in the bargainee, until the deed is inrolled; so that the bargainee cannot bring any action of trespass before entry had; though it is said he may surrender, affign, &c. Cro. Juc. 58: Co. Lit. 147.

A bargainee shall have rent which incurs after the bargain and sale, and before the inrollment. Sid. 310. Upon the inrollment of the deed, the estate descends ab iure, by the Stat. 27 H. 8. c. 16; which says, that it shall not vest, except the deed be inrolled; and when it is inrolled, the estate vests presently by the statute of Uses. 1 Danw. Abr. 606.

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

Houses and lands in London, and any city, &c., are exempted out of the statute of Inrollments. 2 Inst. 676. 1 Nef. Abr. 342.—See further tit. Inrollment.

IV. In pleading a bargain and sale the deed itself must be shewn under seal. 1 Inst. 225. For though the inrollment being on record is of undoubted veracity, being the translation of the court; yet the private deed has not the function of a record, though publicly acknowledged and inrolled; for it might have been falsely and fraudulently dated, or ill executed. Co. Lit. 255 b. 251 b: 2 Inst. 673: 4 Co. 71: 5 Co. 53: 2 Roll. Rep. 119.

It must likewise be set forth that the inrollment was within six months, or six months from the date, &c. Allen 19: Carter 221: Style 54. &c.

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

In replevin the case upon the pleadings was, that the defendant made a title under bargain and sale, inrolled within six months, and the nature of uses, and did not shew that it was in consideration of money; but adjudged, that after a verdict, as this case was, it shall be intended, that evidence was given at the trial, of money paid. 1 Foss. 108.

The party that claims by any bargain and sale, must shew in what court the deed is inrolled, because he must shew all things in certain that make out his title; otherwise his adversary will be put to an infinite search before he could traverse with security. 1 Merl. 213: Cro. Juc. 291. S. C. : Titiv. 313.

BARKARY, barkaria, cautelis.] A ten-house or place to keep bar in for the use of tanners. New Book Enr. tit. Affisce, Corp. Polit. 2.

BARON, bawre.] Is a French word, and hath divers significations here in England. First, it is taken for a degree of nobility next to a viscount. Bredtin, lib. 1. cap. 8, they are called barones, quos volvem habili. In which significations it agrees with other nations, where baron is as much as provincs: so that barons are such as have the government of provinces as their fee holder of the king; some having greater and others less authority within their territories. It is probable, that formerly, in this kingdom, all those were called barons that had such feignories as we now call courts-baron; as they were called seigniors in France, who had any manor, or lordship: and soon after the conquest, all such came to parliament, and fat as peers in the lords' house. But when by experience it appeared that the parliament was too much thronged by these barons, who were very numerous it was in the reign of King John ordained that none but the baron major should come to parliament, who, for their extraordinary wisdom, interest, or quality, should be summoned by writ. After this, men observing the
the estate of nobility to be but casual, and depending merely upon the king's will, they obtained of the king letters patent of this dignity to them and their heirs male, who were called barons by letters patent, or by creation, whole potestate are now by inheritance those barons that are called lords of the parliament; of which kind the king may create at his pleasure. Nevertheless there are still barons by writ, as well as barons by letters patent: and those barons who were first by writ, may now also justly be called barons by prescription, for that they and their ancestors have continued barons, beyond the memory of man. 2 Inst. 48. See tit. Perr. The original of barons by writ, Camden refers to king Hen. 3; and barons by letters patent, or creation, commenced 11 R. 2. Comb. Brin. pag. 169. To these is added a third kind of barons, called barons by tenure, which are some of our ancient barons; and likewise the bishops, who, by virtue of baronies annexed to their bishoprics, always had place in the lords' house of parliament, as barons by succession. Singer of Honour, lib. 4, cap. 11.

There are also barons by office; as the barons of the Exchequer, barons of the Cinque Ports, &c. In ancient records, the word baron includes all the nobility of England, because regularly all noblemen were barons, though they had a higher dignity; and therefore the charter of King Ed. 1, which is an exhibition of what relates to barons in Magna Charta, concludes tellam archeepiscopos, episcopos, baronibus, &c. And the great council of the nobility, when they conferred, besides earls and barons, of dukers, marquises, &c., were all comprehended under the name de la convall de baronage. Glayn. cap. 4. These barons have given them two engaws to remind them of their duties; first, a long robe of scarlet, in respect whereof they are accounted de magno cubiculo regis; and secondly they are given a sword, that they should ever be ready to defend their king and country, 2 Inst. 5. A baron is unus metabolis & principalis; and the chief burgesses of London were in former times barons, before there was a lord mayor, as appears by the city seal, and their ancient charters.—Holinshed. 3. Reg.蛇ex dono annueto & hanc presens charta nobis confrons baronibus nauis de civitate nostra Londun avd eleganto fei maiorum de seibus regni annis, &c. Sylva Cist. The earls palatine and marches of England had anciently their barons under them; but no barons, but those who held immediately of the king were peers of the realm. 'Tis certain the king's tenants were called barons; as we may find in Mot. Paris, and other writers; and in the present law term of baron and dame for husband and wife; which see.

BARONY, baronius. Is that honour and territory which gives title to a baron; comprehending not only the fees and lands of temporal barons, but of bishops also who have two elates; one as they are spiritual persons, by reason of their spiritual revenues and promotions; the other grew from the bounty of our English kings, whereby they have baronies and lands added to their spiritual livelihoods and preferments. The baronies belonging to bishops are by some called regalia, because ex foro liberitates regum des cribito, &c. A vestigia in feudis tenentur. Blount. Baron. Brudenel says, (lib. 2. cap. 34.) is a right indivisible; and therefore if an inheritance be to be divided among coparceners, though some capital melfages may be divided, yet si capitale meffium sit capit

BARON, BARONET. [baronet.] Is a dignity or degree of honour, which hath precedence before all knights, as knights of the bath, knights bachelors, &c. except Baronets, made sub noxulis regis in exercitio regalli in apero bello, & c. Reg. perf. pref. pref. This order of baronets was instituted by King James I. in the year 1601, and was then a purchased honour, for the purpose of raising money to pay troops sent out to quell some insurgents in the province of Ulster in Ireland.—The arms of which province, being a red or bloody hand, every baronet has willed, on his creation, to his coat of arms. Their number at first was but two hundred; but now they are without limitation: they are created by patent with an appellation of honest & baronibus masculis, &c.

BARON AND FEME. The law term for Husband and Wife.

Our law considers marriage in no other light than as a civil contract. The benefits of the matrimonial state, is left entirely to the ecclesiastical law; the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment therefore, or annulling of incestuous and unscriptural marriages, is the province of the Spiritual Court.—Taking marriage in a civil light, the law treats it as does all other contracts; on this part of the subject therefore, as well as on what relates to marriage promises, marriage settlements, &c. See this Dict. title Marriage.

By marriage, the husband and wife are one person in law. 1 Inst. 112. —that is, the very being or legal existence of the woman, is suspended during the marriage; or at least is incorporated and consolidated into that of her husband; under whose wings, protection, &c. the purports every thing; and is therefore called in our law-terms a feme covert, [femina viva cauponata] is said to be covertus baronius, or under the protection and influence of her husband, her baron or lord; and her condition during her marriage is called her coverture. Therefore if an estate be granted or conveyed to a husband and wife and their heirs, they do not take by molesties as other joint tenants, but the intire estate is in both. 2 Leav. 39. And if an estate be granted to an husband and wife, and another person, the husband and wife have but one moiety, and the other person the other moiety. Litt. 1. 291. —A woman may be attorney for her husband; for that implies no separation from, but is rather a representation of her lord. F. N. B. 27. Upon this principle of an union of person in husband and wife, depend almost all the legal rights, duties and disabilities, that either of them acquire by the marriage.

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

I. 1. Of Grants and Conveyances between Husband and Wife; 2. Of their being Resident for or against either other.

II. What Acts and Agreements of the Wife before Marriage bind the Husband.

III. 1. Of the Husband's Power over the Person of his Wife, and of her Rights for any Injury done to her by him. 2. Of Actions by him for Criminal Conversation with her.
IV. Of his Interest in his Estate and Property; and how it comes to be so vested.

V. Where the Husband shall be liable to the Wife's Debts contracted before Marriage; and thereby of a Wife that is Executrix or Administrator.

VI. Of her Conveyances during Marriage, and how far the Husband is bound by such Conveyances; and where a Wife shall be considered as a Free Sole.

VII. Where she alone shall be punished for a criminal Offence, and where the Husband shall be answerable for what she does in a civil Action.

VIII. What Acts done by the Husband, or Wife alone, or jointly with the Wife, will bind the Wife; and thereby of her Agreement or Disagreement to such Acts after the Death of the Husband.

IX. Where the Husband and Wife must join in bringing an Action.

X. Where they must be jointly sued.

XI. Of the Effect of Divorce, and of separate Maintenance, Alimony and Pim-Money.

I. 1. At common law a man could neither in possession, reversion or remainder, limit an estate to his wife; but by Stat. 27 H. 8. c. 10, a man may covenant with other persons to land feised to the use of his wife; or may make any other conveyance to her use, but he may not covenant with his wife to land feised to her use. A man may devise lands by will to his wife, but the devise does not take effect till after his death. Co. Litt. 112.

As to devises by female owners, see tit. Deeds, Will.

According to some books, by custom of a particular place, as of York, the wife may take by immediate conveyance from the husband. Fam. Propr. 61: B. C. Ch. Totam. 56. And it is said that a devisee caussis mortis by husband to wife may be good; because that is in the nature of a legacy. 1 P. Wms. 441.

Where the husband or wife are en aventure, the one may make an estate to the other; if the wife has an authority by will to sell, she may sell to her husband.

111. 122 a. 187 b. and the notes there.

If the same obligee take the obligor to husband, this is a release in law. The like is law, if there be two femes obligees, and the one take the debtor to husband.

111. 266 b: C. C. 551.

In the case of Smith v. Stafford. (Hob. 216) the husband promised the wife before marriage, that he would leave her worth 100L. The marriage took effect, and the question was, whether the marriage was a release of the promise. All the judges but Hume were of opinion, that as the action could not arise during the marriage, the marriage could not be a release of it. The doctrine of this case seems to be admitted in the case of Gage v. Alison; (1 Salk. 325: 12 Mod. 293) the case there arose upon a bond executed by the husband to the wife before marriage, with a condition, making it void if the surviving him, and he left her 100L. Two of the judges were of opinion that the debt was only suspended, as it was on a contingency which could not by any possibility happen during the marriage. But Lord C. J. Hob. differed from them; he admitted that a covenant or promise by the husband to the wife, to leave her so much in case he survives him is good, because it is only a future debt on a contingency, which cannot happen during the marriage, and that is precedent to the debt; but that a bond-debt was a present debt, and the condition was not precedent but subsequent, that made it a present duty; and the marriage was consequently a release of it. The case afterwards went into Chancery; the bond was there taken to be the agreement of the parties, and relief accordingly decreed. 2 Fryr. 481. — A like decree was made in the case of Cornwall v. Buckle, 2 P. Wms. 233: and see 2 Feme 203. — See tit. Bancroft IV. 5.

A. before marriage with M. agrees with M. by deed in writing, that the, or such as the should appoint, should, during the coverture, receive and dispose of the rents of her jointure, by a former husband, as she pleased. It was decreed that, this agreement being with the same party before marriage, was by the marriage extinguished, Civ. Law. 21. But where a man before marriage arrested with the same to make a settlement of certain lands, before the marriage should be solemnised, they intermarried before the settlement, and then the bond died: On a bill by the widow for an execution of the articles, it was decreed against the heir at law of the baron, that the articles should be executed. 2 Vint. 455.

2. In trials of any sort, Husband and Wife are not allowed to be evidence, for or against each other; partly because it is impossible their testimony should be indifferent; but principally because of the union of persons: and therefore if they were admitted to be witnesses for each other, they would contradict one maxim of law, "nemo in propriis causisuffit eodem dictum," and if against each other, they would contradict another, "nemo tenetur ipsiusfam accusatorem." But where the offence is directly against the person of the wife, this rule has been usually departed with; (State Trials, vol. 1. Lord Ashby's case, Str. 633) and therefore by Stat. 3 H. 7. c. 2. in case a woman be forcibly taken away and married, she may be a witness against such her husband, in order to convict him of felony. For in this case she can with propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract; and also, there is another maxim of law, that no man shall take advantage of his own wrong; which the ravisher here would do, if by forcibly marrying a woman he could prevent her from being a witness, who is perhaps the only witness to that very fact. 1 Com. 447. 4.

The husband cannot be a witness against the wife, nor the wife against the husband, to prove the first marriage on an indictment, on Stat. 3. fac. 1. c. 11, for a second marriage. But the second wife or husband may be a witness; the second marriage being void. Bull. N. P. 287: 1 Hal. P. C. 693.

In R. v. 1, there is an opinion, that a husband and wife may be witnesses against one another in treason; but the contrary is adjudged, 1 Broun. 47: see 2 Kebr. 405: and 1 H. P. C. 301. — The rule in Lord Ashby's case, is denied to be law. R. v. 1: and perhaps was admitted on the particular circumstances of the facts which were determinable in the extreme, the husband having asilmed in the rape of his wife. — In an information against two, one for perjury, and the other for subornation, in swearing on the trial of an ejectment, that a child was supposititious, the husband of one of the defendant's was admitted to give evidence of the birth, but refused as to the subornation. Sta. 577: 2 Kebr. 403: Mar. 120. — And the evidence of a wife has been disallowed even against others, where her husband might be in danger. Bull. 540: Lead. Hawk. P. C. 2. 607. 8. — A husband and wife may demand surety of the peace against each.
BARON AND FEME II. III. 1. 2.

each other, and their evidence must then of necessity be admitted against each other. 1 Hawk. P. C. 253; see Sra. 123; and the other authorities cited by Hawk. The wife of a bankrupt may be examined by the commissioners—See tit. Bankrupt, III. 1.

It seems that a wife may be evidence to prove a fraud on the husband, particularly if the parties were thereto, as in cases of a marriage-brocage agreement. 1 Stat. 431; see pff, II. And in cases of seduction. L. E. 55. —And in civil actions, where the husband is not concerned in the action, but the evidence is collateral to discharge the defendant, by charging the husband. 2 Sra. 504; and see 1 Sra. 527.

II. As by marriage the husband and wife become one person in law, therefore such an union works an extinguishment or revocation of several acts done by her before the marriage; and this not only for the benefit of the husband, but likewise of the wife, who, if she were allowed at her pleasure to rescind and break through, or confirm several acts, might be so far influenced by her husband, as to do things greatly to his disadvantage.


But in things which would be manifestly to the prejudice of both husband and wife, the law does not make her acts void; and therefore if a femme sole makes a leaf at will, or is leese at will, and afterwards marries, the marriage is no determination of her will, so as to make the lease void; but she herself cannot without the consent of her husband determine the lease in either case.

5 Co. 10.

So where a warrant of attorney was given to confefs a judgment to a femme sole, the court gave leave, notwithstanding the marriage, to enter up judgment; for that the authority shall not be deemed to be revoked or canceled, because it is for the husband’s advantage; like a grant of a revocation to a femme sole, who marries before attornment, yet the tenant may attain afterwards; otherwise if a femme sole gives a warrant of attorney, and marries, for that is to charge the husband. 1 Salk. 115: 393.

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

Equity will set aside the intended wife’s contracts, though legally executed, when they appear to have been entered into with an intent to deceive the husband, and are in derogation of the rights of marriage; as where a widow made a deed of settlement of her estate, and married a second husband, who was not privy to such settlement; and it appearing to the court, that it was in confidence of her having such estate that the husband married her, the court set aside the deed as fraudulent; so where the intended wife, the day before her marriage, entered privately into a recognizance to her brother, it was decreed to be delivered up. See 2 Chmit. Rep. 41, 79, 81; 2 Fern. 177; 2 Viz. 204; see note 1. 2.

But where a widow, before her marriage with a second husband, assigned over the greater part of her estate to trustees for children by her former husband; though it was ascertained that this was without the privity of the husband, and done with a design to cheat him, yet the court thought, that a widow might thus provide for her children before she put herself under the power of a husband; and it being proved that 8000l. was thus settled, and that the husband had suppressed the deed, he was decreed to pay the whole money, without directing any account. 1 Vern. 428.

III. 1. By marriage the husband hath power over his wife’s person; and by the old law he might give her moderate correction. 1 Hawk. P. C. 253; but this power was confined within reasonable bounds. Mon. 374, 375; F. N. B. 80.—In the time of Charles II. this power of correction began to be doubted. 1 Sid. 113: 3 Keb. 433.

The courts of law however, still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior, stra. 478. 675. But if he threaten to kill her, &c. she may make him surety of the peace, by signing a writ of supersedeas out of Chancery, or by preferring articles of the peace against him in the court of King’s Bench, or the may apply to the Spiritual Court for a divorce, proper &c. and in cases of a marriage-brocage agreement. Cware. 28. 130: F. N. B. 80: Horl. 149. cont. 1 Sid. 113, 116: Dall. c. 68: Lamb. 7: Com. 153.

So may the husband have security of the peace against his wife. 1 Sra. 1207.

But a wife cannot, either by herself or her proctor, bring a homine replegiando against her husband; for he has by law a right to the custody of his, and may, if he think fit, confine her, but he must not imprison her; if he does, it will be a good cause for her to apply to the Spiritual Court for a divorce, proper &c. and in cases of a marriage-brocage agreement she will be able to maintain her husband. 2 P. C. 42.

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

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

In this action the plaintiff must bring proof of the actual cohabitation of a marriage; nothing shall supply its place: consolation or reputation are not sufficient, nor any collateral proof whatever. 4 Rov. 707; 2 Bull. N. P. 27: Doug. 162: Efp. N. P. 343. —But it is not necessary to prove a marriage according to the ceremony of the church of England; if the parties are Jews, Swedes, &c. proof of a marriage according to their rites is sufficient. Bull. N. P. 28. —The cohabitation of the wife will be no proof against the defendant; but a discourse between her and the defendant may be proved, and the defendant’s letters to her; but the wife’s letters to the defendant will be no evidence for him. id.

The injury in case of adultery being great, the damages are generally considerable, but depend on circumstances; such as on the one hand as go in aggravation of damages, and to shew the circumstances and property of defendant; or on the other hand, such as go in extenuation of the offence, and mitigation of damages. Bull. N. P. 27: Efp. 343. 4. —The defendant may prove particular acts of criminality in the wife, previous to her guilt with him, but not her general character, in extenuation. id. id.

If a woman is suffered by her husband to live as a common profiteer, and a man is thereby drawn into crim. mou.
BARON AND FEME IV.

**No action at the suit of the husband will lie; but if the husband does not know this, it goes only in mitigation of damages. Id. ib.**

It is now determined that if the husband consent to his wife's adultery, this will go in bar of his action. 4 Term Rep. 657., in the case of Daberly v. Gaming.—See 1 T. Mod. 232.

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

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

IV. *At the hands of the wife.* The freehold or right of possession of all her lands of inheritance, veils in the husband immediately upon the marriage, the right of property still being preserved to her. 1 Inst. 351 a: 273 b: 326 b, in note. This estate he may convey to another.—An incorrect statement in the book called *Casses in Equity,* temp. Ed. Telcot, p. 107, of what was delivered by his lordship in the case of Robinson v. Cummings, seems to have given rise to a notion that the husband could not make a tenant to the prejudice of his wife's estate for the purpose of suffering a common recovery of it, without the wife's previously joining in a fine; but it now seems to be a settled point that he can. See *Cruttell on Recoveries,* and *p. tit. Fine and Recovery.*—By Stat. 3 & 4 H. 8. c. 28, leaves of the wife's inheritance must be made by indenture, to which the husband and wife are both parties, to be sealed by the wife, and the rent to be referred to the husband and wife, and to the heirs of the wife; and the husband shall not alien the rent longer than during the coverture, except by fine levied by husband and wife.—By the same act it is provided that no fine or other act done by the husband only of the inheritance or right of possession of his wife shall be any discontinuance thereof, or prejudicial to the wife or her heirs, but they may enter according to their rights; fines where unto the wife is party and privy [and the above mentioned leaves] only excepted. As to alienations of a husband's estate by a woman tenant in dower, &c. see *Stat. 11 & 12 H. 8, c. 20,* which makes them void. See *p. tit. Divorce, Wills, and also tit. Forfeiture.*

As to chattels real, and things in action of the wife; where the husband forsook the wife. At the common law, no person had a right to administer. The ordinary might grant administration to whom he pleased, till the statutes which gave it to the next of kin, and if there were persons of equal kindred, whichever took administration first was entitled to the surplus. The statute of distribution was made to prevent this. Where the wife was entitled only to the whole of a chattel real, or to any chose in action, or contingent interest in any kind of personalty, it seems to have been doubted, whether if the husband survived her he was entitled to the benefit of it or not. See 1 Inst. 351: 4 Inst. 87; Rl. Ab. 346: All. 153; Co. Eliz. 426: 5 C. R. 37: Gilb. C. Eq. 234.—See *t. Execut. 1. 1: 5.*

Upon the construction of the statutes of distributions, (see *t. Execut. V. 8,* ) it has been held that the husband may administer to his deceased wife; and that he is entitled for his own benefit to all her chattels real, things in action, frauds, and every other species of personal property, whether actually vested in her, and reduced into possession, or contingent, or recoverable only by action or suit.—It was however made a question after the Statute 20 Car. 2. c. 3, § 25, whether if the husband having survived his wife, afterwards died, during the suspense of the contingency upon which any part of his wife's property depended, or without having reduced into possession such of her property as lay in action of suit, his representative or his wife's next of kin were entitled thereto. But by a series of cases it is now settled, that the representative of the husband is entitled as much to this species of his wife's property, as to any other; that the right of administration, follows the right of the estate, and ought in case of the husband's death, after the wife, to be granted to the next of kin of the husband. See Mr. Hargrave's *Law Tracts,* 475. And that if administration de bonis non of the wife is obtained by any third person, he is a trustee for the representative of the husband. See 1 P. Wms. 378: 382.

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

With respect to her chattels real, as leases for years, there is a distinction between those which are in the nature of a present vested interest in the wife, and those in which she has only a possible or contingent interest. To explain this fully, it seems proper to mention, that it was formerly held that a disposition of a term of years to a man for his life, was such a total disposition of the term, that no disposition could be made of the possible residue of the term; or at least that if it was made, the first devisee might dispose of the whole term, notwithstanding the devise of the residue. This is reported (Dy. 747), to have been determined by all the judges in a case in 6 Ed. 5. The Court of Chancery first broke through this rule, and supported such future dispositions when made by way of trust; their example was followed by the courts of law in *Mar. Manning's case,* 8 Rep. 94 b, and Lampert's *cotes.* 10 Rep. 46 b. This disposition of the residue of a term, after a previous disposition of it to one for life, operates by way of executory devise, and the interest of the devisee of the residue is called a possibility. This possible interest in a term of years differs from a contingent interest created by way of remainder. If a person limits a real estate to A. for life, and after the decease of A., if B. dies in A.'s life-time, to C. for a term of years; this operates not as an executory devise, but as a remainder, and therefore is not to be considered as a possibility, but as a contingent interest.

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

If a person marries a woman entitled to a possessible or contingent interest in a term of years, if it is a legal interest, that is such an interest, as upon the determination of the previous estate, or the happening of the contingency, will immediately vest in possession in the wife, there the husband may dispose of it; unless in those cases where the possibility, or contingency, is of such a nature, that it cannot happen during the husband's lifetime. 1 Litt. 461; 10 Rep. 517; 1 Chit. 326. But it is an exception to this rule, that 1s, at least in equity, that if a future or executory interest in a term or other chattel, is provided for the wife, by or with the consent of the husband, there he cannot dispose of it from the wife, as it would be absurd to allow him to defeat his own agreement. But this supposes the provision to be made before marriage; if made subsequent, it is a mere voluntary act, and void against an assignee for a valuable consideration. 1 Chit. Ca. 225; 1 Ves. 7; 1 Sp. Ab. 258.

If a wife have a chattel real on the husband, as executor or administrator, the husband cannot dispose of it. 1 Litt. 461; 10 Rep. 517; 1 Chit. 326. But if the wife had it as executrix to a former husband, the husband may dispose of it. 3 Will. 272. And if a woman be joint tenant of a chattel real, and marries and dies, the husband shall not have it, but it survives to the other joint tenant. 1 Litt. 165; 1 Chit. 326. And the husband hath not power over a chattel real, which the wife hath as guardian. 1 Poth. 324.

Things in action do not vest in the husband till he reduces them into possession. It has been held that the husband may use alone, for a debt due to the wife upon bond; but that if he join her in the action, and recover the judgment and die, the judgment will survive to her. 1 Ves. 377; see 1 Ark. 376; 2 Ves. 167; 2 Ves. 677. The principle of this distinction appears to be, that his bringing the action in his own name alone, is a disaffirmation to his wife's interest, and implies it to be his intention that it should not survive to her; but if he brings the action in the joint names of himself and his wife, the judgment is that they both should recover; so that the surviving wife, and not the representative of the husband, is to bring the action in the joint names of himself and his wife, and the judgment is that they both should recover; so that the surviving wife, and not the representative of the husband, is to bring the action in the joint names of himself and his wife, and the judgment is that they both should recover; so that the surviving wife, and not the representative of the husband, is to bring the action in the joint names of himself and his wife, and the judgment is that they both should recover; so that the surviving wife, and not the representative of the husband, is to bring the action in the joint names of himself and his wife.

Thee appear to be the general principles of the courts of Law, respecting the interest which the husband takes in, and the power given him over the things in action of his wife; but the courts of Equity have admitted many very nice distinctions respecting them. 1. A settlement made before marriage, if made in consideration of the wife's fortune, entitles the representative of the husband dying in his wife's lifetime, to the whole of her things in action; but it has been said, that if it is not made in consideration of her fortune, the surviving wife will be entitled to the things in action, the property of which has not been reduced into the husband's power by the husband in his life-time: so if the settlement is in consideration of a particular part of her fortune, such of the things in action as are not comprised in that part, it has been said, survive to the wife. See Prec. Ch. 63; 2 Vern. 502: Tall. 168. In the case of Boulton v. Courteney of Hereford, (2 Vern. 301) a settlement was made for the benefit of the wife, but no mention was made of her personal estate; it was then said, that, in all cases where there was a settlement equivalent to the wife's portion, it should be intended that he is to have the portion, though there is no agreement for that purpose. See Eq. Ab. 69.

2. If the husband cannot recover the things in action of his wife but by the assent of a Court of Equity, the court upon the principle, that he who seeks equity, must do equity, will not give him their assent to recover the property, unless he either has made a previous provision for her, or agrees to do it out of the property prayed for; or unless the wife appears in court, and consents to the property being made over to him. 2 P. Wri. 641; 3 P. Wri. 122; Tall. 179; 2 Ves. 690. Neither will the court, where no settlement is made for the wife, direct the fortune to be paid to the husband, in all cases where she does appear personally and consent to it. 2 Ves. 579. It appears to be agreed, that the interest is always payable to the husband, if he maintains his wife. 2 P. Wri. 561; 2 Ves. 579; 2 Ves. 690. The court does not compel the wife's fortune, and will not settle the reft, the court will not only flrop the payment of the residue of her fortune, but will even prevent his receiving the interest of the residue, that it may accumulate for her benefit. 3 Atk. 21.

3. Voluntaries and assignees under a commiilion of bankruptcy, are in cases of this nure subject to the same equity as the husband; and are therefore required by the court, if they apply for it's assent in recovering the wife's fortune, to make a proper provision for her out of it. 2 Atk. 420; 1 P. Wri. 382. But if the husband actually assigns either a trust of title of his wife, or a thing in action, for a valuable consideration, the court does not compel the assignee to make a provision for the wife. 1 Ves. 7; 1 Sp. Ab. 18; and Com L. Wri. 1459, in re, where Lord Thurlow is reported to have said in a case before him, "that he did not find it any where decided, that if the husband makes an actual assignment by contract for a valuable consideration, the assignee should be bound to make any provision for the wife; but that a court of equity has much greater consideration, for an assignment actually made by contract, than for an assignment made by mere operation of law; for in this latter case the creditor should be exact in the case of the husband, and subject precisely to the same equity in favour of the wife."

4. But notwithstanding the uniform and earnest solicitude of the courts of equity, to make some provision for the wife out of her fortune, in those cases where the husband, or those claiming under him by act of law, cannot come at it, without the assent of those courts, still it does not appear that they have ever interfered to prevent its being paid the husband, or to inhibit him from recovering it at law. 2 Atk. 420. In Prec. Ch. 444, it is observed, that if the trustees pay the wife's fortune, it is without remedy.
5. Money due on mortgage is considered as a thing in action. It seems to have been formerly understood that as the husband could not dispose of lands mortgaged in fee, without the wife, the estate remaining in the wife, carried the money along with it, to her and her representatives; but that is as to the fruit and the absolute power of a term of years, there was nothing to keep a mortgage debt, secured by a term, from going to the husband’s representatives; but this distinction is no longer prevalent; and it is now held that the in the case of a mortgage in fee, the legal fee of the lands in mortgage continues in the wife, the husband, and the wife’s trousseau, and the truss is not liable for it, over again, with interest. 1 P. Wms. 161.

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

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

8. And as the husband may generally acquire a property in all the personal subsistence of the wife, so in one particular instance the wife may acquire a property in some of her husband’s goods, which shall remain to her after his death, and not go to his executors. These are called her paraphernalia; which is a term borrowed from the Civil Law, and is derived from the Greek, signifying something over and above her dowry. Our law gives it to signify the apparel and ornaments of the wife suitable to her rank and degree; and therefore even the jewels of a Peersess usually worn by her, have been held to be paraphernalia. 1 P. Wms. 730.—And her necessary apparel is protected even against the claim of creditors. 1 P. Wms. 730.—And her apparel, if real, shall have a necessary rent and apparel. 1 Rel. 611. 1. 20.—See further on the subject of Paraphernalia. Com. Dig. tit. Baron and Feme (F. 3).
to remove the cause, the plaintiff is to move for a proceeding on the return of the habeas corpus: also the court of R. R. may refuse it, where brought to abate a just action. 1 Saik. 8.

In general the husband is liable to the wife's debts, contracted before marriage, whether he had any portion with her or not; and this the law presumes reasonable, because by the marriage the husband acquires an absolute interest in the personal estate of the wife, and has the receipt of the rents and profits of her real estate during coverture; also whatever accrues to her by her labour, or otherwise, during the coverture, belongs to the husband; so that in favour of creditors, and that no person's act should prejudice another, the law makes the husband liable to those debts with which he took her attached.

F. N. B. 265. 20 Hen. 6. 22 b; Mor. 468. 1 Rol. Abr. 352; 3 Mod. 186.

If baron and feme are sued on the wife's bond, entered into by the feme before marriage, and judgment is had thereupon, and the wife dies before execution, yet the husband is liable; for the judgment has altered the debt. 1 Sid. 327.

If judgment be against husband and wife, he dies, and the survive, execution may be against her. 1 Rol. Abr. 890. 10. 30: See post X.

Where a man marries a widow executrix, &c. her evidence shall not be allowed to charge her second husband with more than she can prove to have actually come to her hands. Agreed per cur. 1 Ab. Eq. Ca. 227. Hil. 1719.

D. confess d a judgment to F. who made his wife, the plaintiff, executrix, and died; she administered and married a second husband, and then for abuse, without her husband, acknowledged satisfaction, though no real satisfaction was made.

The court held that this was not good. 1 Sid. 327.

A wife administratrix under 17 shall join with her husband in an action; per Twidle. J. Mod. 297.

If a feme executrix takes a bond, and he releaseth all actions, this shall be a bar during the coverture without question; by the justices. Br. Receives, p. 29.

If a feme executrix take a bond, and the baron puts himself in arbitrament for death of the tenant, and award is made, and the baron dies, the feme shall be barred; per rea cur. Brooke says, that from hence it seems to him, that the release of the baron without the feme is a good bar against the feme; good consideration, anno 39 H. 15; and therefore where he excepted those debts in his release, otherwise they had been extinct. Br. Receives, pl. 79.

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

VI. Every gift, grant, or disposition of goods, lands, or other thing whatsoever, and all obligations and feoffments made by a feme covert, without her husband's consent, are void. 1 H. 5. 125; Finz. Coverit. 18.

The husband is obliged to maintain his wife in necessaries: yet must be according to his degree and estate, to charge him; and necessaries may be suitable to a husband's degree of quality, but not to his estate; also they may be necessaries, but not ex necessitate to charge the husband. 1 Mod. 129; 1 Neif. Abr. 354. If a woman buys things for her necessaries apparel, though without the content of her husband, yet the husband shall be bound to pay it. Brown. 47. And if the wife buys any thing for herself, children, or family, and the baron does any act precedent or subsequent whereby he swears his consent, he may be charged thereupon. 1 Sid. 126. The expenses of a feme covert's funeral, paid by her father, while her husband had left her, and was gone abroad, deemed necessaries. H. Black. Rep. 60. Though a wife is very lewd, if the cohabits with her husband, he is chargeable for all necessaries for her, because he took her for better, for worse: and so he is if he runs away from her, or turns her away: but if she goes away from her husband, then as soon as such separation is notorious, whoever gives her credit doth it at his peril, and the husband is not liable, unless he take her again. 1 Saik. 191; see 1 Stra. 647, 705: and as to actions against femes covert having eloped see 2 Black. Rep. 1079.

If a man cohabits with a woman, allows her to assume his name, and pays her for his wife, though in fact he is not married to her, yet he is liable to her contracts for necessaries; and therefore no unjust acceptor is a bad plea in an action on the debt of a wife; it is good only in divorce or an appeal. Bull. N. P. 136: Eas. N. P. 124.

Although a husband be bound to pay his wife's debts for her reasonable provision, yet if the parts from him, especially by reason of any misbehaviour, and he allows her a maintenance, he shall never after be charged with her debts, till a new cohabitation; but if the husband receive her, or come after her, and lie with her but for a night, that may make him liable to the debts. Ps. Rev. 3 Abn. Mod. Ca. 147, 171. If there be an agreement in writing between husband and wife to live separate, and that she shall have a separate maintenance, it shall bind them both till they both agree to cohabit again; and if the wife is willing to return to her husband, the same; but it has been adjudged, that the husband hath no coercive power over the wife to force her, though he may wish her, and use all lawful means in order to a reconciliation. Mich. Geo. 1. Mod. Ca. in L. & E. 22.

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

It may now safely be assumed as a principle, that "where the husband and wife part by consent, and she has a separate maintenance from the husband, she shall in all cases be subject to her own debts."-This was first finally decided and settled in the case of Ringstead v. Lady Langshourby, M. 23 Geo. 5; and H. 23 Geo. 3, where in actions against the defendant for goods sold the pleaded coverture; and the plaintiff's replication "that the husband married and parted from her husband, from whom the husband had a separate maintenance, and was not liable to her own debts," was a clear demurrer to be held good; and plaintiff had judgment.—In the above case the plea also stated that the husband lived in Ireland, which being out of the reach of the court, some stress was laid on it in the decision; but in the case of Barwell v. Brooks, H. 24 Geo.

BARON AND FEME VI.
BARON AND FEME VII.

24 Geo. 3. It was decided as a general principle, that the husband was not liable in any case where the wife lived apart, and had a separate maintenance; and this principle was recognized in Corbett v. Pochnitz which followed it. 1 Term Rep. 5.

It has been said, that when the husband and wife live apart, the wife must have a separate maintenance from the husband, in order to discharge him. 4 Burr. 2078.—But this opinion seems much shaken by that of Lord Mansfield, in 1 Term Rep. 5 — 1, where he says, the cases (already mentioned) do not rest on one or two circumstances, but on the great principle which the court has laid down that where a woman has a separate estate, and receives credit as a feme sole, she shall be liable as such—a principle which extends further than the facts of any cases yet determined.—And it seems that now a determination in 12 Mo. 623, where coverture and the life of the husband in Ireland was given in evidence in an action against a woman who had traded for 12 years as a widow, is not law.

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

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

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

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

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

A husband who has abjured the realm, or who is banished, is thereby civilitas maritus; and being disabled to sue or be sued in right of his wife, he must be considered as a feme sole; for it would be unreasonable that she should be remedied on her part, and equally hard on those who had any demands on her, that not being able to have any redress from the husband, they should not have any against her. Bro. Baron and Feme, 66: Cor. Lit. 133: 1 Rol. Rep. 400: Mor. 851: 3 Bull. 188: 1 B. J. 140: 2 Fell. 154.

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

By the custom of London, if a femae court trades by herself, in a trade with which her husband does not intermeddle, she may sue and be sued as a feme sole. 10 M. & B. 6.

But in such case she cannot give a bond and warrant of attorney to confess a judgment: and when sued as a feme sole, she must be sued in the courts of the city of London; for if sued in the courts above, the husband must be joined. So the wife alone cannot bring an action in the courts above, but only in the city courts; and this though her husband be dead; if the cause of action accrued in his life-time. 4 Term Rep. 561, 2.

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

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

But for crimes male in se, not being merely offences against the laws of society, she is answerable; as for murder and the like; not only because these are of a deeper die; but also since in a state of nature, no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society. In treason also, (the highest crime which a member of society can, such being guilty of) no plea of coverture shall excuse the wife: no presumption of the husband's coercion shall extenuate her guilt. 1 Hale's P. C. 47.

And this as well because of the odiousness and dangerous consequences of the crime itself, as because the husband having broken through the most sacred tie of social community, by rebellion against the state, has no right to that obedience from a wife which he himself as a subject has forgotten to pay. 4 Comm. 28, 29. (But the shall not be considered criminal for receiving her husband, though guilty of treason, nor for the receiving another offender jointly with her husband. Leach's Haw. P. C. c. 1. § 11, in note.)—See tit. Accessory.

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

If the wife receive stolen goods of her own voluntary act, without the privy of her husband, or if he knowing thereof, leave the house and sells his company, the alone shall be guilty as accessory. 22 Ass. 40: Danw. 717: 1 Hale P. C. 516.

In inferior misdemeanours also, another exception may be remarked; that a wife may be indicted and fined in the pillory with her husband, for keeping a brothel; for it is an offence touching the domestic economy or govern-
B A R O N A N D F E M E V I I I.

government of the house, in which the wife has a principal share; and is also such an offence as the law presumes to be generally committed by the intrigues of the female sex. 1 Hawk. P. C. c. 1, § 12; 10 Mck. 69.

A feme covert generally shall answer, as much as if she were sole, for any offence not capital against the common law or statute; and if it be of such nature, that it may be committed by her alone, without the concurrence of her husband, she may be punished for it without the husband by way of indemnity, which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for any offence to which he is no way privy. 9 Co. 71; 1 Hawk. P. C. c. 1, § 93. See Nov. 815; Hawk. P. C. c. 1, § 93; Nov. 101; Suid. 33; Co. Jur. 682; 11 Co. 61. A feme may be indefeasibly sole for a rent. Dall. 447.

For selling gin against the Stat. 5 Geo. 2. c. 53; S. 1420.

For recusancy. Ad. 46; Hawk. 69; Suid. 403; 10 Co. 69; Suid. 2; For being a common scold. G. M. 243, 249.

For assault and battery. S. 384; For forswearing. Suid. 410. — For swearing. Suid. 344. For bawdy, Hawk. P. C. c. 81, § 6; Suid. 1, § 73. For a forcible entry. 1 Hawk. P. C. c. 64, § 33. — For keeping a gaming house. 10 Mck. 335. — Keeping a bawdy-house, where the husband does not live with her. 1 Barr. Abr. 309. — For trespass or slander. Keith. 61: Re. Abr. 25; 10 Co. Case 11. — See 1 Hawk. P. C. c. 1, § 13, in note.

A man must answer for the trespasses of his wife: if a feme covert slander any person, his husband and wife must be sued for it, and execution is to be awarded against him. 11 Rep. 63. — See post X.

Husband and wife may be found guilty of nuisance, battery, &c. 10 Mck. 69.

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

VIII. A wife is sui juris viri; and therefore her acts shall not bind her, unless the levy a fine, &c. when the husband is examined in private, whether he doth it freely, or by composition of the husband; if baron and feme levy a fine, this shall bar the feme; and where the feme is examined by writ, the feme shall be bound; else no. 1 Baro. Abr. 708. See ante IV.

If the husband and wife are vouchers in a common recovery, the recovery shall be a bar, though the wife be not examined; for though it be proper that she be examined, yet that is not necessary, and is frequently omitted. 1 Sid. 111; 319, 320.

A recovery, as well as a fine by a feme covert, is good to bar her, because the privity in the recovery answers the wife of covenant in the fine, to bring her into court, where the examination of the judges destroys the presumption of the law, that this is done by the coercion of the husband, for then it is to be presumed they would have refused her. 10 Co. 43; 2 Bar. Abr. 395.

By the custom in some cities and boroughs, a bargain and sale by the husband and wife, where the wife is examined by the mayor or other officer, binds the wife after the husband's death. 2 Inf. 673. — And it is observed that by Stat. 34 Geo. 3. c. 22, all such customary conveyances shall be of force notwithstanding the Stat. 32 Geo. 8. c. 28. See ante Div. IV.

So by custom in Denbigh in Wales, a surrender by husband and wife where the wife is examined in court there, binds the wife and her heirs as a fine does; and this custom is not taken away by Stat. 27 Hil. 8. c. 28; for it is reasonable and agreeable to some customs in England. Dy. 315 b.

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

A wife is disabled to make conveyances, &c. 3 Inf. 110. And if a married woman enters into bond as feme sole, if she is sued as feme sole, the may plead Non est factum, and the coverture will avoid her bond. 1 Litt. Abr. 217.

A feme covert may plead non est factum, and give coverture in evidence, which makes it no promise, &c. Rau. 395.

In case money be due to the husband by bill or bond, or for rent on a lease, and it is paid to the wife, this shall not prejudice him, if after payment he publickly disagrees to it. 19 Jac. 1. B. R. 2 Spen. Abr. 426; C经查, if she is used to receive money for him, or if it can be proved the money paid came to his use.

If a feme covert levies a fine of her own inheritance without her husband, this shall bind her and her heirs, because they are set to claim any thing in the land, and cannot be admitted to sit; she was covert against the record; but the husband may enter and defeat it, either during the coverture, to relieve him to the freehold held under writs, or after her death to remove himself to his tenancy by the curtesy, because no act of a feme covert can transfer that interest which the intervixia has vested in the husband; and if the husband avoids it during the coverture, the wife or her heirs shall never after be bound by it. Bro. tit. Fine, 10: Co. 43: Hobb. 225: 7 Co. 8: Cl. Lit. 46.

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

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

If baron and feme by fine for covert grant land to J. S. for ninety-nine years, and warrant the said land to J. S. during the said term, and the Baron dies, and J. S. is evicted by one that hath a prior title, he may therefore bring covenant against the feme, notwithstanding the she was covert at the time when the fine was levied. 2 Sound. 177: 1 Sla. 496: S. C.: 1 Mod. 250: 2 Keb. 684, 703. See title Fine.
BARON AND FEME VII.

If a husband diffuses another to the use of his wife, this does not make her a défioferees, she having no will of her own, nor will any agreement of hers to the défiofen during the coverture, make her guilty of the défiofen, for the same reason: but her agreement after her husband's death will make her a défioferees, because then she is capable of giving her content, and that makes her tenant of the freehold, and so subject to the remedy of the défiofes. 1 Rel. Adb. 660: Bro. Diffiofen 67.

But if a femme covert actually enters and commits a défioffen, either sole or together with her husband, then she is a défioferees, because she thereby gains a wrongful possessions; but such actual entry cannot be to the use of her husband or stranger, so as to make them défioferees, because though by such entry she gains an estate, yet she has no power of transferring it to another. Co. Litt. 357: 1 Rel. Adb. 660: Bro. Diffiofen 15, 67: See 8 Hen. 6. 14. cont.

If the husband, seized of lands in right of his wife, makes a lease thereof for years by indenture or deed poll, reserving rent; all the books agree this to be a good lease for the whole term, unless the wife, by some act after the husband's death, shews her different intent; for if she accepts rent which becomes due after his death, the lease is thereby become absolute and unavoidable; the reason whereof is, that the wife, after her intermarriage, being by law disabled to contract for, or make any disposition of, her own possessions, as having subjected herself and her whole will to the will and power of her husband; the law therefore transfers the power of dealing and contracting for her possessions, to the husband, because no other can then intermeddle therewith, and without such power in the husband, they would be obliged to keep them in their own manure or occupation, which might be greatly to the prejudice of both; but to prevent the husband's abusing such power, and lest he should make leases to the prejudice of his wife's inheritance, the law has left her at liberty after his death, either to affirm and make good such lease, or defend and avoid it, as she finds it subservient to her own interest; and this she may do, though she joined in such lease, unless made pursuant to statute 32 Hen. 8. c. 28: See ante IV: Bro. Acceptance 10: Bro. Lifes 24: G. Jac. 332: 2 Aud. 42: Co. Litt. 45: Pano. 137: Co. Jac. 563: 3d. 11: Co. Eliz. 769.

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

A re-delivery by the wife after the death of her husband, of a deed delivered by her during the coverture is a sufficient confirmation of such deed so as to bind her, without its being re-executed or re-attested—and circumstances alone may be equivalent to such re-delivery, though the deed be a joint deed by baron and feme affecting the wife's lands; and no fine levied. Comp. 201.

The husband being seized of copyhold lands in right of his wife in fee, makes thereof a lease for years not warranted by the cullum, which is a forfeiture of her estate, yet this shall not bind the wife or her heirs after the husband's death, but that they may enter and avoid the lease, and thereby purge the forfeiture; and the diversity of which that at an end when the lease is expired or defeated by the entry of the lord, or the wife after the husband's death; and such acts as are a continuing detriment to the inheritance, as wilful waste by the husband, which tends to the destruction of the manor; so of non-payment of rent, denial of suit or service; for such forfeitures as these bind the inheritance of the wife after the husband's death; but in the other case, the husband cannot forfeit by this lease more than he can grant, which is but for his own life. 2 Rel. Rep. 344: 361, 372: Cro. C. 7: Cro. Eliz. 139: 4 Co. 27.

A femme covert is capable of purchasing, for such an act does not make the property of the husband liable to any disadvantage, and the husband is supposed to assent to this, as being to his advantage, but the husband may disaffire; and that shall avoid the purchase; but if he neither agrees nor disaffires, the purchase is good, for his conduct shall be esteemed a tacit consent, since it is to return to his advantage; but in this case, though the husband should agree to the purchase, yet after his death the may waive it, for having no will of her own at the time of the purchase, she is not indispensably bound by the contract; therefore if she does not, when under her own management and will, by some act express her agreement to such purchase, her heirs shall have the privilege of departing from it. Co. Litt. 3 a.

Joint rents paying off a mortgage was decreed to hold over till she or her executor be satisfied, and interest to be allowed her. Chem. Cases 271.

The husband gave a voluntary bond after marriage to make a jointure of a certain value on his wife; the husband accordingly makes a jointure; the wife gives up the bond; the jointure is exerted; the jointure shall be made good out of the husband's personal estate, there being no creditors in the case; and the delivery up of the bond by a femme covert could no ways bind her interest. Vern. 427: pl. 402.

A femme covert agrees to sell her inheritance, so as the might have 200l. of the money secured to her; the land is sold, and the money put out in a trustee's name accordingly; this money shall not be liable to the husband's debts, nor shall any promise by the wife, to that purpose, subsequent to the first original agreement, be binding in that behalf. 2 Vern. 63, 65: pl. 58: Trin. 1688.

It is a general rule that a femme covert acting with respect to her separate property, is competent to act in all respects as if she were a feme folium. 2 Feb. 190: 1 Bro. C. R. 20; and see 1 Feb. 163. Where the wife, being authorized by testament to dispose of her separate estate, contracted to sell it, the court of Chancery will bind her to a specific performance. 1 Feb. 517: 1 Bro. C. R. 20.

So the bond of a femme covert jointly with her husband shall bind her separate estate. 1 Bro. C. R. 16: 2 Feb. 190.
In those cases where the debt or cause of action will survive to the wife, the husband and wife are regularly to join in action; as in recovering debts due to the wife before marriage; in actions relating to her freehold or inheritance, or injuries done to the person of the wife.

But if a feme sole hath a rent-charge, and rent is in arrear and the marriage, and the baron disfains for this rent, and thereupon a.re.ossis is made, this is a tort to the baron himself, and he may have an action alone. Cro. Eliz. 439: Owen 82. S. P.; Mor. 584. S. C.

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

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

The baron may have an action alone upon the Statute 5 R. 2. fl. 1. v. 8. For entering into the land of the feme; trespasses and taking enricies of the inheritance of the feme; hire and waste, etc. But for personal torts, they must join, though the baron is to have the damages. 1 Domp. 709. 1 Rol. Rep. 560. The husband is to join in actions for battery to the wife; and a wife may not bring any action for wrong to her without her husband. Ca. Lit. 132, 326.

An action for a battery on the wife, brought by husband and wife, must be laid to the damage of both. 2 Lord Kam. 1209. For an injury done to the wife alone, action cannot be maintained by the husband alone, without her; but for assault and debauching or lying with the wife, or for a loss and injury done to the husband, in depriving him of the conversation and service of his wife, he alone may bring an action; and these last actions are laid for assault, and detaining, &c. the wife, per quod consequitum amisit, &c. Cro. Jac. 538: See Yelv. 89.

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

Where the feme is administratrix, the suit must be in both their names, for by the intermarriage the husband hath authority to intermeddle with the goods as well as the wife; but in the declaration the granting administration to the feme must be set forth. Vide the Books of Entries, and Galb. 40. pl. 44. In an action for goods which the feme holds as executrix, they must join, to the end that the damages thereby recovered may accrue to her as executrix in lieu of the goods. Winf. Off. Ex. 257.

In an action upon a trover before marriage, and a conversion after, the baron and feme ought to join; for this action, as a trespass, disfavors the property; but the baron alone ought to bring a reflexion, detinue, &c. for the allegations admit and affirm a property in the feme at the time of the marriage, which by consequence must have vested in the baron. 1 Sid. 172; 1 Keb. 641. S. C.; 1 Vent. 261; 2 Lev. 107. S. P.; and that he may join the wife at his election.

If A. declares, that the defendant being indebted to him and his wife, as executrix to one of S. in consideration that A. would forbear to sue him for three months, assumed, &c. and avers that he forbore, and that his wife is still alive, the action is well maintainable by the husband alone, for this is on a new contract, to which the wife is a stranger. Careb. 462: 1 Salk. 117; Yelv. 84; Cro. Jac. 110. S. P.

Where a right of action doth accrue to a woman before marriage, as where a bond is made to her and forfeited, there, if the marry, she must be joined with the husband in an action of debt against the obligor. Owen 82.

In all actions real for the land of the wife, the husband and wife ought to join. R. 1 Bdfj. 21. So in actions personal for a theft in action, due to the wife before coverture. 1 Rol. Rep. 537: Vide Com. Dig.

For an injury done to the wife during coverture, in which cases the baron is to have the damages. 1 Domp. 709. But if baron alone, and the wife is not a party; it may be a means of making the husband’s property liable, without giving him an opportunity of defending himself. Ca. Lit. 133: Doctr. Plaut. 3.; 2 Hen. 6. 4.

If goods come to a feme covert by trover, the action may be brought against husband and wife, but the conversion may be laid only in the husband, because the wife cannot convey goods to her own use; and the action is brought against both, because both were concerned in the trespass of taking them. See Ca. Lit. 351: 1 Rol. Abr. 9. pl. 7; Yelv. 116; Noj 79; 1 Leon 312; Cro. Car. 254, 494: 1 Rol. Abr. 348. But in debt upon a dehavit against baron and feme executrix, it shall not be laid quod dehavit; for a feme covert cannot waive. 2 Lev. 145.

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

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

If an action be brought against an husband and wife for the debt of the wife, when sole, and the plaintiff recovers judgment, the ca. fa. shall issue to take both the husband and wife in execution. Mor. 704.—But if the action was originally brought against herself when sole, and pending the suit the marriage, the ca. fa. shall be awarded against her only, and not against the husband. Cro. Jac. 323.—Yet if judgment be recovered against an husband and wife, for the contract, may even for the personal misbehaviour (Cro. Car. 513.) of the wife, during her coverture, the ca. fa. shall issue against the husband only; which is (says Mr. J. Blackstone) one of the many great privileges of English wives. 3 Cosum. 414: Sec 3 Wilk. 114.
XI. If baron and feme are divorced causa adulterii, which is a divorce a mensa et thoro, they continue baron and feme; it is otherwise in a divorce a vinculo matrimonii, which dissolves the marriage.

The feme, after divorce, shall rehave the goods which she had before marriage. Br. Coverture, pl. 82. Because the divorce being a vinculo matrimonii, by reason of some prior impediment, as precontract, &c. makes them never husband and wife ab initio; but if the husband had made a feoffment in fee of the lands of his wife, and then the divorce had been, that would have been a discontinuance as well as if the husband had died, because there the interest of a third person had been concerned, but between the parties themselves it will have relation to destroy the husband's title to the goods, and it proves no more than the common rule, viz., that relations will make a nullity between the parties themselves, but not amongst strangers. Lord Raym. 521: Tit. 11 W. 3.

If a man gives lands in tail to baron and feme, and they have issue, and after, divorce is fust, now they have only franktenement, and the issue shall not inherit. Br. Tail et Dout. &c. pl. 9.

If the baron and feme purchase jointly and are diffusus, and the baron relater, and after they are divorced, the feme shall have the moiety, though before the divorce there were no moieties; for the divorce converts it into moieties. Br. Derogation. pl. 13. cites 32 Hen. 8.

If baron alien the wife's land, and then there is a divorce causa praecorporis, or any other divorce which dissolves the marriage a vinculo matrimonii, the wife during the life of the baron may convert by statute 32 Hen. 8. c. 28: Dyer 13. pl. 61: But vide Id. Raym. 521.

But if after such alienation and divorce the baron dies, she is put to her cut in vita ante discretionem; yet and the words of the statute are, that such alienation shall be void, but this shall be intended to toll the cut in vita. Mo. 58. pl. 104. Parch. 8 Eliz. Broughton v. Cosway.

Divorce causa adulterii of the husband; afterwards the wife sues in the spiritual court for a legacy; the executor pleads the releas of the baron; the release binds the wife, for the simulacrum matrimonii continues. Cro. Eliz. 968: Vide 1 Salk. 115.

A bill may be brought in Chancery for a specific performance of an agreement by the husband with a third person, for a separate maintenance of the wife; notwithstanding that alimony belongs to the spiritual court. Treat. Eq. 39.

The court of chancery has decreed the wife a separate maintenance out of a trust fund on account of the cruelty and ill-behaviour of the husband, though there was no evidence of a divorce or agreement that the fund in dispute should be applied. 2 Vern. 752. And in another case the husband having quitted the kingdom, Lord Hardwicke decreed the wife the interest of a trust fund till he should return and maintain her as he ought. 2 Atk. 95. Yet in a subsequent case Lord Hardwicke observes, that he could find no decree to compel a husband to pay a separate maintenance to his wife, except upon an agreement between them, and even then unwillingly. 3 Atk. 547. And this latter opinion seems most reconcileable with principle, for the case of a divorce proper laesionem (see 2 Vern. 493) may be considered as an implied agreement; and if there be an express or implied agreement, there seems no doubt, but that courts of equity may, concurrently with the spiritual court, in proceeding upon it, decree a separate maintenance. Wood's Inst. 62. 2 Vern. 360; Guth v. Guth, MSS.

The spiritual court however would be the more proper jurisdiction if it acted in rem. Lit. Rep. 78. 2 Atk. 511. But if after an agreement between husband and wife to live separate, they appear to have cohabited, equity
BARON, &c.

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

Where, on a separation, lands are conveyed by the 
baron in trust for the feme, chances will not bar the 
feme from suing the barm in the trufter's name, and a 
surrender or release by the baron shall not be made use of 
against the feme. 2 Chann. Co. 182.

A woman living separate from her husband, and 
having a separate maintenance, contracts debt. The 
creation, by a bill in this court, may follow the separate 
maintenance whilst it continues; but when that is 
determined, and the husband dead, they cannot by a bill 
charge the jointure with the debts: by Lord Keeper 
North; and the rather, because the executor of the 
husband, who may have paid the debt, is no party. Vern. 
326.

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

A term was created on the marriage of A. with B. for 
raising 1000l. a year for pin-money, and in the settlement 
A. covenanted for payment of it. There was an arrear 
of one year at A.'s death, which was decreed, because of 
the covenant to be charged on a trust-estate settled for 
payment of debts, it being in arrear for one year only; 
since had it been in arrear for several years. Chann. 

The plaintiff's relation (to whom he was heir) allowed 
the wife pin-money; which being in arrear, he gave her 
a note to this purpose; I am indebted to my wife 100l. 
which became due to her such a day after his will he 
made provision out of his lands for payment of all his debts, 
and all money which he would to over-part in trust for his 
caste; and the question was, whether the 100l. was to 
be paid within this trust, and my Lord Keeper decreed 
not; for in point of law it was no debt, because a man 
cannot be indebted to his wife, and it was not money 
due to any in trust for her. 2d. 1701, between Cramer 
and the bar. of Moxham. But where, for the tenant 
locked on this as a debt, and intends to it, and provide 
for it by his will. Abur. Es. Ca. 66.

Where the wife hath a separate allowance made before 
marriges, and buys jewels with the money arising therefrom, 
they shall not be liable to the husband's debts. Chann. 
Proc. 295.

Where there is a provision for the wife's separate use 
for clothes, if the husband finds her clothes, this will be 
the wife's claim; nor is it material whether the allowance 
be provided out of the estate which was originally the 
husband's, or out of what was her own estate; for in both 
cases she not having demanded it for several years togethcr, 
shall be considered a custom from her that she should 
receive it; per Lord C. Macleod. 2 P. Wms. 82, 83.

So where 50l. a year was reserved for clothes and private 
expenses, secured by a term for years, and ten years after 
the husband died, and soon after the wife died; the ex- 
ecutors in equity demanded 500l. for ten years arrear of 
this pin-money; but it appearing that the husband 
maintained her, and no proof that she ever demanded it, the claim 
was disallowed. 2 P. Wms. 517.

BAR, or BARR, Lat. barre. Fr. barre.] In a legal 
cause, is a plea or peremptory exception of a defendant, 
sufficient to destroy the plaintiff's action. And it is 
divided into bar to common intentment, and bar special; 
bar temporary, and peremptory bar to common intentment 
is an ordinary or general bar, which usually is a bar to the 
declaration of the plaintiff: bar special is that which is 
more than ordinary, and fails upon some special circum-
stance of the suit, as to the case in hand. 'Terms de Ley.

Bar temporary is such a bar that is good for the present, 
but may afterwards fall: and bar peremptory is that which 
overthrows the action of the plaintiff for ever. Plead. 
26. Bar a plea in bar, not giving a full answer to all 
the matter contained in the plaintiff's declaration is not 
good. 1 Litt. Abr. 211. If one be barred by plea to the 
words, or to the action of the suit, he may have the same 
writ again, or his right action; but if the plea in bar, 
be to the action itself, and the plaintiff is barred by judge-
ment, &c. It is a bar for ever in personal actions. 6 Rep. 7.

And a recovery in debt is a good bar to action on the case 
for the same thing; also a recovery on assumpsit in cause, 
is a good bar in debt, &c. Com. Jus. 110; 4 Rep. 94.

In all actions personal, as debt, account, &c. a bar is 
perpetual, and in such cases the party hath no remedy, 
but by writ of error or assize; but if a man is barred 
in a real action or judgment, yet he may have an action 
of as high a nature, because it concerns his inheritance; 
as for instance, if he is barred in a form for the estate, 
and he may have a form for the remainder, &c. 6 Rep. 
57. It has been resolved, that a bar in any action real 
or personal by judgment upon demurrer, verdict, or 
conclusion, is a bar to that action, or any action of the like 
nature for ever: but, according to Pemberton Chief 
Justice, this is to be understood, when it doth appear 
that the evidence in one action would maintain the other; 
for otherwise the court shall intend that the party hath 
waived his action in the former. 2 P. Wms. 517.

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

There is a bar material, and a bar at large: bar ma-
terial may be also called special bar; as when one, in 
the suit of the plaintiff's action, pleads that some particular 
matter, &c. a defect from him that was owner of the 
land, &c. a factment made by the ancestor of the plain-
tiff, or the like; bar at large is, when the defendant, 
by way of exception, doth not traverse the plaintiff's 
suit, by pleading, nor confess, nor avoid it, but only 
makes to himself a title in his bar. Kitch. 68: 5 H. 7. 29.

See titles Abatement, Action, Judgment; and especially 
Placing.

This word Bar is likewise used for the place where fer-
jeans and counsellors at law stand to plead the causes
in court; and where prisoners are brought to answer their indictment, &c. whence our lawyers, that are called to the bar, are termed barristers. 24 H. 8. c. 24.

BARRASTER, BARRISTER, barratorius.] A counsel-\or learned in the law, admitted to plead at the bar, and there to take upon him the protection and defence of clients. They are termed jurisconfultis; and in other countries licensed in juris: and anotently barristers at law were called appretebii of the law, (from the French apprendre to learn,) in Lat. apprentici juris notabiliss. Forti:fe. The time before they ought to be called to the bar, by the ancient orders, was eight years, now reduced to five; and the exercises done by them, (if they were not called ex gratia) were twelve grand moots performed in the ins of Chancery, in the time of the grand readings, and twenty-four petty moots in the term times, before the readers of the respective ins; and a barrister newly called was to attend the first (or four) next long vacations: the exercise of the house, win. in Lent and Summer, and was thereupon for those three (or two) years titled a vacation barrister. Also they are called utter barristers, i.e. pleaders out of the bar, to distinguish them from benchers, or those who have been readers, who are sometimes admitted to plead within the bar, as the king, queen, or prince's counsel are.

From the degrees of barristers and serjeants at law, (fee his title Serjeant) some are usually selected to be his Majesty's counsel; the two principal of whom are called his Attorney and Solicitor-General. — The first king's counsel under the degree of serjeant, was Sir Francis Bacon, who was made to honoris causa, without either patent or fee; so that the first of the modern order, who are now the sworn servants of the crown with a flanding salary, seems to have been Sir Francis North, afterwards Lord Keeper to Charles II. These king's counsel must not be employed in any cause against the crown without special licence. A custom now prevails of granting letters patent of precedence to such barristers as the crown thinks proper to honour with that mark of distinction, whereby they are entitled to such rank and pre-audience as are assigned in their respective patents, sometimes next after the king's Attorney General, but usually next after his Majesty's counsel then being. These, as well as the queen's Attorney and Solicitor-General, rank prominently with the king's counsel, and together with them sit within the bar of the respective courts; but receive no salaries and are not sworn, and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately, (except in the court of Common Pleas, where serjeants only are admitted in term time) may take upon them the protection and defence of any clients whether plaintiff or defendant. 5 Comm. 27, 28.

A counsel can maintain no action for his fees; (Davis Priv. 22, 1 C. R. 38;) which are given not as a salary or hire, but as a mere gratuity, which a barrister cannot demand without doing wrong to his reputation. Davis 23.

In order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to unfeemly licentiousness, it hath been held, that a counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove ab-
BARR

It seems to be the settled practice not to suffer the prosecutor to go on in the trial of an indictment of this kind, without giving the defendant a note of the particular matters which he intends to prove against him; for otherwise it would be impossible to prepare a defence, and uncertain a charge, which may be proved by such a multiplicity of different instances. 5 Mod. 18: 1 La. Ryn. 450: 12 Mod. 516: 2 Art. 340: 1 Hawk. P. C. 81, § 13.

To this head may also be referred another offence of equal malignity and audacity; one either not in being at all, or one who is ignorant of the facts. This offence, if committed in any of the king's superior courts, is left, as a high contempt, to be punished at discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by Stat. § 4 Eliz. c. 2, to be punished by six months' imprisonment, and to recover the party injured.

BARREL, barrelum. A measure of wine, ale, oil, &c. Of wine it contains the eighth part of a ton, the fourth part of a pipe, and the moiety of a hoghead; that is, thirty-one gallons and a half. Stat. 1 R. 3. c. 13. Of beer it contains thirty six gallons; and of oil, thirty-two gallons. Stat. 23 H. 8. c. 4: 12 Car. 2. c. 23. The assize of herring barrels is thirty-two gallons wine measure, containing in every barrel usually a thousand full herring. Stat. 13 El. c. 11. The eel barrel contains thirty gallons. 2 H. 6. c. 11.

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

BARROW, from the Sax. berow, a heap of earth.] A large hillock or mount, raised or call up in many parts of England, which seem to have been a mark of the Roman tomuli, or sepultures of the dead. The Sax. berow was commonly taken for a grove of trees on the top of a hill. Kennet; Gloss. To BARTER, from the Fr. barater, or Span. baratar, circumcivare.] To exchange one commodity for another, or truck wares for wares. Stat. 1 R. 3. c. 9. Because probably they that exchange in this manner do endeavour, for the most part, one to over-reach and circumvent the other.—So BARTER the substantive in Stat. 13 Eliz. c. 7, of Bankraps.

BARTON, or BERTON. A word used in Devonshire, for the demesne lands of a manor; sometimes the manor-house itself; and in some places for out-houses and fold-yards. In the Stat. 2 & 3 Ed. 6. c. 12, barton lands, and demesne lands, are used as synonimous. Broughton says it always signifies a farm distinct from a manor; and hereafter were farmers, husbandmen that held barons at the will of the lord. In the Weal, they called a great farm a hoxon or baron; and a small farm, a living. Broughton, in Barton and Barton.

BAS CHEVALIERS. Low or inferior knights by tenure of a base military fee, as distinguished from baronets, the chief or superior knights: hence we call our simple knights, c.viz. knights butchers, bas chevaliers. Kennet; Gloss. to Paroch. Antiq.

BASE COURT, Fr. cour baufc.] is any inferior court, that is not of record, as the court baron, &c. Kitch. fea. 95, 96.

BASE ESTATE, Fr. bar efat.] Or base Tenure. That estate which basfe tenants have in their lands. And basfe tenants, according to Lambard, are those who perform villainous services to their lords; but there is a difference between a base estate and villenage: for to hold in pure villenage is to do all that the lord shall command him; and if a copy-holder have but a base estate, he not holding by the performance of every commandment of his lord, cannot be held to hold in villenage. See Kitch. 41.—This Dict. title Tenures.

BASE FEE, is a tenure in fee at the will of the lord, distinguished from fagage free tenure: but Lord Coke says, that a base fee, or qualified fee, is what may be defeated by limitation, or on entry, &c. Co. Litt. 1. 18.

BASE TENURE, or base tenure, was a holding by villenage, or other customary service, opposed to base tenure, the higher tenure in capite or by military service, &c.—See tit. Tenure; Test.

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

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

BASELARD, or BASILLARD, In the Stat. 12 Rich. 2. c. 6. Signifies a weapon, which Mr. Spright, in his exposition upon Chaucer, calls pedronis et flicam, a poniard. Knighton, lib. 5. p. 2731.

BASELUS, A word mentioned in several of our historians signifying King, and seems peculiar to the kings of England. Monasticon, tom. 1. p. 65. Ego Edgar tunc Angliae basilicus confirmavi.—In many places of the Magnon this word occurs; and also in Ingulphus, Malnebury, Mar. Paris. Hannon, &c.

BASKET-TENURE of lands. See Caughellus.

BASNETUM, A buffet, or helmet.

BASSINET, Tenure of lands. See Caughellus.

BASSE-DE-SABLE, A kind with which the soldiers covered themselves. Brought on.

BASTARD, bastardus; fancifully derived from the Greek ΒΑΣΤΑΡΔΟΣ, morerix; more truly from the Brit. Baf, tart, in, spura; or according to Spelman from the German, basart—bus, low, and nert rifer, Sax. sieris; as up-flart, bono nox, suddenly rifer up.] One whole father and mother were not lawfully married to each other, previous to his birth; or as it has been feamingly more incorrectly phrased, "one born out of lawful wedlock."

I. 1. Who are Bastsard, and of their Incapacities.

II. 1. Of the Trial of Bastiards.

II. 2. Of the Case of Infants-Bastards, their Maintenance and Protection.

II. 2. Of the Murder of Infant-Bastards.

I. 1. A bastard by our English laws, is one that is not only begotten, but born out of lawful marriage. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards interminate; and herein they differ most materially from our law; which though not so strict as to require that the child shall be legitimated, yet makes it an indispensable condition to make it legitimate, that it shall be born after lawful wedlock. 1 Comm. 454: 2 Inst. 96. 7.

Blackstone
BASTARD I. 1.

Blackstone observes, that the reason of our English law is surely much superior to that of the Roman, in the considerations of the marriage contract taken in a civil view. He then recapitulates several motives, which he concludes we may suppose actually to have acted on some former parliament of Marriage, when they refused to enact that children born before marriage should be deemed legitimate. [Comm. 458]—See 1 Inst. 244, &c., and 245 a, in the notes.

If a man marries a woman grossly big with child by another, and within three days after, she is delivered, the issue is no bastard. [1 Dan. Abr. 739.] If a child is born within a day after marriage between parties of full age, if there be no apparent impossibility that the husband should be the father of it, the child is not bastard, but supposed to be the child of the husband. [1 Rot. Abr. 358.]

As all children born before matrimony are bastards, so are all children born so long after the death of the husband, that by the usual course of gestation they could not be begotten by him. But this being a matter of some uncertainty, the law is not exact as to a few days. [C. J. Jac. 451.]—See 1 Inst. 1236, in note 1 and 2; where the time of gestation as connected with this question is enquired into at great length, and with exquisite nicety and accuracy. On the whole it appears that what is commonly considered as the usual period is sixty weeks, or 280 days.—But though the child is born some time after, it only presumes presumptuiously, not proof of illegitimacy. The information of the late celebrated anatomist Dr. Hunter, is also given, from which we learn, 1. That the usual period is nine calendar months; (from 270 to 280 days;) but there is very commonly a difference of one, two, or three weeks. 2. A child may be born alive at any time, from three months, but we see none born with powers of coming to manhood, or of being reared before seven calendar months, or near that time; at six months it cannot be. 3. The Doctor said he had known a woman bear a living child, in a perfectly natural way, fourteen days later than nine calendar months; and he believed two women to have been delivered of a child alive, in a natural way, above ten calendar months from the hour of conception.

This case of birth of children after the death of the husband, gives occasion to the writ de centre injusticiis. See title Centre in justiciis.

But if a man dies, and his widow soon after marries again, and a child is born within such a time, as that by the course of nature it might have been the child of either husband, in this case he is said to be more than ordinarily legitimate, for he may when he arrives to years of discretion, choose which of the fathers he pleases. [1 Inst. 8.] For this reason by the ancient Saxon laws, in imitation of the civil law, a widow was forbidden to marry for twelve months. [L. Ethel. A. D. 1008: L. Com. c. 71; 1 Comm. 456, 7.—See 1 Inst. 8 a, in note 7, where it is said, "Brook questions this doctrine, from which it seems as if he thought it reasonable that the circumstances of the case, instead of the choice of the issue, should determine who is the father." See Bro. Alb. Basterd. p. 18: Palms. 10.—See further, 1 Inst. 123 6. in note 1, where additional authorities are cited, to show that in this case a jury ought to decide on the question, according to proof of the woman's condition.

Children born during wedlock, may also in some circumstances be bastards. As if the husband be out of the kingdom of England, (or as the law somewhat loosely phrases it, extra quattuor maria,) for above nine months, so that no access to his wife can be presumed, the issue during that period shall be bastards. [1 Inst. 244.] But generally, during the coverture, access of the husband shall be presumed, unless the contrary can be shown. [Salk. 123: 5 P. Wms. 276: Sre. 925.] which is such a negative as can only be proved by showing him to be elsewhere; for the general rule is primum non nocere. [5 Rep. 98.]—See also 1 Inst. 128 a, in note 2; and as to there phrases infra (or more classically infra & extra), quantum maria, see some incomplete notes in 1 Inst. 168 a, note 6; and 261 a, note 1.—Although a abuse coverture may on a question of bastardy give evidence of the fact of criminal conversion, yet the shall not be admitted to prove the non-access of her husband. [Annul. 79.]

There are determinations by which it appears that the child of a married woman may be proved a bastard by other circumstantial evidence than that of the husband's non-access, &c. For by the rules of the civil law, this person is supposed to be the child of the husband, and afterwards marries the same woman, the issue in a lawful and null from the marriage, in a spiritual court a vinculo matrimonii, all the issue born during the coverture are bastards; because such divorce is always upon some cause, that rendered the marriage unlawful and null from the beginning. [1 Inst. 253.]

If a man or woman marry a second wife or husband, the first being living, and have issue by each second wife or husband, the issue is a bastard. See Rott, [Ed. 1793 by Cost.] 397, p. 521. Before the statute 2 & 3 Ed. c. 21, one was adjudged a bastard, Quia filius suclavidiis.

A man hath issue a son by a woman before marriage, and afterwards marries the same woman, and hath issue another son born after the marriage; the first of these is termed in law a bastard sanguinis, and the second a natura, or natura putidus; by the common law, as hath been said, such bastard sanguinis is as incapable of inheriting, as if the father and mother had never married; but yet there is one case in which his issue was let into the succession, and that was by the consent of the lord and person legitimate; as if upon the death of the father the bastard sanguinis enters, and the natura during his whole life never disturbs him, he cannot upon the death of the bastard sanguinis enter upon his issue. [Lis. 393: 2 Cot. Lith. 245.]

To exclude the natura from the inheritance, there must not only be an uninterrupted possession of the bastard sanguinis during his life, but a descent to his issue. [Cot. Lith. 245.] 1 Rel. Abr. 624.

No man can bastardize another after his death, that was a natura by the laws of holy church, and who carried the reputation of legitimate during his life; for a man must be bastardized by the rules of the civil or common law: by the rules of the civil law, this person is by implication legitimate; and if the common law be made the Judge, he cannot be bastardized; for it is a rule of common law, that a personal descents with the person, and cannot after his death be objected to his successor that represents.
BASTARD I. 2.

presents him; and this rule of law was taken from the humanity of the antients, which would not allow the calumny of the dead; as also from an important reason of convenience, for pedigrees are often derived through several persons, concerning whom there remains little knowledge or remembrance of anything, but only of their being; and therefore it was an easy matter to throw on them the aspersions of bastardy by any forged evidence, which cannot be confronted by opposite proof; and so it is to limit a time in which all proofs of bastardy are to be disallowed. 7 Co. 44: Jenk. Rep. 268; 1 Brown's Co. Lit. 331: 1 Lit. 579. Co. Lit. 245.

In the case of Pride v. The Earl of Bath and Montague, it was held that the rule that a person shall not be bastardized after his death, is only good in the case of bastardy evident and malleable. 1 Saw. 120: 3 Lev. 410.

If there be an apparent impossibility of procreation on the part of the husband, natural or accidental, as in case of the husband being only eight years old, or disabled by disease, there the issue of the wife shall be a bastard.

1 Inf. 214.

The rights of a bastard are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody, and sometimes called filius nullius, sometimes filius populii. For Isa. de Li. c. 40.

Yet he may gain a surname, though he has none by inheritance. 1 Inf. 3, 123: 6 Co. 65.

Where a remainder is limited to the eldest son of Jane S., whether legitimate or illegitimate, and the rash issue, a bastard shall take this remainder, because he acquires the denomination of her issue by being born of her body; and so it was never uncertain, who was designated by this remainder. Nay 35.

When parents are married, and afterwards divorced, this gives the issue the reputation of children, and so doth a subsequent marriage of the parents. 6 Co. 65: Hug. 2. Abr. 531.

If a man, in consideration of natural affection and love, covenants to stand feised to the use of a bastard, this is not good; for he is not de fangoine partis; but it is said that a woman may give lands in frank-marriage with her bastard, because he is of the blood of the mother; but he hath no father, but from reputation only. Dyer 374: Adr. 790; 6 Co. 772: Nay 35.

A court of equity will not supply the want of a surrender of a copyhold estate, in favour of a bastard, as it will for a legitimate child. Preced. Chinn. 475.

The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs but of his own body; for being as was before said nullius filius, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. But though bastards are not looked upon as children to any civil purposes, yet the ties of nature hold as to maintenance, and many other purposes; as particularly that a man shall not marry his bastard sister or daughter. 3 Saw. 66, 7: Le Roy. 68: Comb. 356.

And see. 7. II.

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

A bastard may be made legitimate, and capable of inheriting by the transcendent power of an act of parliament, and not otherwise. 4 Inf. 361; as was done in the case of John of Cram's bastard children, by a Stat. of R. 2; 1 Comm. 459.

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

In the case of the Stat. of Morton, 20 H. 3, the question, whether born before or after marriage, was examined before the ecclesiastical judge, and his judgment was certified to the king or his justices, and the king's court either abided by it, or rejected it at pleasure. But after the solemn protest made by the Barmes at Morton, against the introduction of the doctrine of the civil and canon law in this respect, bastardy has been always triable at common law; and general bastardy alone has been left to the judgment of the ecclesiastical judge, who in this case agrees with the temporal. 2 Inf. 99: Reserve Hist. Eng. Laws, 85, 201; and see 1 Inf. 120 a. note 2; and 245 a. note 1.

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

Formerly bastards had a way in such issues to trifle themselves into legitimation; for they used to bring forged actions, and get submerged witnesses before the bishop to prove their legitimation, and then got the certificate return'd of record, and after that their legitimation could never be contested; for being return'd of record as a point adjudged by its proper judges, and remaining among the memorials of the court, all persons were concluded by it; but this created great inconveniences, as is taken notice of in the preamble of Stat. 9 M. 6, c. 11, in the case of several persons of quality; for the evidence of the contrary parties concerned were never heard at the trial, and yet their interest was concluded; to remedy this inconvenience without altering the rules of law, it was enacted, that, before any writ to the bishop, there should be a proclamation made in the court, where the plea depends, and, after that, the issue should be certified into Chancery, where proclamation should be made once in every month for three months, and then the Chancellor should certify to the court where the plea depends, and afterwards it shall be again proclaimed in the same court, that all that are concerned may go to the Ordinary to make their allegations; and without these circumstances, any writ granted to the ordinary, and all proceedings thereupon, shall be utterly void. 1 Rel. Abr. 361.

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

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

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

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

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

Special bastardy, is two fold: 1st. Where the bastard is the gift of the action, and the material part of the issue. 2dly. Where those are bastards by the common law that are mulers by the spiritual law. 1 New Abr. 314. Co. Lit. 134: 1 Rel. 307: Hob. 117.

If a man receives any temporal damage by being called a bastard, and brings his action in the temporal courts, and the defendant justifies that the plaintiff is a bastard, this must be tried at common law, and not by writ to the bishop; for otherwise you suppose an action brought in a court which hath not a capacity to try the cause of action. 1 Brownl. 1: Hob. 179: Gold. 479: Co. Ent. 29.

If be found by an affidavit taken at large that a man is a bastard, the temporal courts are judges of it; for the jury cannot be stopped to speak truth which may fall within their own knowledge, and what they find becomes the record of the temporal courts, and so within their concurrence. Bro. Bastardy 97.

II. 1. By Stat. 18 Eliz. c. 3, (and see Stat. 3 Car. 1. c. 4,) two justices of peace may make an order on the mother or reputed father of a bastard to maintain the infant by weekly payments or otherwise: and if the party disobey such order, he or she may be committed to gaol, until they give security to perform it; or to appear at the feissions.—By Stat. 7 Jac. 1. c. 4. § 7, the justices may commit the mother of a bastard, likely to become chargeable, to the house of correction for a year; or for a second offence ill; give security for her good behaviour. By Stat. 13 & 14 Car. 2. c. 12. § 19, if the putative father or lawful mother run away from the parish, the overseers may by authority of two justices, issue, and by order of the feissions, fell the effects of the father or mother to maintain the child.—By Stat. 6 Geo. 2. c. 31, the mother of a bastard may, before or after it is born, swear it to any person; and the putative father shall then on application by the overseer of the parish be apprehended and committed; unless he give security to indemnify the parish; or to appear at the next sessions: but if the woman die or marry before delivery, or miscarriage, or prove not to be with child, the reputed father shall be discharged. Any justice near the parish, on application of the reputed father in custody, shall summon the overseer to show cause against his being discharged; and if no order be made in pursuance of Stat. 43 Eliz. c. 2, (for the maintenance of the child,) within six weeks after the woman's delivery, he shall be discharged.—By the said Stat. 6 Geo. 2. c. 31. § 4, it is expressly provided that, "It shall not be lawful for the justice to send for any woman before the shall be delivered, or for a month after, in order to be examined concerning her pregnancy; or to compel any woman before her delivery to answer any question relating to her pregnancy."—By Stat. 13 Geo. 3. c. 82. § 5, bastards born in any licensed hospital for pregnant women, are settled in the parishes to which their mothers belong. And the like provision is made by Stat. 20 Geo. 3. c. 36. § 2, as to bastards born in houses of industry.

The putative father of a bastard, although no legal relationship subsists between them, is so far considered as its natural guardian, as to be entitled to the custody of it, for its maintenance and education. 2 Stra. 116; and therefore while under his care and protection, and not likely to become chargeable to the parish, the parish officers have no concern with it. 1 Med. 43; 1 Sid. 444. Bastards are within the meaning of the marriage act. Stat. 26 Geo. 2. c. 33, which requires the content of the father, &c. 1 Term Rep. 66. And the rule that a bastard is filius nullius applies only to the case of inheritances. Ib. 101.

As however, without the protection of its natural parents, a bastard is settled in the parish in which it is born, (Salk. 479; 3 Raw. 7; Paul's P. O. 81;) unless such birth be procured by fraud, Sel. Ca. 66; or happen under an order of removal, 1 Swif. Ca. 33: Salk. 121, 474, 532; or in a state of vagrancy, Stat. 17 Geo. 2. c. 51; or in the house of correction, 2 Bull. 358; or under a certificate, Salk. 186;) and the parish of consequence becomes charged with its maintenance, then and before, the authority of the churchwardens and overseers begins. Say. 93; and they may act without an order from the justices. 3 Term Rep. C. P. 253.—It seems however, that until a bastard attain the age of seven years, it cannot be separated from its mother, Cald. 6; but may be removed to the place of her settlement, while the age of nurture continues. Carls. 279; and must under these circumstances be maintained by the parish where it was born. Doug. 7.

An order of bastardy must be made by two justices, 2 Salk. 479: 1 Salk. 475; on complaint, 1 Barn. K. B. 201; and the examination of the woman must be taken in the presence of both the justices. 6 Mod. 180: 2 Black. Rep. 1027; but it is not necessary that the putative father should be present to hear what the deposes. Cald. 368; although he must be summoned before an order of litigation can be made, 8 Mod. 3: 1 Pet. Ca. 179; for he cannot be compelled to give security, or be compelled until he has made default. 1st. Regn. 233. 82; 3 Salk. 66; but if an order of litigation is once made, the fact of bastardy is established until the order is reversed. Cro. Jud. 515.
BASTARD.

The justice may commit if the putative father neglects to pay the maintenance therein ordered for the support of the child, unless he give a bond to bear the parish harms, or to appear at the sessions. 1 Sid. 32: 1 Vent. 41: Lid. Raym. 658, 1157. The order can only be reversed by an appeal to the sessions, which must be to the next sessions after notice of the order; 2 Sid. 486, 2: and if the sessions reverse the order of the two justices, yet they may on summons make another, on the same or on any other person; for in this respect they have an original jurisdiction. 1 Bish. 355: 1 Stra. 473: Dugl. 632. The order however may before appeal to the sessions be removed by coercio, into K. B. and there quashed for errors on the face of it. Co11. 172.—But no order of bastardy made at sessions can be quashed in K. B. unless the putative father is present in court. 2 Salk. 475: for, on its being quashed, he shall enter into a recognizance to abide the order of the sessions below. 1 Bl. Rep. 158.

On this part of the subject see further, Bast's Pou Lewes, Comp's Edit. 1793.

In an ancient MS, temp. E. 3, it is said that he who gets a bastard in the hundred of Middleton in Kent, shall forfeit all his goods and chattels to the king. 2. By Stat. 21 Jac. 1, c. 27, it is enacted, "That if any woman be delivered of any issue of her body, which being born alive, should by the laws of this realm be a bastard, and the endeavours privately, either by drowning, or secret burying thereof, or any other way, either by herself, or the procuring of others, so to conceal the death thereof, as it may not come to light, whether it were born alive or not, but be concealed; in every such case the said mother so offending shall suffer death, as in case of murder; except such mother can make proof by one witness at the least, that the child, whose death was by her intended to be concealed, was born dead."

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

Also, it hath been agreed, that where a woman appears to have endeavoured to conceal the death of such child within the statute, there is no need of any proof that the child was born alive, or that there were any signs of hurt upon the body, but it shall be sufficiently taken that the child was born alive, and murdered by the mother. 2 Harg. P. C. 46, §43.

But it hath been adjudged, that where a woman lay in a chamber by herself, and went to bed without pain, and waked in the night, and knocked for help but could get none, and was delivered of a child, and put it in a trunk, and did not dissemble it till the following night, yet the was not within the statute, because she knocked for help. 2 Harg. P. C. 46, §43.

Also, it hath been agreed, that if a woman conceals herself with child beforehand, and afterwards be surprized and delivered, no body being with her, she is not within the statute, because there was no intent of concealment, and therefore in such cases it must appear by signs of hurt upon the body, or some other way, that she was born alive. 2 Harg. P. C. 46, §43.

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

If a woman be quick or great with child, if she take, or any other give her any potion to cause an abortion, or if a man lirkne her, whereby the child within her is killed; though it be a great crime, yet it is not murder nor manslaughter by the law of England, because the child is not yet at term natural, nor can it legally be known, whether it were killed or not: for if such child were born alive, and after die of the stroke given to the mother, this is not homicide. 1 Hal. H. P. C. 433. The offender however may be indicted for a misdemeanor, at common law.

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

BASTARDY. [Bastard.] The defect of birth, objected to one born out of wedlock. Brab. ab. 5. c. 10. See Bastard.

BASTARD EIGNE, See Bastard.

BASTON, Fr.] A staff, or club. In the statutes it signifies one of the warden of the Fleet's servants or officers who attend the king's courts with a red staff for taking such into custody who are committed by the court. Stat. 1 R. 2. c. 12: 5 Eliz. c. 23. See Visiter.

BASUS, po basum intemum capere, To take toll by rilie; and by heap; po basus, being opposed to in corum vel cantelo. See Conficiend. Domus de Farcandor, MS, f. 42.

BATTLEGROUND. Land that lay between England and Scotland, heretofore in question, when they were distinct kingdoms, to which it belonged; litigious or doubtful ground, i.e. land about which there is debate; and by that name some calls ground that is in controversy. Comb. Britan. title Cumberland.

BAITELLA, A Beet.

BATH, lat. Batum, called by the Britons Bathua, has been termed the city of bucken, Saxon: Acconitum Cyrilis. It is a place of resort in Somersetshire famous for its medicinal waters. The chairmen there to be selected by the mayor and aldermen, by statute 7 Geo. 1 c. 19. And a public hospital or infirmary for poor is established in the city of Bath, the governors whereof have power to hold all charitable gifts, &c. and appoint physicians, surgeons and other officers: any person not able to have the benefit of the Bath waters, may be admitted into this hospital, their case being attested by some physician, and the poverty of the patient certified by the minister and churchwardens of the place where they live, &c. Every person to admitted, shall have the use of the old hot baths, and be entertained and relieved in the hospital; and when cured or discharged, such persons shall be supplied with 3d. each, to defray the expense of removing them back to their parishes, &c. Stat. 12 Geo. 2. c. 31.


BATTLE, Fr. bataille. A trial by combat, anciently allowed of in our laws, (among other cases,) where the
the defendant in appeal of murder or felony might fight with the appellant, and make proof thereby whether he be culpable or innocent of the crime. When an appellee of felony wages battel, he pleads that he is not guilty, and that he is ready to defend the same by his body, and then dings down his glove; and if the appellant will join battel he replies, Thus he is ready to make good his appeal by his body upon the body of the appellee, and then the appellee lays his right hand on the book, and with his left hand takes the appellee by the right, and swears thus: Hear this thou who callest thyself John by the name of baptism, that I who call myself Thomas by the name of baptism, did not feloniously murder the father W. by name, on the day and year of, &c. at B. as you surmise, nor am any way guilty of the fault felony; so help me God. And then he shall kiss the book and say: And this I will defend against thee by my body, as this court shall award. Then the appellant lays his right hand on the book, and with his left hand takes the appellee by the right, and swears to this effect: Hear this thou who callest thyself Thomas by the name of baptism, that thou dost dingle feloniously on the day, and in the year, &c. at B. murder my father W. by name; so help me God. And then he shall kiss the book, and say: And this I will prove against thee by my body, as this court shall award. This being done, the court shall appoint a day and place for the battle; and in the mean while the appellee shall be kept in custody of the marshal, and the appellee shall find sureties to be ready to fight at the time and place, unless he be an approver, in which case he shall also be kept by the marshal: and the night before the day of battle, both parties shall be arraigned by the marshal, and shall be brought into the field before the justices of the court where the appeal is depending, at the rising of the sun, bare-headed and bare-legged from the knee downwards, and bare in the arms to the elbows, armed only with swords, epees, and broadswords, and four-cornered targets: and before they engage, they shall both make oath, But they have neither eat nor drunken, nor done any thing else, by which the law of God may be defeated, and the law of the land enforced; and then, after proclamation for silence under pain of imprisonment, they shall begin the combat, wherein if the appellee be so far vanquished that he cannot or will not fight any longer, he may be adjudged to be hanged immediately; but if he can maintain the fight till the stars appear, he shall have judgment to be quit of the appeal; and if the appellee becomes a crying coward, the appellee shall recover his damages, and may plead his acquittal in bar of a subsequent indictment of appeal; and the appellee shall for his perjury lose his liberam legem. If an appellant becomes blind by the act of God after he has wagered battel, the court will discharge him of the battel; and in such case it is said that the appellee shall go free. This trial by battel is at the defendant's choice; but if the plaintiff be under an apparent disability of fighting, as under age, maids, &c., he may counterplead the wager of battel, and compel the defendant to put himself upon his country, no champions being allowed in criminal appeals; also any plaintiff may counterplead a wager of battel, by alleging such matters against the defendant, as induce a violent presumption of guilt; as in appeal of death, that he was found lying upon the deceased with a bloody knife in his hand, &c.; for here the law will not oblige the plaintiff to make good his accusation in so extraordinary a manner, when in all appearance he may prove it in the ordinary way. It is a good counterplea of battel that the defendant hath been indicted for the same fact; when if appeal be brought, the defendant shall not wage battel. And if a peer of the realm bring an appeal, the defendant shall not be admitted to wage battel, by reason of the dignity of the appellant. The citizens of London are privileged by charter, that in appeals by any of them, there shall be no wager of battel; and by Stat. 6 R. 2. c. 6, defendant shall not be received to wage battel in an appeal of rape. 2 Haml. P. C. c. 45. This trial by battel is before the contable and marshal; but is now diluted. See Gloce. lib. 12: Bracton; lib. 3: Ebriron, c. 22: Smith de Rep. Angl. lib. 2: Co. Litt. 294, &c. For the manner of waging battel in an appeal of treason, Hawkins cites Roper, co. part 2. vol. 1. 112 — 126; and 3 Comm. 338, vol. 2. This species of trial by wager of battel, (says Blackstone) was introduced into England, among other Norman customs, by William the Conqueror; but was only used in three cases, one military, one criminal, and the third civil. — The first in the court martial or court of chivalry and honour; (Co. Litt. 261.) the second in appeals of felony; [of which above] and the third, upon issue joined in a writ of right, the last and most solemn decision of real property. For in writs of right the jus proprietas which is frequently a matter of difficulty is in question; but other real actions being merely questions of the jus possessio, which are usually more plain and obvious, our ancillors did not in them appeal to the decision of Providence. Another [and as it seems the jurer] pretext for allowing it upon these final writs of right, was for the sake of such claimants as might have the true right, but yet by the death of witnesses or other defect of evidence, be unable to prove it to a jury. Although the writ of right itself, and of course this trial thereof, is at present much diluted, yet it is law at this day; and on that account as matter of curiosity the forms of proceeding therein are collected and preserved in 3 Comm. 338, &c. and the appendix thereto; and are similar to those above recited in criminal cases. The last trial by battel that was waged in the court of Common Pleas at Westminster; [though there was afterwards one in the court of Chivalry in 1631, 6 Car. 1, between Donald Lord Rey appellant, and David RanseI, esquire, defendant, which was compromised; See Org. Jurid. 65: 19 Raym. 322; and another in the county palatine of Durham in 1638; Crow. Car. 512.] was in 13 Eliz. A. D. 1571, as reported by Dyne, and held in Ferrhill-field, Westminster. See Dr. 301, and Spen. in v. Campus; the latter of whom was present at the ceremony. In this trial by battel, on a writ of right, the battel is waged by champions, and not by the parties themselves; because in civil actions, if any party to the suit dies, the suit must abate and be at an end for the present; and therefore no judgment could be given for lands in question, if either of the parties were slain; and also that no person might claim an exemption from this trial, as was allowed in criminal cases. Co. Litt. 224. This form of trial by battel, the tenant or defendant in a writ of right, has it in its election at this day to demand.
BATUS.

Bead.

demand. 3 Comm. 341. And it was the only decision of such writ of right from the Conquest, till Hen. II., by consent of parliament introduced the grand assay; a particular species of trial by jury, in concurrence therewith, giving the tenant his choice of either the one or the other.

—See Glanius, lib. 2. c. 6.

BATTLEUS. See Batus.

BATTERY. Seé title Aduant.

BATUS, Lat. from the Sax. bat.] A boat, and batus: a little boat. Chart. Ed. 1: 20. Julii 18. regni. Hence we have an old word bawnfaim, for such as we now call bawnfaim or a ship.

BAUBELLA. bawbes. [A word mentioned in Homeric in R. 1. and signifies jewels or precious stones.

BADEKIN, baidcum, and baidkinum. Cloth of baidekin, or gold; it is said to be the richest cloth, now called brocade, made with gold and silk, or silks, upon which figures in silk, &c. were embroidered.

BAWDY-HOUSE, Laypanar, fortes.] A house of ill fame, kept for the resort and commerce of evil people of both sexes. The keeping of a bawdy-house comes under the cognizance of the temporal law, as a common nuisance, not only in respect of its endangering the public peace by drawing together idle and debauched persons, and promoting quarrels, but also in respect of its power to corrupt the manners of the people, by an open profusion of lewdness. 3 Inf. 265: 1 Hawk. P. C. c. 74. Those who keep bawdy-houses are punished with fine and imprisonment; and all such infamous punishment, as pillory, &c., as the court in discretion shall think fit: and a lodger who keeps only a single room for the use of bawdry, is liable for keeping a bawdy-house. 1 Saak. 352. Persons resorting to a bawdy-house, are punishable, and they may be heard to their good behaviour, &c. But if one be indicted for keeping or frequenting a bawdy-house, it must be expressly alleged to be such a house, and that the party knew it; and not by suspicion only. Popb. 208. A man may be indicted for keeping bad women in his own house. 1 Hawk. P. C. c. 61. § 2. A constable upon information, that a man and woman are gone to a lewd house, or about to commit fornication or adultery, may, if he finds them together, carry them before a justice of peace without any warrant, and the justice may bind them over to the sessions. 1 Deil. 214.

Constables in these cases may call others to their assistance, enter bawdy-houses; and arrest the offenders for a breach of the peace: in London they may carry them to prison; and by the custom of the city, whores and bawds may be carried. 3 Inf. 365.

As to a married woman's being indicted for keeping a house of ill fame. See ibid. Bawin and Poin VII.

But it is said, a woman cannot be indicted for being a bawd generally; for that the bare licitation of chastity is not indictable. 1 Hawk. P. C. c. 74. § 1. 1 Saak. 352.

It was always held infamous to keep a bawdy-house; yet some of our historians mention bawdy-houses, brothels houses or houses publicly used by bawd in times, till the reign of Hen. 8; by whom they were suppressed about A. D. 1415: and writers assign the number to be eighteen thousand as listed down on the back-side in Southwerk. See Bovale-houses.

By Stat. 35. Gen. 2. c. 36, made perpetual by Stat. 28. Gen. 2. c. 19. If two inhabitants, paying foot and loz, shall give notice to a constable of any person keeping a

bawdy-house, the constable shall go with them before a justice of peace, and shall, (upon such inhabitants making oath, that they believe the contents of such notice to be true, and entering into a recognizance of 20 l. each, to give material evidence of the offence,) enter into a recognizance of 30 l. to prosecute with effect such person for such offence at the next sessions; the constable shall be paid his reasonable expenses by the overseers of the poor, to be ascertained by two justices; and if the offender be convicted, the overseers shall pay to the two inhabitants 10 l. each. On the constable's entering into such recognizance as aforesaid, the justice shall bind over the person accused to the next sessions, and if he shall think proper, demand security for such person's good behaviour in the mean time. A constable neglecting his duty forfeits 20 l. Any person appearing as mather or mistress, or as having the care or management of any bawdy-house, shall be deemed the keeper thereof, and liable to be punished as such.—The same act also directs the licensing by magistrates of all public places within 20 miles of the metropolis.

BAY, or pen. Is a pond head made up of a great height, to keep in water for the supply of a mill, &c., so that the wheel of the mill may be driven by the water coming through a passage or sluice. Stat. 27. Eliz. c. 14. A harbour where ships ride at sea, near some port, is also called a bay.

BEACON, from the Sax. beacons, figure, whence the English, broken to nod or make a sign.] A signal well known; being a fire maintained on some eminence near the coasts of the sea. 4 Inf. 142. Hence beacons (sea-consumers) money paid towards the maintenance of beacons: See Stat. 2. Hen. 4. c. 2, as to keeping watch on the sea coast.

The erection of beacons, light-houses and sea marks, is a branch of the royal prerogative; whereas the first was antiently used in order to alarm the country, in case of the approach of an enemy; and all of them are generally useful in guiding and preserving vessels at sea by night as well as by day. For this purpose the king hath the exclusive power, by commission under his great seal; (3 Inf. 204: 4 Inf. 148;) to cause them to be erected in fit and convenient places, (4 Inf. 135;) as well upon the lands of the subject as upon the demesnes of the crown: which power is usually visé by letters patent in the office of Lord High Admiral, (Sid. 158: 4 Inf. 149;) or the Admiralty board. And by Stat. 8. Eliz. c. 13, the corporation of the Trinity House are empowered to set up any beacons or sea-marks wherever they shall think them necessary; and if the owner of the land or any other person shall destroy them, or shall take down any keep, tree or other known sea-mark, he shall forfeit 10 l. or in case of inability to pay it, he shall be ipso facto outlawed. 1 Comm. 265 — See the Stat. 4. Eliz. c. 20, and 3 Ann. c. 17, for building the Lighthouse light-house near Plymouth, and raising the duties payable by ships for its support; and Stat. 3. Geo. 2. c. 36, as to the lighthouse on the rock Sheerness near Hull, and the piers at the county of Anglie and.

BEAD, or beale, Sax. bead, valu.] A prayer, in that to say over beads, is to say over one's prayers. They were most in use before printing, when poor persons could not go to the charge of a manuscript book: though they are still used in many parts of the world, where the Roman-Catholic religion prevails. They are not allowed to be brought into England, or any superstitious things.
to be used here, under the penalty of a

BEAMS and BALANCE, for weighing goods and merchandise in the city of London. See tit. \em{Weights and Measures.}

BEARERS, Such as bear down or oppress others, and is said to be all one with maintainers. - J uic ests of a sheriff in his county. There is an inferior officer of a parish, or liberty, and otherwise called a bailiff, or him who shall demand such fine, or by such services, as to a bishop, and abbot, subject to the like services, viz. to provide men to serve in the wars; and when they as well as the laity had obtained a property in those lands, they were called regalia when given by the king; and on the death of a bishop, were returned to the king till another was chosen. Office of Hold, c. 21: Blount, \em{Foe.}\n
BEAN, That part of the head of a flag where the horns grow, from the Sax. \em{beam, i.e. orbis;} because they grow out of the head as branches out of a tree.beam is likewise used for a common balance of weights in cities and towns.

BEANS and BALLANCE, for weighing goods and merchandise in the city of London. See tit. \em{Weights and Measures.}

BEAP, BEAREERS, Such as bear down or oppress others, and is said to be all one with maintainers. - Judges of a sheriff in his county. There is an inferior officer of a parish, or liberty, and otherwise called a bailiff, or him who shall demand such fine, or by such services, as to a bishop, and abbot, subject to the like services, viz. to provide men to serve in the wars; and when they as well as the laity had obtained a property in those lands, they were called regalia when given by the king; and on the death of a bishop, were returned to the king till another was chosen. Office of Hold, c. 21: Blount, \em{Foe.}\n
BEAN-FEES. - See tit. Game.

BEAU-PLEADER, paltecr placentius, Fr. brezpleider, i.e. to plead fairly. - Is a writ upon the stature of Marlbridge, 52 Hen. 3, c. 1, whereby it is enacted, That neither in the circuit of justices, nor in counties, hundreds, or courts-baron, any fines shall be taken for fair pleading, viz. for not pleading fairly or apply to the purpose; upon which statute this writ was ordained, directed to the sheriff, bailiff, or him who shall demand such fine, and it is a prohibition not to do it; whereupon an alias and pluries and attachment may be had, &c. New Nat. Br. 596, 597. And draw-pleader is as well in respect of vicious pleadings, as of the fair pleading, by way of amendment. 2 Idf. 122.

BEDDELY, bededalia. The same to a bedel, as bailwick to a bailiff. Lit. lib. 3, cap. 5. Blount: Cowell.

BEDEREPE, alias biderpe, Sax. - A service which certain tenants were ancienly bound to perform, viz. to reap their landlord’s corn at harvest; as some yet are tied to give them one, two, or three days’ work, when commanded. This customary service of inferior tenants was called in the Latin \em{praecario bederium,} &c. See Magna Praecovia.

BEDEWIR, Those which we now call bunders; profligate and excommunicated persons. The word is mentioned in Man. Parf. anno 1258.

BEER, As to the exporting, selling, measuring, &c. See tit. \em{Alehouse, Bever, Navigation Acts, Weights and Measures.}

BEGGARS. See Vagrants.

BEHAVIOUR OF Perfons. Vide Good Behaviour.

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

BERCARIO, bereberg, from the Fr. bergerie.] A sheepfold, or other enclosure for the keeping of sheep: in Domesday it is written berqueriam. 2 Inf. 476: Mon. Angl. tom. 2. p. 599. Bereria: is taken for a sheep-herd: and hereica is said to be abbreviated from hericaria, and berica; hence comes bericams a ram, bericam, an ewe, cora bericiana, motion. *Cowel.*

BERFELLARII: There were seven churches so called, anciently belonging to the church of St. John of Beverley. *Cowel.* Blount.

BERFREIT, BERFREID, A large wooden tower. Simon Dunstan Anno 1123: Blount.

BERGMITER, from the Sax. berg, a hill, quaff, master of the mountains.] Is a bailiff or chief officer among the Derbyshire miners, who also executes the office of a coroner. E. de An. 16 Ed. 1. num. 34 in Turri London. The Germans call a mountaineer, or miner, a bergmann. Blount.

BERGMUTH, or BERMIMOTO, Comes from the Sax. berga a hill, and gentz, a community; and as much as to say an assembly or court on a hill, which is held in Derbyshire, for deciding pleas and controversies among the miners. And on this court of bergmuth, Mr. Mannors, in his Treatise of the Customs of the Miners, hath a copy of the laws, with references to statutes, &c. Vide Super on the Anglo Saxons Government.

BERIA, bery, berry, A large open field.] Those cities and towns in England which end with this word, are built in plain and open places, and do not derive their names from boroughs, as Sir Henry Spelman imagines. Most of our glossographers in the names of places have confounded the word beria with that of bury and borough, as the appellatives of ancient towns; whereas the true sense of the word beria is a flat wide campaign, as is proved from sufficient authorities by the learned Dr. Fretius, who observes that Beria Sancti Edmondis, mentioned by Matt. Paris. sub ann. 1174, is not to be taken for the town, but for the adjoining plain. To this may be added, that many flat and wide meads and other open grounds, are called by the name of beria, and beryfield: the spacious meadow between Oxford and Islip was in the reign of king Athelstan called Bery. As is now the largest pasture ground in Gloucester in the county of Buckingham, known by the name of Beryfield. And though these meads have been interpreted demesne or manor meadows, yet they were truly flat or open meadows, that lay adjoining to any vill or farm. *Cowel.*

BERIA, A plain open heath. Berias afferentare, to grab up such barren heaths. *Cowel.*

BERNET, Invennum, comes from the Sax. byrnan, to burn: it is one of those crimes which by the laws of Hen. 1 cap. 15, remendari non poenatur. Sometimes it is used to signify any capital offence. Leges Canuti apud Brompt. c. 90: Leg. Hen. 1. c. 12. 47.

BERQUARIUM, Vide Bertaria.

BERSA, Fr. bos.] A limit or bound. A park pale. *Blount.*

BERSARE, Germ. hofja, to shoot.] Berse in forsuna mea ad vixi vocit. Chart. Ranulf. Comit. Cancell. ann. 1218. *Vide* to hunt or shoot with three arrows in my forest. Bersearii were properly those that hunted the wolf. *Blount.*


BERTON, Set. Burton.

BEREWICH, or BERRICK, Villages or hamlets belonging to some town or manor. This word often occurs in Domesday: *Vide* berewich or berewich also maneri. *Blount.*

BERWICK, The town of Berwick upon Tweed was originally part of the kingdom of Scotland; and as such was for a time reduced by King Edward I. into the possession of the crown of England: and during such its subjection it received from that prince a charter, which (after its subsequent cessation by Edward Balliol, to be for ever united to the crown and realm of England) was confirmed by King Edward III. with some additions; particularly that it should be governed by the laws and usages which it enjoyed during the time of King Alexander, that is, before its reduction by Edward I. Its constitution was new modelled and put upon an English footing by a charter of King James I. and all its liberties, franchises, and customs were confirmed in parliament by 22 E. 4. c. 8; and 2 Stat. 1. c. 28. Though therefore it hath some local peculiarities derived from the ancient laws of Scotland; (See Hale Hist. C. L. 183: 1 Stat. 324, 462: 2 Stat. 355) yet it is clearly part of the realm of England, being represented by barges in the house of commons, and bound by all acts of the British parliament, whether specially named or otherwise. And therefore it was perhaps perniciously declared by Stat. 20 Geo. 2. c. 42, that where England only is mentioned in any act of parliament, the same notwithstanding hath been and shall be deemed to comprehend the dominion of Wailes and town of Berwick upon Tweed. And though certain of the king's writs or processes of the courts of Westminster, do not usually run into Berwick, any more than the principality of Wailes, yet it hath been solemnly adjudged, that all prerogative writs (as those of mandamus, prohibition, habeas corpus, certiorari, &c.) may issue to Berwick as well as to every other of the dominions of the crown of England; and that indictments and other local matters arising in the town of Berwick, may be tried by a jury of the county of Northumberland. 1 Cow. 543: 2 Ro. 252: Stat. 11 Geo. 1. c. 4: 4 Burr. 334: 1 Comm. 99.

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

BESAILLE, or BESAYLE, Fr. biseul, freuse.] The father of the grandfather: and in the common law it signifies a writ that lies where the great grandfather was felt the day that he died, of any lands or tenements in fee-simple; and after his death a stranger entered the same day upon him, and keeps out the heir. *F. N. B. 222.* See the Mort d' Anterle.

BESCHA,
BESCHA, from the Fr. bencher, fakere, to dig.] A spade or shovel. Hence perhaps, nna Befchate terra inchela—Mon. Ang. tom. 2. fol. 642, may signify a piece of land usually turned up, as gardeners fit and prepare their grounds; or may be taken for as much land as one man can dig with a spade in a day.

BESTIALS, bestiales.] Beasts or cattle of any sort; Stat. 4 Ed. 3. c. 5, it is written bestiales; and is generally used for all kinds of cattle, though it is generally restrained to those anciently purveyed for the king's provision.


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

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

BIDALE, or BIDALL, precaria potatoria, from the Sax. bidan, to pray or supplicate.] Is the invitation of friends to drink ale at the house of some poor man, who thereby hopes a charitable contribution for his relief; it is still in use in the West of England: and is mentioned Stat. 26 Eliz. 3. c. 6. And something like this seems to be what we commonly call house warming, when persons are invited and visited in this manner on their first beginning house-keeping.

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

BIDENTES, Two yearlings or sheep of the second year. Parech. Antiq. p. 216.

BIDUANA, A falling for the space of two days. Mate. Wof. p. 155.

BIGA, bigara.] A cart or chariot drawn with two horses coupled side to side; but it is said to be properly a cart with two wheels, sometimes drawn by one horse; and in our ancient records it is used for any cart, wain or waggon. Mon. Angl. tom. 2. fol. 256.

BIGAMUS, One guilty of bigamy.

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

Bigamy according to the Canonists, consisted in marrying two virgins successively, one after the death of the other, or in once marrying a widow. Such were esteemed incapable of holy orders; probably on the ground of St. Paul's words. 1 Tim. c. 5. v. 2. "That a bishop should be the husband of one wife." and they were by a canon of the council of Lyon, A. D. 1274, denied all clerical privileges. This canon was adopted and explained in England by the Stat. 4 Eliz. 1. b. 3. (commonly called the Stat. de bigamia) c. 5; and bigamy thereupon became no uncommon counterplea to the claim of the benefit of clergy. The cognizance of the plea of bigamy was declared by Stat. 18 Eliz. 3. b. 3. c. 2, to belong to the Court Chriftian, like that of bastardy. But by Stat. 1 Ed. 6. c. 12. § 16, bigamy was declared to be no longer an impediment to the claim of clergy. See Dal. 21: Dyve 201; and 1 Litt. 819; note 1.

A second marriage, living the former husband or wife is, by the ecclesiastical law of England, simply void, and a mere nullity; but the Legislature has thought it just to make it felony, by reason of its being so great a violation of the public economy and decency of a well-ordered state. By Stat. 1 Jac. 1. c. 11, it is enacted that if any person, being married, do afterwards marry again, the former husband or wife being alive, it is felony; but within the benefit of clergy.

This act however makes exception to five cases, in which such second marriage, (though in the three firsts it is void) is yet no felony: (See 3 Inst. 89: Kel. 27: 1 Hal. P. C. 694.)—1. Where either party has been continually abroad for seven years, whether the party in England hath notice of the others being living or no. 2. Where either of the parties has been absent from the other seven years within this kingdom; and the remaining party hath had no knowledge of the other's being alive within that time. 3. Where there is a divorce; (or separation à mensaj de theri.) 1 Hawk. P. C. 174;) by sentence in the ecclesiastical court. 4. Where the first marriage is declared absolutely void by any such sentence; and the parties looked à vinculo matrimonia, or 5. Where either of the parties was under the age of consent at the time of the first marriage. 1 Hawk. P. C. 174. 1 Inst. 79.

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

If the first marriage were beyond sea, and the latter in England, the party may be indicted for it here; because the latter marriage is the offence; but not vice versa, though scarce where not. 1 Hawk. P. C. 174, 5: 1 Hal. P. C. 592: 1 Sid. 171. Kel. 60.

A sentence in the ecclesiastical court against a marriage, in a suit for jailing does not preclude the proof of a marriage on an inditement on the statute.—And admitting such sentence were conclusive as to the fact of marriage, the effect may be avoided by evidence of fraud and collusion in obtaining the sentence. 11 St. Tr. 262. Dutches of King'ston's cafe.

As to husband and wife being evidence against each other on trial for this offence. See fit. Baron. and Feme. 1. 2.

BIGOT, A compound of several old Eng. words.] An obilinate person; or one that is wedded to an opinion, in matters of religion, &c. It is recorded that when Rolle the first duke of Normandy, refused to kill the King's foot, unless he held it out to him, it being a ceremony required in token of subjection for that duke, domin, with which the King invited him; those who were present taking notice of the duke's refusal, advised him to comply with the king's desire, who answered them ne se biget; whereupon he was in derision called bigot, and the Normans are so called to this day. Blount.

BILAGINES, Lat.] By-laws of corporations, &c. See By-laws.
BILL OF EXCEPTIONS TO EVIDENCE. At Common law a writ of error lay, for an error in law, apparent in the record, or for error in fact, where either party died before judgment; yet it lay not for an error in law not appearing in the record; and therefore, where the plaintiff or defendant, tenant or defendant, alleged any thing not true, which was over-ruled by the judge, this could not be assigned for error, not appearing within the record, not being an error in fact, but in law; and for the party alleged was without remedy. 2 Inst. 298. 1228.

And therefore by the act of 15 Eliz. c. 31, "When one pleaded before any of the judges, alleging an exception, praying they will allow it, and if they will not, he that alleges the exception writes the same, and requires that the judges will put to their seals, the judges shall do; and if one will not, another shall; and if, on complaint made of the judges, the King cause the record to come before him, and the exception be not found in the roll, and the plaintiff shew the written exception, with the seal of the judge thereto put, the judge shall be commanded to appear at a certain day, either to confess or deny his seal, and if he cannot deny his seal, they shall proceed to judgment according to the exception, as it ought to be allowed or disallowed."

This statute extends to the plaintiff as well as defendant, also to him who comes in loco tenens, as one that prays to be received, or the voucher; and in all actions whether real, personal, or mixt. 2 Inst. 347.

The statute extends not only to all pleas dilatory and peremptory, but to prayers to be received, error of records and deeds, &c. also to challenges of jurors, and any material evidence offered and overruled. 2 Inst. 347: 2 Bl. 231. pl. 1. 2 Sym. 436.

The exceptions ought to be put in writing underhand curial, in the presence of the judge who tried the cause, andigned by the counsel on each side; and then the bill must be drawn up and tendered to the judge that tried the cause to be sealed by him; and when sigued, there goes out a fieri facias to the same judge ad expungendum scriptum, and that is made part of the record, and the return of the judge with the bill itself, must be entered on the blue roll; and if a writ of error be brought, it is to be returned as part of the record. 1 Nelf. 373. If a bill of exceptions is drawn up, and tendered to the judge for sealing, and he refuses to do it, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated; and if he returns that the fact is untrue stated, when the case is otherwise, an action will lie against him for making a false return. 3 Comm. 372: 2 Reg. Br. 182: 2 Inst. 347.

If one of the judges signs his seal to the bill, it is sufficient; but if they all refuse, it is a contempt in them all. 2 Inst. 347: 2 Sym. 327. S. P.

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

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

These bills of exceptions are to be tendered before a verdict given; 2 Inst. 347; and extend only to civil actions.
BILL of EXCHANGE.

I. Of the Nature of 1, Bills of Exchange; 2, Inland and Foreign; 3, Promissory Notes.—4. The Parties to them.—5. The Distinction and Reusance between the several Kinds of Bills and Notes.—6. Bank and Bankers' Notes.—7. The Assumptions, of Bills and Notes.

II. Of the Acceptance of Bills; how, when, by and to whom made.

III. Of the Transfer of Bills and Notes by Indorsement, &c.

IV. Of the Engagements of the several Parties.

V. Of 1, the Notice and Remedy on Bills and Notes; 2, Manner of declaring and pleading; 3, The Evidence; and 4, the Defence.

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

I. A BILL of EXCHANGE is an open letter of request, addressed by one person to another, ordering him to pay a sum of money to a third, or to any other to whom that third person shall order it to be paid: or it may be made payable to bearer.

The person who makes the bill is called the drawer; he to whom it is addressed the drawer; and when he undertakes to pay the amount, he is then called the acceptor. The person to whom it is ordered to be paid is called the payee; and if he appoint another to receive the money, that other is called the indorser, as the payee is, with respect to him, the indorser; any one who happens for the time to be in possession of the bill is called the holder of it.

The time at which the payment is limited to be made is various, according to the circumstances of the parties and the distance of their respective residences. Sometimes the amount is made payable at sight; sometimes at so many days after sight; at other times at a certain distance from the date. Usance is the time of one, two or three months after the date of the bill according to the customs of the places between which the exchanges run; and the nature of which must therefore be known and averred in a declaration on such a bill.—Double or treble usance is double or treble the usual time; and half usance is half the time. Where the time of payment is limited by months, it must be computed by calendar, not lunar months: and where one month is longer than the succeeding one, it is a rule not to go in the computation into a third. Thus on a bill dated the 23rd, 29th, 30th or 31st of January, and payable one month after date, the time expires on the 28th of February in common years, and in the three latter cases in leap-year on the 29th. [To which are to be added the days of grace. See p. 38.] Where a bill is payable at so many days after sight, or from the date, the day of preference, or of the date is excluded. Thus where a bill payable 10 days after sight is presented on the 17th day of a month, the 10 days expire on the 11th; where it is dated the 18th, and payable 20 days after date, these expire on the 21st. Le. Rns. 281; Sirw. 829.

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

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

It does not appear that inland bills of exchange were very frequent in England before the reign of Charles II; (see 6 Mod. 29;) And when they were introduced, they were not regarded with the same favour as foreign bills.

At length the Legislature by two different statutes; 9 & 10 W. 3. c. 17; and 3 & 4 Anr. c. 9; set both on nearly the same footing: so that what was the law and custom of merchents with respect to the one, is now in most respects the established law of the country with respect to the other.

The following are the most general forms of inland and foreign bills of exchange; but which are varied according to circumstances.

L. 100.

London January 1, 1793.

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

To Mr. C. D.

[Place of abode and business] T. T.

Acc. C. D.

London, Jan. 1, 1793.

Exchange for L 50 sterling

At sight [Or, at sight of this my only bill of exchange] pay to Mr. A. B. or order, Fifty pounds sterling value received of him, and place the same to account, as per advice [Or without further advice] from

To Mr. C. D. & Co.

V. S.

London, Jan. 1, 1793.

Exchange for 10,000 liv. Tournois.

At fifteen days after date [Or, at one, two, &c. usance] pay this my first bill of exchange, (second and third of the same tenor and date not paid) to Messrs. A. B. and Co. or order, Ten thousand livres Tournois, value received of them, and place the same to account, as per advice from

To Mr. E. F.

Banker in Paris. C. D.

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

3. A Promissory Note, is a less complicated kind of security, and may be defined to be, an engagement in writing, to pay a certain sum of money, mentioned in it, to a person named, or to his order, or to the bearer at large. At first these notes were considered only as written evidence of a debt; for it was held that a promissory note was not assignable or indorsable over, within the custom of merchants; and that if in fact such a note had been indorsed or assigned over, the person to whom it was so indorsed or assigned, could not maintain an action within the custom against the drawer of the note; nor could even the person to whom it was in the first instance made payable, bring such action. 1 Salt. 129; 2 Ld. Raym. 757. 9. But at length they were recognized by the Legislature and put on the same footing with inland bills of exchange; by Stat. 5 & 6. Geo. c. 9; (made perpetual by Stat. 7- Geo. c. 25, § 3); which enacts that promissory notes payable to order or bearer, may be assigned and indorsed, and action maintained thereon, as on inland bills of exchange.

Form of Promissory Notes.

£20  London, Jan. 1, 1795.
I promise to pay A. B. or bearer on demand Twenty pounds value received.

T. T.

£20  London, Jan. 1, 1795.
Two months after date, we and each of us promise to pay to Mr. C. B. or order, Twenty pounds value received.

A. B.  C. D.

4. By the Stat. 15 Geo. 3. c. 51; and 17 Geo. 3. c. 30, made perpetual by Stat. 27 Geo. 3. c. 16, all negotiable notes and bills for less than £20, are declared void; and notes or bills between that sum and £5, must be made payable within 21 days after date; must particularly the name and description of the payee; must bear date at the time and place they are made; must be attested by a subscribing witness, and the indorsement of them must be attended with the same strictness in all respects, and made before the notes or bills become due.

Bills of exchange and promissory notes must now be drawn on flanp paper. The flanp is proportioned, under Stat. 31 Geo. 3. c. 21, to the amount of the bill, from 3 d. to 21. If foreign bills are drawn here the whole fee must be flanp but bills drawn abroad of necessity are not liable to any flanp duty.

Bills of exchange having been first introduced for the convenience of commerce, it was formerly thought that no person could draw one, or be concerned in the negotiation of it, who was not an actual merchant; but it soon being found necessary for others, as at all engaged in trade, to adopt the same mode of remittances and security, it has been since decided that any person capable of binding himself by a contract, may draw or accept a bill of exchange, or be in any way engaged in the negotiation of it, and, since the Stat. 3 & 4. Geo. c. 9, be a party to a promissory note, and shall be considered as a merchant for that purpose. Carth. 82; 2 Vent. 293; Comb. 152; 1 Show. 123; 2 Show. 501; Lex. 891; 1585; 12 Med. 36, 360; Salt. 126.

But an infant cannot be sued on a bill of exchange. Carth. 160.—Nor a name covert; except in such cases as he is allowed to act as a female sole. 1 Ld. Raym. 147; Salt. 116. See title Barn. and Farm.

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

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

5. A promissory note in its original form of a promise from one man to pay a sum of money to another bears no resemblance to a bill of exchange. When it is indorsed, the resemblance begins, for then it is an order by the indorser to the maker of the note, who by his promise is his debtor, to pay the money to the indorsee.

—The indorser of the note corresponds to the drawer of the bill; the maker to the drawee or acceptor; and the indorsee to the payee. When this point of resemblance is once fixt, the law is fully settled to be exactly the same in bills of exchange and promissory notes: and whenever the law is reported to have been settled with respect to the acceptor of a bill, it is to be considered, as applicable to the (drawer, or) maker of a note; when with respect to the drawer of a bill, then to the first indorser of a note; the subsequent indorsers and indorsee bear an exact resemblance to one another. 2 Burr. 576.

Both bills and notes are in two different forms, being sometimes made payable to such a man or his order, or to the order of such a man; sometimes to such a man or bearer, or simply to bearer,

The first kind have always been held to be negociable; but where they were made payable to the order of such a man, exception has been taken to an action brought by that man himself, on the ground that he had only an authority to indorse; but the exception was not allowed. 10 Mod. 286; 2 Show. 8; Comb. 401; Carth. 403. —And it is now decided law, that bills and notes payable to bearer, are equally transferable as those payable to order; and the transfer in both cases equally confers the right of action on the hand that holds. 1 Black. Rep. 835; 3 Burr. 1516; Stat. 3 & 4. Geo. c. 9, § 5; 1 Burr. 452, 9.

The mode of transfer however is different; bills and notes payable to bearer are transferred by mere delivery, the others by indorsement.

6. The bills and notes mentioned above are considered merely as securities for money; but there is a species of each which is considered as money itself. These are Bank-notes, bankers' cash-notes, and drafts on bankers payable on demand.

Bank-notes are treated as money or cash in the ordinary courts or transactions of business by common consent, which gives them the credit and currency of money.
ny to every effectual purpose; they are as much considered to be money as guineas themselves; 1 Burr. 457, and it seems are as lawful a tender. See Stat. 5 W. & M. c. 20. § 28; 3 Term Rep. 554.

Bankers' cash notes and drafts on bankers, are so far considered as money among merchants, that they receive them in payment as ready cash; and if the party receiving them do not within a reasonable time demand the money he must bear the los in case of the bankers' failure. What shall be construed to be a reasonable time has been subjected to much doubt; it was formerly considered as a question of fact depending on the circumstances of the case, to be determined by a jury; but it is now established to be a question of law to be decided by the court, though the precise time is necessarily undetermined. 1 Black. Rep. 1. See 1 Lea. Ra. 744: 1 Stra. 415, 6, 550: 2 Stra. 910, 1175, 1248. And on the whole the bell rule in these cases seems to be, that drafts on bankers, payable on demand, ought not to be carried for payment on the very day on which they are received; if from the distance and situation of the parties that may conveniently be done.

Bills of exchange and promissory notes, though according to the general principles of law, they are to be considered only as evidences of a simple contract, are yet in one respect regarded as specialties; and on the same footing with bonds; for unless the contrary is shown by the defendant, they are always presumed to have been made on a good consideration; nor is it incumbent on the plaintiff either to shew a consideration in his declaration, or to prove it at the trial. 1 Black. Rep. 415:

Feesham v. Wood. K. B. Exch. 18 Geo. 3. —However though though in some cases were always entitled to this privilege it was not without some difficulty that it was extended to inland bills; and notes are indebted for it to the statute. 2 Lea. Ra. 758: 1 Black. Rep. 487.

7. Bills of exchange, contrary to the general nature of choses in action, are by the custom of merchants, assignable or negotiable without any fiction, and every person to whom they are transferred may maintain an action in his own name against any one, who has before him in the course of their negotiation rendered himself responsible for their payment. The same privilege is conferred on notes by the statute. But the instrument or writing which constitutes a good bill of exchange according to the custom, or a good note under the statute must have certain essential qualities. 3 Wilf. 213.

One of these qualities is, that the bill or note should be for the payment of money only; and not for the payment of money end the doing some other act; (2 Stra. 1771;) for these instruments being originally adopted for the convenience of remittance, and now considered only as securities for the future payment of money most undertake only for that; and it must be money in specie, not in good East India bonds, or any thing else which can itself be only considered as a security. Bull. N. P. 273.

Another requisite quality is, that the instrument must carry with it a personal and certain credit, given to the drawer or maker, not confined to credit on any particular fund. 3 Wilf. 213. But in the application of this principle there seems to be a material distinction between bills and notes. As to the former, where the fund is supposed to be in the hands of the drawer, the object holds in its full force; not only because it may be uncertain whether the fund will be productive, but because the credit is not given to the person of the drawer; but where the fund on account of which the money is payable, either is in the hands of the drawer, or he is accountable for it, the objection will not hold, because the credit is personal to him, and the fund is only the consideration of his giving the bill. —With respect to a note, if the drawer promise to pay out of a particular fund, then within his power, the note will be good under the statute: the payment does not depend on the circumstance of the fund's proving unproductive or not, but there is an obligation on his personal credit; the bare making of the note being an acknowledgment that he has money in his hands. See Josephe v. Laslo, 2 Blackf. Fort. 281: 10 Mod. 294, 310 —Jennv v. Herb, 1 Stra. 591: 2 Lea. Ra. 1361: 8 Mod. 265: Dinish. & ass. v. Delaware, 3 Wilf. 207: 2 Black. Rep. 782. —On the principle which governed these cases an order from an owner of a ship to the freighter to pay money on account of freight, was held to be no bill of exchange. 2 Stra. 1211. —But such a bill from the freighters of a ship, to any other person, if good in other respects, would certainly not be bad, though made payable on account of freight; because indisputably there is a personal credit given to the drawer, the words "on account of freight," only expressing the consideration for which the bill was given. See Piersen v. Donloy, Doug. 571.

And there may be cases where the instrument may appear at first sight to be payable out of a particular fund, but in reality be only a distinction how the drawer is to reimburse himself, or a recital of the particular species of value received by the maker of a note; in which cases their validity rests on the personal credit given to the acceptor of the bill, or drawer of the note. 2 Lea. Ra. 1431, 1545: 2 Stra. 764: Burm. K. B. 12.

Another essential quality to make a good bill or note is, that it must be absolutely payable at all events; and not depend on any particular circumstances which may or may not happen in the common course of things. 3 Wilf. 213: 1 Burr. 325: See 2 Lea. Ra. 1562, 1566, 1569: 8 Mod. 355: 4 Vin. 240, p. 16: 2 Stra. 1151: 4 Moat. 242: 1 Black. Rep. 532. In the case of notes however it is not necessary, that the time of payment should be absolutely fixed; it is sufficient if, from the nature of the thing the time may certainly arrive, on which their payment is to depend; (2 Stra. 127): 1 Burr. 227;) for here the words of engagement make the debt; and it is no direction to another person; the former part of the note is a promise to pay the money, and the rest is only fixing the particular time when it is to be paid. It is sufficient if it be certain, and at all events payable at that time, whether the maker live till then, or die in the interim. —And it has been decided that a promise to pay "within two months after such a ship shall be paid off" will make a good note; for the paying off the ship is a thing of a publick nature and morally certain. See 1 Stra. 24: 1 Wilf. 202, 3. —But this indulgence seems to have been carried almost too far; and such a latitude seems incompatible with the nature and original intention of a bill of exchange; its allowance in favour of promissory notes arising entirely from a liberal construction of the statute on which the negotiability of those notes depends.
BILL or EXCHANGE II.

In most of the cases where the several instruments have been denied the privilege of bills and notes, it is not for that reason to be concluded that they are of no force: when the fund from which they are to be paid, can be proved to have been productive, or the contingency on which they depend has happened, they may be used as evidence of a contract, according to the circumstances of the case, or according to the relation in which the parties stand to one another. See 2 Black, Rep. 1072.

No precise form of words is necessary to make a bill of exchange or a note under the statute; any order which cannot be complied with, or promise which cannot be performed, without the payment of money, will make a good bill or note. Thus an order to deliver money, or a promise that such a one shall receive it. 10 Mod. 237; 2 Ld. Raym. 1396; 1 Stra. 649, 706; 1 Will. 203; 3 Will. 213; 8 Mod. 504; All. 1.

The words usually received being in general inserted in bills and notes, there seems to have been some doubt, whether they were essential; in one cafe, (Buckley v. Leight, 2 Stra. 1212,) where the want of these words was objected, a verdict was given on that account against the instrument, but that case seems a very doubtful authority.—On several occasions it appears to have been said incidentally by the court, and at the bar, that these words are unnecessary. 20 Car. 2 Barn. K. B. 83; 3 Mod. 267; 1 Show. 5, 497; 3 Lord Raym. 1556; 1481 Latw. 889; 1 Mod. Extr. 310. —And the point is now fully settled that these words are not necessary; for as these instruments are always prefixed to have been made on a valuable consideration, words which import no more, cannot be essential. White v. Ledwich, K. B. Hil. 25 Gen. 3.

Whether it be essential to the constitution of a bill of exchange, that it should contain words which render it negotiable, as to order or to bearer, seems not hitherto to have received a direct judicial decision. There are two cases in which the want of such words was taken as an exception; but as there were other exceptions, the point was not decided. 2 Stra. 1212; 3 Will. 212. —In another case, the same exception was taken and overruled, but under such circumstances that the point was not generally determined. 2 Will. 352. —If in a doubtful point however it may be allowed to reason on general principles, it should seem, that being the original intention and the usual use of bills of exchange that they should be negotiable, such drafts as want these operative words are not entitled to be declared on as specialties, however they may be sufficient as evidence to maintain an action of another kind. 6 Kyd, 42. —But it has been ruled that such words are not necessary in notes, and that the person to whom they are made payable may maintain an action on them, within the nature against the maker. Moore v. Paine, Hardw. 288.

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

An acceptance may be either written or verbal; if the former, it may be either on the bill itself, or in some collateral writing, as a letter, &c. 1 Str. 648. —In foreign bills it has always been understood that a collateral or parol acceptance was sufficient: 1 Str. 648; 3 Barb. 1674; Hardw. 75. And it is now settled that such acceptance is also good in cases of inland bills; as by word, Lomony v. Palmer, 2 Stra. 1100; or by letter, 1 Atk. 717 (613).

The acceptance is usually made between the time of signing the bill and the time of payment; but it may also be made before the bill has issued, or after it has become due; when it is made before the bill is issued, it is rather an agreement to accept, than an actual acceptance; but such agreement is equally binding as an acceptance itself. 3 Barb. 1674; Doug. 284; 1 Atk. 715, (613). —When the acceptance is made after the time of payment is elapsed, it is considered as a general promise to pay the money: and if it be to pay according to the tenor of the bill, this shall not invalidate the acceptance, though the time being past, it be impossible to pay according to the tenor; but these words shall be rejected as surplusage. 1 Salk. 127; 3 Ld. Raym. 564, 574; 12 Mod. 214, 410; Gatt. 439.

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

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

The mere answer of a merchant to the drawer "that he will duly honour his bill" is not of itself an acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement: but if there be any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer. Comp. 572, 4: 1 Atk. 715, (611). And an agreement to accept may be expressed in such terms as to put a third person in a better condition than the drawer. If one, meaning to give credit to another, make an absolute promise to accept his bill, the drawer or any other person may then give promissory notes, or give promissory notes on the exchange to procure credit, and a third person advancing his money on it has nothing to do with the equitable circumstances which may induce the drawer and acceptor.
BILL OF EXCHANGE III.

An acceptance is generally according to the tenor of the bill; and then it is called a general and absolute acceptance: but it may differ from the tenor in some material circumstances, and yet, as far as it goes, be binding on the acceptor.—Thus it may be for a less sum than that mentioned in the bill; or it may be for an enlarged period. 1 Str. 214. Martin: 21. So the drawee may accept a bill which has no time mentioned for payment, and which is held to be payable at sight, to pay, at a distant period; which acceptance will bind him. 11 Mod. 190.

A bill was payable the 1st of January; the drawee accepted to pay the 11th of March: the holder struck out the 1st of March, and inferred the 1st of January, and when it was payable according to that date, presented it for payment, which the acceptor refused; on which the holder restored the acceptance to the original form; and the court held that it continued binding. Price v. Shaw, Esq. 33 Car. 2. So the acceptance may direct the payment to be made at a different place from that mentioned in the bill, as at the house of a banker. See 2 Str. 1195. So also the acceptance may differ from the tenor of the bill in its mode of payment, as to pay half in money, half in bills. Ball, N. P. 270. An acceptance may also be conditional, as 'to pay when certain goods conjoined to the acceptor, and for which the bill is drawn, shall be sold.' 2 Str. 1152.

What shall be considered as an absolute or conditional acceptance is a question of law to be determined by the court, and is not to be left to the jury. 1 Term Rep. 182. See 1 Str. 618: 1 Atk. 717, (612).—If the acceptance be in writing, and the drawee intend that it should be only conditional, he must be careful to express the condition in writing as well as the acceptance; for if the acceptance stand, on the face of it, to appear to be absolute, he cannot take advantage of any verbal condition annexed to it, if the bill should be negociated and come to the hands of a person unacquainted with the condition; and even against the person to whom the verbal condition was expressed, the burden of proof will be on the acceptor. Doug. 286. A conditional acceptance, when the conditions on which it depends are performed, becomes absolute. Camp. 571. But if the conditions on which the agreement to accept a bill is made, be not complied with, that agreement will be discharged. Doug. 297.

An acceptance by the custom of merchants as effectually binds the acceptor, as if he had been the original drawer; and, having once accepted it, he cannot afterwards revoke it. Co. Jus. 308: Hard. 437.

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

If the party under-writes the bill, prefixed such a day, or only the day of the month; this is such an acknowledgement of the bill as amounts to an acceptance. 3 New Abr. 610: Comb. 401. So if he order a direction to another person to pay it. Ball. N. P. 270.

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

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

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

If a merchant be desired to accept a bill, on the account of another, and to draw on a third, in order to reimburse himself, and in consequence he draw a bill on that third person; the bare act of drawing this bill, will not amount to an acceptance of the other. 1 Term Rep. 269.

An agreement to accept or honour a bill, will in many cases be equivalent to an acceptance, and whether that agreement be merely verbal, or in writing, is immaterial: If A. having given or intending to give credit to B. write to C. to know whether he will accept such bills as shall be drawn on him on B.'s account; and C. return for answer, that he will accept them; this is equivalent to an acceptance; and a subsequent prohibition to draw on him on B.'s account, will be of no avail, if in fact, previous to that prohibition the credit has been given. 3 Burr. 1603.

If a book-keeper or servant, or other person having authority, or who usually transacts business of this nature for the master, accept a bill of exchange, this shall bind such master. 3 New Abr. 611.

If a bill be drawn on a servant (as a clerk of a corporation, &c.) with a direction to place the money to the account of his employer, and the servant accept it generally, this renders him liable to answer personally to an indorser. 2 Str. 555: Hardw. 1.

If a bill be accepted, and the person who accepted the same happens to die before the time of payment, there must be a demand made of his executors or administrators; and on non-payment, a protest is to be made, although the money becomes due before there can be administration, &c.

Forging the acceptance of any bill of exchange, or the number or principal sum of any accountable receipt, is made felony, by Stat. 7 Geo. 2, c. 22.

III. According to the difference in the bills of negotiability of bills and notes, the modes of their transfer also differ. Bills are payable to bearer are transferred by delivery: if payable to A. B. or bearer they are payable to bearer, as if A. B. were not mentioned. 1 Burr. 452: 3 Burr. 1516: 1 Black. Rep. 465. But to the transfer of those payable to order, it is necessary in addition to delivery that there should be something, by which the payee may appear to express his order. This additional circumstance is an indorsement, &c. called from being usually (though not necessarily) written on the back of the note or bill.
BILL OF EXCHANGE III.

Where no regulation is made by act of parliament (see ante I. 4.) relative to the negotiation of bills or notes, no particular form of words is necessary to make an indorsement; only the name of the indorser must appear upon it, and it must be written or signed by him, or by some person authorized by him for that purpose.

Indorsements are either in full or in blank; a full indorsement is that by which the indorser orders the money to be paid to some particular person, by name; a blank indorsement confids only of the name of the indorsee—Blank indorsements are most frequent, indeed almost universal in business.—A blank indorsement renders the bill or note afterwards transferable by delivery only, as if it were payable to bearer; for by only writing his name the indorser shews his intention that the instrument should have a general circulation, and be transferable by every possessor. Doug. 617, (639), 611, (633).

Except where restrained by statute (See ante I. 4.) The transfer of a bill or note may be made at any time after it has issued, even after the day of payment, and, in case of bills, where the acceptor resides at a distance from the drawer, is frequently made before acceptance. 1 Ld. Raym. 575: See 3 Term Rep. 80: 3 Burr. 1516: 3 Black. Rep. 485: Doug. 611, (633).

An indorsement may be made on a blank note, before the insertion of any date or sum of money, in which case the indorsee is liable for any sum, at any time of payment that may be afterwards inferred, and it is immaterial whether the person taking the note on the credit of the indorsee knew whether it was made before the drawing of the note or not; for in such a case the indorsement is equivalent to a letter of credit for any indefinite sum. Doug. 456, (514).

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

Though a blank indorsement be a sufficient transfer, and may enable the person, in whose favour it is made, to negotiate the instrument, yet it is in his option, to take it either as indorser, or as servant or agent to the indorsee; and the latter may, notwithstanding his indorsement, declare as holder in an action against the drawer or acceptor. Nothing is more usual than for the holder of a bill or note to indorse it in blank, and send it to some friend for the purpose of procuring the acceptance or the payment; in this case it is in the power of the friend, either to fill up the blank space over the indorsee's name, with an order to pay the money to himself, which shews his election to take as indorsee; or to write a receipt which shews he is only the agent of the indorsee. 1 Sum. 125, 128, 130: 1 Sum. 153: 2 Ld. Raym. 871. And, on this principle one, to whom a bill was delivered with a blank indorsement, and who carried it for acceptance, was admitted, in an action of trover for the bill against the drawer, to prove the delivery of it to the latter. 1 Sum. 130: 2 Ld. Raym. 871.

The original contract on negotiable bills and notes is to pay to such person or persons, as the payee, or his indorsee, or their indorsee, shall direct; and there is as much privity between the last indorsee and the last indorser, as between the drawer and the original payee. When the payee assigns it over, he does it by the law of merchants, for as a thing in action, it is not assignable by the general law. The indorsement is part of the original contract, incidental to it in the nature of the thing, and must be understood to be made in the same manner as the instrument was drawn; the indorsee holds it in the same manner and with the same privileges, qualities, and advantages as the original payee, as a transferable negotiable instrument, which he may indorse over to another, and that other to a third, and so on at pleasure; for these reasons an indorsee for a valuable consideration cannot limit his indorsement by any restriction on the indorse, so as to preclude him from transferring it to another as a thing negotiable. 2 Burr. 1222, 3, 9, 7—See also 1 Sum. 311: 1 Salk. 157: 2 Burr. 1216: 1 Black. Rep. 293: and to the effect of Restrictive Indorsements, see Doug. 615, (637): 617, (639), 640.

Where the transfer may be by delivery only, that transfer may be made by any person who by any means, whether accident or theft has obtained the possession; and any holder may recover against the drawer, acceptor or indorsee in blank, if such holder gave a valuable consideration without knowledge of the accident. 1 Burr. 452: 3 Burr. 1516: 1 Black. Rep. 485. The same principle applies also to the case of a bill negotiated with a blank indorsement. Peacock v. Rhodes & al. Doug. 611, (633): where the court held, that there was no difference between a bill or note indorsed blank, and one payable to bearer. They both pass by delivery, and possession proves property in both cases. The holder of either cannot without propriety be considered as assignee of the payee: an assignee must take the thing assigned, subject to all the equity to which the original party was subject: if this rule were applied to bills and notes, it would be little different from the ordinary cases. Where the transfer may be under such circumstances as to justify the law to consider the instrument as not assignable, the instrument is in the possession of such person, who has a right to negotiate it, as an assignee. Black. 642, (639). Where the indorsee is a woman, and she afterwards marries, the right to indorse it over belongs to her husband, for by the marriage he is entitled to all her personal property. 1 Salk. 510: Ca. L. E. 240.

If a man become bankrupt, the property of bills and notes of which he is the payee or indorsee, vests in his assignees, and the right to transfer is in them only. If the holder of a bill or note die, it devolves to his executors or administrators, and they may indorse it, and their indorsee maintain an action, in the same manner as if the indorsement had been made by the testator or intestate.
BILL OF EXCHANGE IV.

intestate. But on their indorsement they are liable personally to the sub-sequent parties, for they cannot charge the effects of the teftator.—They may also be the indorsees of a bill or note in their quality of executors or administrators; as where they receive one from their teftator or intestate; and in that character they may bring an action on it against the acceptor, or any of the other parties.

When a bill payable to order is expressed to be for the sum of another person than the payee, yet the right of transfer is in the payee, and his indorsees may recover against the drawer or acceptor. 

It has been adjudged, that a bill of exchange cannot be indorsed for part, so as to subject the party to several actions. 

IV. By the very act of drawing a bill, the drawer comes under an implied engagement to the payee, and to every subsequent holder, fairly entitled to the possession, that the person on whom he draws is capable of binding himself by his acceptance, that he is to be found at the place at which he is described to be, if that description be mentioned in the bill; that if the bill be duly presented to him, he will accept it in writing on the bill itself, according to its tenor; and that he will pay it when it becomes due, if presented in proper time for that purpose.

In default of any of these particulars, the drawer is liable to an action at the suit of any of the parties before mentioned, on due diligence being exercised on their parts, not only for the payment of the original sum mentioned in the bill, but also in some cases for damages, interest and costs; and he is equally answerable whether the bill was drawn on his own account, or on that of a third person; for the holder of the bill is not to be affected by the circumstances that may exist between the drawer and another; the personal credit of the drawer being pledged for the due honour of the bill. 

If a man write his name on a blank piece of paper, and deliver it to another, with authority to draw on it a bill of exchange to any amount, at any distance of time, he renders himself liable to be called on as the drawer of any bill so formed by the person to whom he has given the authority. 

If acceptance be refused and the bill returned, this is notice to the drawer of the refusal of the drawer; and then the period when the debt of the former is to be considered as contracted, is the moment he draws the bill; and an action may be immediately commenced against him; though the regular time of payment, according to the tenor of the bill, be not arrived. For the drawer not having given credit, which was the ground of the contract, what the drawer had undertaken has not been performed. 

When a bill of exchange is indorsed by the person to whom it was made payable, as between the indorser and indorsee, it is a new bill of exchange; as it is also between every subsequent indorser and indorsee; the indorser for the acceptance and payment of the bill by the drawer; his indorsement imposes on him the same engagement that the drawing of the bill does on the drawer; and the period when that engagement attaches is the time of the indorsement.

Nothing will discharge the indorser from his engagement but the absolute payment of the money, not even a judgment recovered against the drawer or any previous indorser. 

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

Whether the holder of a bill, payable at a certain time after the date be bound to present for acceptance immediately on the receipt of it, or whether he may wait till it become due, and then present it for payment, is a question which seems never to have been directly determined: in practice however it frequently happens that a bill is negotiated and transferred through many hands, without acceptance; and not presented to the drawer till the time of payment, and no objection is ever made on that account. 

If however, the holder in fact present the bill for acceptance, and that be refused, he is bound to give regular notice to all the preceding parties to whom he intends to refer for non-payment; to the drawer, that he may know how to regulate his conduct with respect to thedrawer, and make other provision for the payment of the bill; and to the indorsers, that they may severally have their remedy in time against the parties on whom they have a right to call; and if on account of the holder's delay, any loss accrue by the failure of any of the preceding parties, he must bear the loss.

It is also the duty of the holder of a bill, whether accepted or not, to present it for payment within a limited time; for otherwise the law will imply, that payment has been made; and it would be prejudicial to commerce if a bill might rise up to charge the drawer at any distance of time, when all accounts might be adjusted between him and the drawer. —For the old cases on this subject, see 1 Salk. 127, 132, 3; 1 She. 155; 1 Ed. Rolls 743; 2 Salk. 839—This time for demand of payment seems at present to be regulated by the parties as to notice to preceding indorsers immediately following.

A presentment either for payment or acceptance must be made at reasonable hours; which are the common hours of business in the place where the party lives to whom the presentment is to be made.
BILL of EXCHANGE IV.

If acceptance or payment be refused, or the drawee of the bill or maker of the note has become insolvent, or has absconded, notice from the holder himself must be given to the preceding parties; and in that notice it is not enough to say that the drawee or maker refuses, is insolvent, or has absconded, but it must be added, that the holder does not intend to give him credit. The purpose of giving notice is not merely that the interior should know default has been made, for he is chargeable only in a secondary degree; but to render him liable, it must be shown, that the holder looked to him for payment, and gave him notice that he did so. See 1 Sa. 441, 154; 2 Black, Rep. 747; as to bills — and 1 Black, Rep. 75; 2 Black, Rep. 170; as to notes.

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

With respect to acceptance, it is usual to leave a bill for that purpose with the drawee till the next day, and that is not considered as giving him time; it being understood to be the usual practice; but if on being called on the next day, he delay or refuse to accept according to the tenor of the bill, the rule now established, where the parties, to whom notice is to be given, reside at a different place from the holder and drawee, is, that notice must be sent by the next mail. Under the same circumstances, the same rule obtains in the case of non-payment. 1 Term Rep. 179. So also if in case the drawee or maker has absconded, or cannot be found, notice of these circumstances, either in case of non-acceptance or non-payment, must be sent by the first mail.

The great difficulty has been to establish any general rule, where the party entitled to notice resides in the same place, or at a place at a small distance from that in which the holder lives. On this point as well as on the question of what shall be considered as a reasonable time for making the demand of payment, it has been an object of no little controversy, whether it was the province of the jury, or of the judge to decide. See ante 164: till lately it seems the jury had been permitted to determine on the particular circumstances of each individual case what time was reasonably to be allowed, either for making demand or giving notice, 1 Doug. 515. (681.)

But it having been found that this was productive of endless uncertainty and inconvenience, the court on several occasions have laid it down as a principle, that what shall be considered as a reasonable time in either case is a question of law; juries have however struggled so hard to maintain their privilege in this respect, that in two cases they narrowed the time for demand, contrary to the opinion of the court; and on a second trial being granted, they in both cases adhered to their opinion, contrary to the direction of the judge. In one of them however, application being made for a third trial, the court would have granted it, had not the plaintiff precluded himself by proving his debt under a commission of bankruptcy which had arisen against the drawees of the bill between the time of the verdict and the application. See Doug. 515: 1 Term Rep. 171, and the cases there cited.

In a third case, where the struggle by the jury was to give a longer time for notice than was necessary, the court adhered to their principle and granted no less than three trials. 1 Term Rep. 167, 9; Linday v. Brown. It seems therefore fully established that what shall be reasonable time is a question of law: and generally that a demand must be made, and notice given as soon as, under all the circumstances, it is possible to do.

The reason why the law requires notice is, that it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and that if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if he have no effects in the other's hands, then he cannot be injured for want of notice; and if it be proved on the part of the plaintiff, that from the time the bill was drawn, till the time it became due, the drawee never had any effects of the drawer in his hands, notice to the latter is not necessary in order to charge him, for he must know this fact; and if he had no effects in the drawer's hands, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice that it has been dishonoured. 1 Term Rep. 410; and see 1 Term Rep. 405.

Yet though it appear that the drawer had no effects in the hands of the drawee, no action can be maintained against the indorser, if no notice was given him of the bill being dishonoured; for though the drawer may have received no injury, the indorser, who must be presumed to have paid a valuable consideration for the bill, probably has. 2 Term Rep. 714.

Though in the case where the drawer has effects in the hands of the drawee, the want of notice cannot be waived by a subsequent promise by the drawer, to discharge the bill; yet where he had no effects it may, though it appear that in fact he sustained an injury for want of such notice; such a subsequent promise is an acknowledgment that he had no right to draw on the drawee, and if he has in fact sustained damage it is his own fault. — But where damage in such a case has been sustained, and no subsequent promise appears, it may be very doubtful whether want of notice can be waived. See 2 Term Rep. 715, 714.

In the manner in which notice, either of non-acceptance or non-payment is given, there was a remarkable difference between inland and foreign bills; in the former no particular form of words is necessary to entitle the holder to recover, against the drawer or indorsers, the amount of the bill on failure of the drawer or acceptor; it is sufficient if it appear that the holder means to give no credit to the latter, but to hold the former to their responsibility. 1 Term Rep. 170. — But in foreign bills other formalities are required; if the person to whom the bill is addressed, on presentment, will not accept it, the holder is to carry it to a person vested with a public character, who is to go to the drawer and demand acceptance, and if he then refuse, the officer is there to make a minute on the bill itself, consisting of his initials, the month, the day and the year, with his charge for minuting. He must afterwards draw up a solemn declaration, that the bill has been presented for acceptance, which was refused, and that the holder intends...
intends to recover all damages which he or the deliverer of the money to the drawer, or any other may sustain on account of the non-acceptance; the minute is in common language termed the noting of the bill; the solemn declaration, the protest, and the person whose office it is to do these acts a public notary; and to his presentation all foreign courts give credit. Mol. 254: 112. 16.

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

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

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

As this protest on foreign bills must be made on the last day of grace, and immediate notice sent to the parties concerned, it seems established that such a bill is payable at demand made, at any time that day within reasonable hours, and that the acceptor has not the whole day to pay the bill. 1 Term Rep. 170.

Besides the protest for non-acceptance, and non-payment, there may also be a protest for better security; this is usual when a merchant who has accepted a bill happens to become insolvent, or is publicly reported to have failed in his credit; a bill may be payable on demand made, at any time within reasonable hours, and that the protesture has not the whole day to pay the bill. 1 Term Rep. 170.

Where the original bill is lost, and another cannot be had of the drawer, a protest may be made on a copy, especially where the refusal of payment is not for want of the original bill, but merely for another cause. 1 Shaw, 169.

The effect of protest for non-acceptance or non-payment, is to charge the drawer or indorsors, not only with the payment of the principal sum, but with interest, damages, and expenses; which latter consist usually of the exchange, re-exchange, provision, and postage, together with the expenses of the protest. See Stor. 124.

Whenever interest is allowed, and a new action cannot be brought for it, which is the case on bills and notes, the interest is to be calculated up to the time of signing final judgment. 2 Burr. 1036, 7: and see 2 Term Rep. 52.

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

To the constitution of a bill of exchange, as has been said before, it is not necessary that the words, 'value received,' should be inserted; and the want of these in a foreign bill, cannot deprive the holder of the benefit of a protest; but that benefit in case of non-payment is not given by the statutes to inland bills; which, if these words, and therefore they cannot be protested for non-payment; and the second act provides, that 'where the words are wanting, or the value is less than 20l. no protest is necessary either for non-acceptance or non-payment,' this false construction of which seems to be, that inland bills, without the words value received, or under 20l. shall continue as at common law, and shall not be intitled to the privilege of a protest, either for non-acceptance or non-payment.

An inland bill, payable at so many days after sight, cannot be protested at all; and no inland bill can be protested, till after the expiration of the three days of grace; notice of which protest is by the statute to be sent within fourteen days after the protest. 1 Term Rep. 170.

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

On inland bills where damages, interest and costs, [expenses] are to be recovered, there is more indulgence in the time allowed for notice of non-payment than where only the principal sum is to be recovered; for when there is no protest for non-payment, presentation for payment must be made so early on the last day of grace, that the holder may give notice of non-payment by the next post. See before.

That part of the Stat. 3 & 4 Anne, c. 9, which puts notes on the same footing with inland bills, makes no express provision for protesting them for non-payment; but there can be no doubt that the practice under which such a protest is frequently made is founded in justice.

As to several varieties relative to qualified acceptance, and protests under peculiar circumstances. See Beaus. Lex Merc. See also 1 Wall. 185; Doug. 249.

When a bill is once accepted absolutely, it cannot in any case be revoked, and the acceptor is at all events bound, though he hear of the drawer's having failed the next
BILL of EXCHANGE V. I.

next moment, even if the failure was before the acceptance. — The acceptor may however be discharged by an express declaration of the holder, or by something equivalent to such declaration. Doug. 237, (249). — But no circumstances of indulgence shown to the acceptor by the holder, nor an attempt by him to recover of the drawer, will amount to an express declaration of discharge. Doug. 235, (247). — Neither will any length of time spent upon the nature of limitations, nor the receipt of part of the money from the drawer or indorser, nor a promise by indorsement on the bill by the drawer to pay the residue, discharge the holder's remedy against the acceptor. Doug. 238, (239) note; but see Sta. 733. — See ante II.

Though the receipt of part from the drawer or indorser be no discharge to the acceptor, yet the receipt of part from the acceptor of a bill, or the maker of a note, is a discharge to the drawer and indorsers in the one case, and to the indorsers in the other, unless due notice be given of the non-payment of the residue; for the receipt of part from the maker or acceptor without notice, is construed to be a giving of credit for the remainder, and the undertaking of the preceding parties is only conditional, to pay in default of the original debtor on due notice given: but where due notice is given that the bill is not duly paid, the receipt of part of the money from an acceptor or maker, will not discharge the drawer or indorsers; for it is for their advantage, that as much should be received from others as may be. 1 Dec. 734, 2 Sta. 745; 1 Wiff. 48; Bull. N. P. 271. — So the receipt of part from an indorser, is no discharge of the drawer or preceding indorser.

If the drawer of a note, or the acceptor of a bill, be sued by the indorser, and the bill pay the debt and costs, this absolutely discharges the indorser as much as if the principal had paid the note or bill; and the bill cannot afterwards recover against the indorser in the name of the indorser. 1 Wiff. 46.

Though in order to initiate himself to call on any of the preceding parties, in default of the acceptor of a bill, or maker of a note, it be necessary that the holder should give due notice of such default, to the party to whom he means to refer, yet notice to that party alone is sufficient as against him: it is not necessary that any attempt should be made to recover of the money of the other collateral undertakers; or in case of such attempt being made, to give notice of its being without effect. Thus in order to initiate himself to recover against an indorser, it is not necessary for the indorsee to shew an attempt to recover against the drawer of a bill of exchange, or the payee-indorser of a promissory note. See 1 Sta. 131, 31; 1 Str. 441; 1 Dec. 441; and finally, Heylyn v. Adamson, 2 Burr. 659; on the principles of all which cases it is now finally settled, that to initiate the indorsee to recover against the indorser of an inland bill of exchange, it is not necessary to demand the money of the first drawer.

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

V. 1. Before the doctrine of Bills of Exchange was well understood, and the nature and extent of the cun-

The end v. 8, 9. &c. that to ob-
BILL OF EXCHANGE V. 2. 3.

The action therefore in which the drawer or indorser, after payment of the money in default of the acceptor, may recover, the first against the acceptor, and the latter against any of the preceding parties, must be brought in their original capacity as drawer or indorser, and not as indorser. Vid. Simonds v. Parminter, 1 Wif. 185: Vid. Morgan, Proc. 437, 44; 4 Term Rep. 82, 5.

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

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

The holder of the bill or note may sue all the parties who are liable to pay the money; either at the same time, or in succession; and he may recover judgment against all, if satisfaction be not made by the payment of the money before judgment obtained against all; and proceedings will not be had in any one action but on payment of the debt and costs in that action, and the costs in all the others in which he has not obtained judgment. Vid. Golding v. Grace, 2 Bl. Rep. 740.

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

To this action the defendant may plead the statute of limitations; and by the express provision of the statute of Queen Anne, all actions on promissory notes must be brought within the same time as is limited by the statute of James, with respect to actions on the cafe. And it is no good replication to this plea, that it was on account between merchants, where it appears to be for value received. Comb. 156. 392.

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

In stating the bill or the note, regard must be had to the legal operation of each respectively. 1 Bure. 324, 5. It has been decided that the legal operation of a bill, or of a note, payable to a fictitious payee, is, that it is payable to the bearer, and therefore it is proper in the statement of such a bill, to allege that the drawer thereby required the drawer to pay so much money to the bearer; in the statement of such a note, that the maker thereby promised to pay such a sum to the bearer. Vex v. Lewis, 3 Term Rep. 183; Minst & al. v. Gibbons & al. Id. 485; Confirmed in Dom. Proc. See H. Black, Rep. 569.

Cullin v. Emmett, H. Black, Rep. 312, and more fully as to this subject pld. 3. of this division.

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

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

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

On a note to pay jointly and severally, a declaration against one in the terms of the note will be good. Burchell v. Slocock, 2 Bure. W. Raym. 1545. So on a note to pay jointly or severally, Comp. 832; contrary to former determinations.

Inland bills and notes may be staled to have been made at any place where the plaintiff chooses to lay his action, because the action on them is transitory, and may be staled to have arisen anywhere. In an action against the acceptor, it must be alleged that he accepted the bill, for the acceptance is the foundation of the action, but the manner of acceptance needs not to be alleged. 2 Bure. W. Raym. 1542: 1 Bure. W. Raym. 364, 5, 374, 5: 1 Salib. 127, 9: Caius. 459.

If the bill or note was payable to order, and the action by an indorsee, such indorsements must be stated as to shew his title; an indorsement by the payee must at all events be stated, because without that, it cannot appear that he made any order, on the existence of which depends the title of the indorsee. If the first indorsement was special, to any person by name, in an action by an indorsee after him, his indorsement must, for the same reason, be stated: so also must all special indorsements.

But if the indorsement was in blank, and the action be against the drawer, acceptor, or payee, no indorsement is necessary to be stated than that of the payee; in an action against a subsequent indorser, his indorsement at least must be added: in an action on a bill or note payable to bearer, no indorsement need be stated, because it is transferable without indorsement. See ante III.

In an action against the drawer or indorser of a bill, or against the indorser of a note, it is absolutely necessary, on account of non-payment of the bill or note, to state a demand of payment from the acceptor of the bill, or the maker of the note, and due notice of refusal given to the party against whom the action is brought; for these circumstances are absolutely necessary to entitle the plaintiff to maintain his action; and a verdict will not help him on a writ of error. The general rule of pleading in this case is, that where the plaintiff omits altogether to state his title or cause of action, it is not necessary to prove it at the trial; and therefore there is no room for preclusion that there was actual proof. Faferton v. Aspinall, Doug. 679, (683): but if the title be only imperfectly staled, with the omission only of some circumstances necessary to complete the title, they shall, after a verdict, be presumed to have been proved; and in some cases no advantage can be taken of the want of them on a general demurrer. Doug. 684, in the notes.
BILL OF EXCHANGE V. 3.

3. Most part of what might be said as to the proof and defence in actions on bills or notes, necessarily arises out of the general doctrine already explained.

The plaintiff must in all cases prove so much of what is necessary to entitle him to his action, and of what must be stated in his declaration, as is not, from the nature of the thing and the situation of the parties, necessarily admitted.

In an action against the acceptor, it is a general rule that the drawer's hand is admitted; because the acceptor is supposed to be acquainted with the writing of his correspondent; and by his acceptance he holds out to every one who shall afterwards be the holder, that the bill is truly drawn. 1 Ld. Raym. 444; Str. 946; 3 Borr. 1354: See 1 Bl. 390.—In an action against the acceptor therefore, where the acceptance was on view of the bill, whether in writing on the bill, or by parol, it is not necessary to prove the handwriting of the drawer.—That of the acceptor himself must of course be proved; and that of every person through whom the plaintiff, from the nature of the transaction, must necessarily derive his title.

On a bill payable to bearer, there is no person through whom the holder derives his title; in an action against the acceptor therefore, on such a bill, he has only to prove the handwriting of the acceptor himself.—But in an action against the acceptor of a bill payable to order, the plaintiff must prove the handwriting of the very payee who must be the first indorser. See 4 Term Rep. 28.—If the indorsement of the payee be general, the proof of his handwriting is sufficient; if special, that of his indorsee must be proved; but otherwise that of any other of the indorsers is not requisite, though all the subsequent indorsements be stated in the declaration.—Any subsequent holder may declare as the indorsee of the first indorser; but in this case, in order to render the evidence correspondent to the declaration, all the subsequent names must be struck out, either at or before the trial. See ante III.

But the plaintiff in the case of a transfer by delivery (See ante III,) may be called upon to prove that he gave a good consideration for the bill or note, without the knowledge of its having been stolen, or of any of the names of the blank indorsers having been forged. 1 Burr. 542: Doug. 633, Peacock v. Rhodes.—And though the acceptance be subsequent to the indorsements, yet the necessity of proving the payee's handwriting is not, by this means, superseded. 2 P. 233: 1 Term Rep. 654.

In an action by an indorsee against the drawer, the same rules obtain with respect to proof of the handwriting of the indorsers as in an action against the acceptor. See Collis v. Emmet, 1 H. Black. Rep. 313.—That of the drawer himself must of course be proved. It must also be proved that the plaintiff has used due diligence. See ante IV.

From the rule, that in an action against the drawer or acceptor of a bill payable to order, there must be proof of the signature of the payee, first indorser, and of all those to whom an indorsement has been especially made, arose the question which long, and greatly, agitated the commercial world, on the subject of indorsements in the name of fictitious payee. A bill payable to the order of a fictitious person, and indorsed in a fictitious name, is not a novelty among merchants and traders. See Stone v. Freeland, R. R. Sittings after Easter, 1763, alluded to in 3 Term Rep. 176.—But in the years 1786, 7 and 8, two or three houses connected together in trade, entering into engagements far beyond their capital, and apprehending that the credit of their own names would not be sufficient to procure currency to their bills, adopted, in a very extensive degree, a practice which before had been found convenient on a smaller scale.—So long as the acceptors or drawers could either procure money to pay these bills, or had credit enough with the holder to have them renewed, the subject of these fictitious indorsements never came in question. But, when the parties could no longer support their credit, and a commission of bankrupt became necessary, the other creditors felt in their interest to refit the claims of the holders of these bills; and insisted that they should not be admitted to prove their debts, because they could not comply with the general rule of law requiring proof of the handwriting of the first indorser. The question came before the Chancellor by petition. He directed trials at law, and several were had; three against the acceptor in the King's Bench, and one against the drawer in the Common Pleas, though not all expressly by that direction. See Tatlock v. Harris, 3 Term Rep. 174: Vose v. Lewin, 3 Term Rep. 183: Missu & al. v. Gilson & al. 3 Term Rep. 485: Collis v. Emmet, 1 H. Black. Rep. 313. From the decisions on these cases, the principal of which was affirmed in the House of Lords, and which have settled that such bills are to be considered as payable to bearer, (see ante 2 of this division V.) it follows, that proof of the acceptor's handwriting only, is sufficient to entitle the holder to recover on the bill; and in the case of Tatlock v. Harris, where a bill was drawn by the defendant and others on the defendant, it was determined that a blank holder for a valuable consideration might recover the amount against the acceptor in an action for money paid, or money had and received.

[The principal case above alluded to, as affirmed in the House of Lords, is that of Missus & al. v. Gilson & al. already so often mentioned. It is better known by the name of Gilson and Johnson v. Missus and Fellow; and the opinions of the Judges in the House of Lords, are very fully and accurately reported in 1 H. Black. Rep. 569. The effect of the determination, as there stated, is as follows.]

If a bill of exchange be drawn in favour of a fictitious payee, with the knowledge, as well of the acceptor as the drawer; and the name of such payee be indorsed on it by the drawer, with the knowledge of the acceptor, which fictitious indorsement purports to be to the drawer himself or his order; and then the drawer indorses the bill to an innocent indorser for a valuable consideration, and afterwards the bill is accepted; but it does not appear that there was any intent to defraud any particular person; such innocent indorsee for a valuable consideration may recover against the acceptor, as on a bill payable to bearer. Perhaps also, in such case, the innocent indorsee might recover against the acceptor, as on a bill payable to the order of the drawer; or on a count stating the special circumstances.

Other cases, Master & al. v. Gilson & al. and Hunter v. Gilson & al. were afterwards brought before the House of Lords, (June 1793) on demurrers to evidence; on which the Judges gave their opinion, that it was not competent
the illegality of the consideration for which the bill or note was given. See this Dict. title Confirmation.

In general no advantage can be taken of the illegality of the consideration, but as between the persons immediately concerned in the transaction; any subsequent holder of the bill or note, for a fair consideration, cannot be affected by it.—But there are cases, in which it has been determined, that by the construction of certain statutes, even the innocent indorsee shall not recover against the acceptor of the bill or drawer of the note.

As on Stat. 6 Anne c. 2. § 1, which absolutely invalidates notes, bills, &c., given for money won at play, 2 Str. 175.—So on Stat. 12 Anne 2. c. 15. § 1, as to securities on furious contracts; Lowe v. Walker, Doug. 735. And reasoning by analogy, on Stat. 5 Geo. 2. c. 30. § 11, against notes given by a bankrupt to procure his certificate. See this Dict. title Bankruptcy.

It has however been repeatedly ruled at Nisi prius, that wherever it appears that a bill or note has been indorsed over, after it is due, which is out of the usual course of trade, that circumstance alone throws such a suspicion on it, that the indorsee must take it on the credit of the indorser, and must stand in the situation of the person to whom it was payable. See 3 Term Rep. 30. § 3.

VI. See ante III. and the general principles, already exemplified.

If a bank bill payable to A. B. or bearer, be lost, and it is found by a stranger, payment to him would indemnify the Bank; yet A. B. may have trover against the finder, though not against his affiance for valuable consideration, which creates a property. 3 Salk. 71.

If the possessor of a bill by an accident loses it, he must cause intimation to be made by a witness public before witnesses, that the bill is lost or mislaid, requiring that payment be not made of the same to any person without his privity. And by Stat. 9 & 10 W. 3. c. 17, if any inland bill of exchange for five pounds or upwards, shall be lost, the drawer of the bill shall give another bill of the same tenor, security being given to indemnify him, in case the bill so lost be found again.

If a bill lost by the possessor should afterwards come into the possession of any person paying a full and valuable consideration for it, without knowledge of its having been lost, the drawer (and acceptor, if the bill was accepted) must pay it when due to such fair possessor, so that the provision of the statute may in many cases be useless to the lessor of the bill.—But against the person who finds the bill, the real owner may maintain an action of trover. 1 Salk. 126: 1 Ld. Raym. 738.

Stealing of bills of exchange, notes, &c. is felony in the same degree, as if the offender had robbed the owner of so much money, &c. And the forging bills of exchange, or notes for money, indorsements, &c. is felony, by Stat. 2 Geo. 2. c. 25: 9 Geo. 2. c. 18. And wide Stat. 31 Geo. 2. c. 22. § 78.

There are also Bills of Credit between merchants, of which the following is a form.

THIS present writing witnesseth, That I A. B. of London, merchant, do undertake, to and with C. D. of, &c. merchant, his executors and administrators, that if the said C. D. as deliver, or cause to be delivered unto
BILL.

E. F. g. &c. or to his use, any sum or sums of money amounting to the sum of &c. of lawful Britith money, and shall take a bill under the hand of the said E. F. confessing and acknowledging the receipt thereof; and then I, my executors or administrators, having the same bill delivered to me or them, shall and will immediately, upon the receipt of the same, pay, or cause to be paid unto the said C. D. his executors or assigns, all such sum or sums of money as shall be contained in the said bill: at, &c. For which payment in manner and form aforesaid, I bind myself, my executors, administrators and assigns, by these presents. In witness, &c.

BILL of LADING. A memorandum signed by masters of ships, acknowledging the receipt of the merchants' goods, of which there usually are three parts, one kept by the confignor, one sent to the confignee, and one kept by the captain. See titles Factor, Merchant.

BILL or RIGHTS. The statute 1 Wm. and Mary, cap. 2, is so called; as declaring the true rights of British subjects. See title Liberty, where this important act is stated at large.

BILL or SALE. Is a solemn contract under seal, whereby a man passes the right or interest that he hath in goods and chattels; for if a man promises or gives any chatts without valuable consideration, or without delivering possession, this doth not alter the property, because it is unum pactum, unde non erit actio; but if a man sells goods by deed under seal duly executed, this alters the property between the parties, though there be no consideration, or no delivery of possession; because a man is pledged to do his own deed, and affirm anything contrary to the manifest solemnity of contracting. Teilo. 156: Cre. Jur. 270: 1 Browne 111: 6 Co. 18.

But what is chiefly to be considered under this head, is the statute of 13 Eliz. cap. 5: by which it is enacted, 'That all fraudulent conveyances of lands, &c. goods and chattels, to avoid the debt or duty of another, shall (as against the party only, whose debt or duty is to be suffered to be avoided) be utterly void, except gratis made bona fide, and on a good (which is construed a valuable) consideration.'

A. being indebted to B. in 400l. and to C. in 200l. C. brings debt against him, and, pending the writ, A. being possessed of goods and chattels to the value of 300l. makes a secret conveyance of them all without exception, to B. in satisfaction of his debt; but, notwithstanding, continues in possession of them, and sells four of them, and others of them, being sheep, he sets his mark on: and resolved that it was a fraudulent gift and false within the aforesaid statute, and shall not prevent C. of his execution for his just debt; for though such false hath one of the qualifications required by the statute, being made to a creditor for his just debt, and consequently on a valuable consideration; yet it wants the other; for the owner's continuing in possession, is a fixed and undoubted character of a fraudulent conveyance, because the possession is the only indicium of the property of a chattel, and therefore this false is not made bona fide. 3 Co. 80: Mo. 638: 2 Bulst. 226.

As the owner's continuing in possession of goods after his bill of sale of them, is an undoubted badge of a fraudulent conveyance, because the possession is the only indicium of the property of a chattel, which is a thing unmixed and transitory; so there are other marks and char-

BILLUS. A bill, stick or staff, which in former times was the only weapon for servants.—It was long in use for watchmen, and we are told is still carried by those at Litchfield. See Steevens' Shakespere.
BIO

BIOETHANUS. One who deserves to come to an untimely end. Ordericus Vitellius, writing of the death of William Rufus, who was slain by Walter Tyrrel, tells us, that the bishops, considering his wicked life and bad exit, adjudged him ecclesiasticum velitio bioethanetum absolvuntis indignum. Lib. 10. p. 782.

BRITAINUM. A thin cap fitted close to the shape of the head; and is also used for the cap or coif of a judge, or juriecant at law. Spen.

BIRTHS, BURIALS, AND MARRIAGES, &c. By statute, a duty was granted on births and burials of persons, from 50l. a duke., &c. down to 10s. and 2s. And the like on marriages; also bachelors, above twenty-five, of age, were to pay 2s. yearly. Stat. 6 & 7 W. 3. c. 6. Exp. as to the duties. See tit. Stamps, Taxes.

BISACUTUS. An iron weapon double edged, so as to cut on both sides. Fleta. lib. 1. c. 53.

BISANTIIUM, beauziant, or beanziant. An ancient coin first coined by the Western emperors at Bisanctium or Constantinople. It was of two sorts, gold and silver; both which were current in England. Obverse represents the gold beauziant to have been equivalent to a ducat; and the silver beanziant was computed generally at two crowns. In some old leaves of land there have been reserved, by way of rent, summ bianziantum, vel duo folis.

BIS-SCOT. At a session of seizers held at Wigenhale in Norfolk, 9 Ed. 3. it was decreed, That if any should not repair his proportion of the banks, ditches and causeways by a day assigned, xilid. for every perch unrepaired should be levied upon him, which is called a biaze; and if he should not, by a second day given him, accomplish the same, then he should pay for every perch 2s. which is called beazant. Hift. of Inhauing and Drainage, f. 254.

BISHOPS AND ARCHBISHOPS.—A Bishop (Episcopus) is the chief of the Clergy in his diocese, and is the archbishop's suffragan or assistant.

An Archbishop (Archiepiscopus) is the chief of the clergy in his province, and is that spiritual secular person who hath supreme power under the king in all ecclesiastical causes; and the manner of his creation and consecration, by an archbishop and other two bishops, &e. is regulated by Stat. 25 H. 8. c. 20. (See post Bifhop.) An archbishop is said to be inhumed, when a bishop is said to be inducted; and there are four things that constitute a bishop or archbishop, as well as a paean: first, election, which makes him a bishop; second, consecration, the next is confirmation, and this resembles admission; next, consecration, which resembles institution; and the last is installment, refused to induction. 5 Dowl. 72.

In ancient times the archbishop was bishop over all England, as Augin was, who is said to be the first archbishop here; but before the Saxons conquer the Britains had only one bishop, and not any archbishop. 1 Roll. Rep. 328; 2 Roll. 440.

But at this day, the ecclesiastical state of England and Wales is divided into two provinces or archbishoprics, to wit, Canterbury and York. Each archbishop hath within his province bishops of several dioceses. The archbishop of Canterbury hath under him within his province, of ancient foundations, Rochester, London, Winchester, Norwich, Lincoln, Ely, Chichester, Salisbury, Leicester, Bath & Wells, Worcester, Coventry and Lichfield, Hereford, Llandaff, St. David's, Bangor, and St. Asaph; and four founded by King Henry 8. erected out of the ruins of dissolved monasteries, viz. Gloucester, Bristol, Peterborough, and Oxford. The archbishop of York hath under him four; viz. the bishop of the county palatine of Chester, newly erected by King Henry 8. and annexed by him to the archbishopric of York; the county palatine of Durham; Carlisle; and the Isle of Man, annexed to the province of York by King Hen. 8; but a greater number this archbishop anciently had, which time hath taken from him. Co. Lit. 94.

Waliswinder was one of the new bishoppicks created by Hen. 8, out of the revenues of the dissolved monasteries. 2 Burn. E. L. 78. Thomas2. Walsh was the only bishop that ever filled that see. He surrendered the bishoppick to Ed. 6. A. D. 1550, 20th March; and on the same day, it was dissolved and added again to the bishoppick of London. Ryn. Enc. 15. p. 222. Queen Mary afterwards filled the church with Benedictine monks, and Elias, by authority of parliament, turned it into a collegiate church, subject to a dean.

The archbishop of Canterbury is now filled metropolitan & prims raisus Anglica; and the archbishops of York filled prims & metropolitana Anglica. They are called archbishops in respect of the bishops under them; and metropolitans, because they were consecrated at first in the metropolis of the province. 4 Inst. 94. Both the archbishops have distinct provinces, wherein they have suffragan bishops of several dioceses, with jurisdiction under them. The archbishop hath also his own diocese, wherein he exercises episcopal jurisdiction, as well as he does his own diocese: the other as superintendent, throughout his whole province, of all ecclesiastical matters, to correct and supply the defects of other bishops.

The archbishop is entitled to present by lapse to all the ecclesiastical livings in the diocesan bishop, if not filled within six months. (See title Archdeacon.) And the archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own, to be provided for by such suffragan bishop; in lieu of which is now usual for the bishop to make over by deed to the archbishop, his executors and assigns, the next consecration of such dignity or benefice in the bishop's diocese within that see, as the archbishop himself shall choose; which is therefore called his Option, which options are only binding on the bishop himself who grants them, and not on his successors. The prerogative itself, seems to be derived from the legatae power formerly annexed, by the Popes, to the Metropolitan of Canterbury.

The Archbishop of Canterbury hath the privilege to crown all the Kings of England; and to have prelates to be his officers: as for instance; the bishop of London is his provincial dean; the bishop of Winchester, his chancellor; the bishop of Lincoln, his vice-chancellor; the bishop of Salisbury, his precentor; the bishop of Worcester, his chaplain, &e. It is the right of the archbishop to call the bishops and clergy of his province to convocation, upon the king's writ; he hath a jurisdiction in cases of appeal, where there is a supped default of justice in the ordinary; and hath a landing jurisdiction over his suffragans: he confirms the election of bishops, and afterwards consecrates them, &c. And he may appoint coadjutors to a bishop that is grown infirm. He may confer degrees of all kinds; and confer and excommunicate,
BISHOPS AND ARCHBISHOPS.

eate, suspend or depose, for any just cause, &c. 2 Roll. Abr. 223. And he hath power to grant dispensations in any case, formerly granted by the see of Rome, not contrary to the law of God; but if the case is new and extraordinary, the king and his council are to be consulted. Stat. 25 H. 8. c. 21: 28 H. 8. c. 16. § 5. This dispensing power is the foundation of the archbishop's granting spiritual licenses, to marry at any place or time; to hold two livings and the like; and in this also is founded the right he exerices of conferring degrees in prejudice of the two Universities. He may retain eight chaplains; and, during the vacancy of any see, he is guardian of the spiritualities. Stat. 21 H. 8. c. 13: 25 H. 8. c. 21: 28 H. 8. c. 16.

The archbishop of Canterbury hath the preceidency of all the clergy; next to him the archbishop of York; next to him the bishop of London; next to him the bishop of Durham; next to him the bishop of Winchester; and then all the other bishops of both provinces after the seniority of their consecration; but if any of them be a privy councillor, he shall take place next after the bishop of Durham. Co. Lit. 94: 1 Ogilv. Ord. Jud. 486.

The first archbishop of York, that we read of, was Paulinus, who, by Pope Gregory's appointment, was made archbishop there, about the year of our Lord 622. Gesch. 14.

The Archbishop of York hath the privilege to crown the Queen-consort, and to be her perpetual chaplain. The archbishop of Canterbury is the first peer of the realm, and hath precedence, not only before all the other clergy, but also (next and immediately after the blood royal) before all the nobility of the realm: and as he hath the precedence of all the nobility, so also of all the great officers of state. Stat. 15.

The Archbishop of York hath the precedence over all dukes, not being of the blood royal; as also before all the great officers of state, except the Lord Chancellor. Gesch. 14.

A Bishop is elected by the king's Conseil d'État or licence to elect the person named by the king, directed to the dean and chapter; and if they fail to make election in twelve days, they incur the penalty of a praemunire, and the king may nominate whom he pleases by letters-patent. Stat. 25 H. 8. c. 20. This was to avoid the power of the see of Rome. This election or nomination, if it be of a bishop, must be signified by the king's letters-patent to the archbishop of the province; if it be of an archbishop, to the other archbishop and two bishops, or to four bishops; requiring them to conform, invest and consecrate the person so elected, which they are bound to perform immediately. After which the bishop elect shall be due to the king for his temporalities, shall make oath to the king and none other, and shall take affirmation of his secular possessions out of the king's hands only. Archbishops and bishops refusing to confirm election, incur the penalties of a praemunire. On confirmation, a bishop hath jurisdiction in his diocese; but he hath not a right to his temporalities till consecration. The consecration of bishops, &c. is confirmed by act of parliament. It is directed in the form of consecrating bishops, that a bishop when consecrated must be full thirty years of age.

It is held a bishop hath three powers: 1. His power of ordination, which is gained on his consecration, and not before; and thereby he may confer orders, &c. in any place throughout the world. 2. His power of jurisdiction, which is limited and confined to his see. 3. His power of administration and government of the revenues; both which last powers he gains by his confirmation: and some are of opinion, that the bishop's jurisdiction, as to ministerial acts, commences on his election. Psalm. 473. 4. 5.

The king may not seize into his hands the temporalities of bishops but upon just cause, and not for a contempt, which is only finable. See title Temporaries. Bishops are allowed four years for payment of their first fruits, by 6 & 7 Hen. c. 27. Every bishop may retain four chaplains. Vide Stat. 21 Hen. 8. c. 13, 16. 8 Eliz. c. 1.

A Bishop hath his consistory court, to hear ecclesiastical causes; and to visit the clergy, &c. He consecrates churches, ordains, admits, and enstitutes priests; confirms, suspends, excommunicates, grants licences for marriage, makes probate of wills, &c. Co. Lit. 95: 2 Roll. Abr. 252. He hath his archdeacon, dean and chapter, chancellor, and vicar-general, to assist him: may grant leases for three lives, or twenty-one years, of land usually letten, reverting the accustomed yearly rents. Stat. 32 H. 8. c. 28: 1 Eliz. c. 19. § 3. See this Dict. title Lego.

The chancellor to the bishop is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law; who as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law, to created in some University. Stat. 37. H. 8. c. 17.

By Stat. 24 Geo. 3. 20. 2 c. 35. The Bishop of London, or any bishop by him appointed, may admit to the order of deacon or priest, subjects of countries out of his majesty's dominions, without requiring the oath of obedience.—But no person shall be thereby enabled to exercise such offices within his majesty's dominions.

By Stat. 26 Geo. 3. c. 84. The Archbishops of Canterbury or York, with such other bishops as shall call to their assistance, may consecrate subjects of countries out of his majesty's dominions to be bishops, without requiring the usual oaths; purging the forms prescribed by the act: But no such bishops or their successors, or persons ordained by them, shall exercise their functions within his majesty's dominions.

The right of trial by the Lords of Parliament, as their Peers, is laid, does not extend to bishops; who though they are Lords of Parliament, and sit there by virtue of their baronies, which they hold乘用车, yet are not ennobled in blood, and consequently not peers with the nobility. 3 Inst. 31: 11 Eliz. c. 20: 4 Comm. 501: 4 Comm. 204: and this Dict. title Parliament.

Archbishops and Bishops may become void by death, deprivation for any very grave and notorious crime, and also by resignation. All resignations must be made to some superior. Therefore a bishop must resign to his metropolitan, but the archbishop can resign to none but the king himself. 1 Comm. 382.

The following are some of the popular distinctions between archbishops and bishops. The archbishops have the title and title of Grace, and Most Reverend Father in God by Divine Providence. The bishops, those of Lord, and Right Reverend Father in God by Divine permission. Archbishops are imprisoned; bishops installed.

Mr. Christian in his notes on 1 Comm. 380, says, that the suppos'd answer of a bishop on his consecration, "Nemo episcopus," is a vulgar error.
BISHOPRIICK, The diocese of a bishop.
BISSEXTILE, bissextilla.] Leap year, so called because the sixth day before the calends of March is twice reckoned, making an additional day in the month of February; so that the bissextile year hath one day more than the others, and happens every fourth year. This intercalation of a day was first invented by Julius Caesar, to make the year agree with the course of the sun. And, to prevent all doubt and ambiguity that might arise thereupon, it is enacted by the statute de anno bissextill, 21 H. 3, that the day increasing in the leap-year, and the day next before, shall be accounted but one day.
Brit. 200: Dyer 17. See title Year.
BISUS, bisus, mica bis, pantis bitius, Fr. pain bis.] Brown bread, a brown loaf. Coule.
BLACK ACT, or WALTHAM BLACK ACT. The Stat. 9 Geo. 1. cap. 22. is so called, having been occasioned by some devastations committed near Waltham, in Hampshire, by persons in disguise, or with their faces blacked. By this act, persons hunting armed and disguised, and killing or robbing deer, or robbing warrens, or stealing fish out of any river, &c. or any persons unlawfully hunting in his majesty's forests, &c. or breaking down the head of any fish-pond, or killing, &c. of cattle, or cutting down trees, or setting fire to hedges, barn, or wood, or hunting at any person, or sending anonymous letters, or letters signed with fictitious name, demanding money, &c. or reeling such offenders, are guilty of felony without benefit of clergy. This act is made perpetual by 31 Geo. 2. cap. 42. And see further, Stat. 6 Geo. 2. c. 37: 27 Geo. 2. c. 15. See also Stat. 16 Geo. 3. cap. 39, against deer-dealers; the milder punishment inflicted by which act has been thought a virtual repeal of the punishment of the black act above recited. Leach's Book. P. C. 1. c. 49. § 7. and this Dict. titles Poaching, Game, Deer-hunting.
BLACK LEAD. By Stat. 25 Geo. 2. cap. 10. Entering mines of black lead, with intent to steal, is made felony; and by the same act offenders committed or transported for entering mines of black lead with intent to steal, escaping, or breaking prison, or returning from transportation, are excluded from mercy.
BLACK MAIL, Fr. mailis, a link of mail, or small piece of metal or money.] Signifies in the North of England, in the counties of Cumberland, Northumberland, &c. a certain rent of money, corn, or other thing, anciently paid to persons inhabiting upon or near the borders, belonging to men of name and power, allied with certain robbers within the said counties; to be free and protected from the devastations of those robbers. But by Stat. 43 Eliz. cap. 19, to take any such money or contribution, called black-mail to secure goods from rape, is made a capital felony, as well as the offences such contribution was meant to guard against. It is also used for rents reserved in work, grain, or baker money; which were called residuum rigert in contradistinction to the black farm or residuum alien. See tit. Alba Firma and Blank Firms.
BLACK-ROD, The gentleman usher of the black rod is chief gentleman usher to the king; he belongs to the garter and hath his name from the black rod, on the top whereof sits a lion in gold, which he carrieth in his hand. He is called in the Black Book, fol. 253. Licet urbs viginti, & harmless; and in other places urbs viginti. His duty is ad portandum urias cornum domino rege ad felun sancti Georgii infra canem de Windesore: and he hath the keeping of the chapter-house door, when a chapter of the order of the garter is sitting; and in the time of parliament, he attends on the house of peers. His habit is like to that of the regifter of the order, and garter king at arms; but this he wears only at the solemn times of the festival of St. George, and on the holding of chapters. The black rod he bears, is instead of a mace, and hath the same authority; and this officer hath anciently been made by letters patent under the great seal, he having great power; for to his custody all peers, called in question for any crime, are first committed.
BLACKS OF WALTHAM. See tit. Black AB.
BLACKWELL-HALL. The public market of Blackwell-hall, London, is to be kept every Thursday and Saturday, at certain hours; and the keepers not to admit any buying or selling of woollen cloth at the said hall upon any other days or hours, on penalty of 100l. Factors selling cloth out of the market, shall forfeit 5l. &c. Registrars of all the cloths bought and sold are to be weekly kept: and buyers of cloth otherwise than for ready money, shall give notes to the sellers for the money payable: and factors are to transmit such notes to the owners in twelve days, or be liable to forfeit double value, &c. Stat. 3 & 4 W. 3. cap. 9. See also Stat. 4 & 5 P. &c. c. 5. § 28: 39 Eliz. c. 20. § 12: 1 Geo. 1. c. 15.
BLADARIUS, A corn-monger, meal-man, or corn-chandler. It is used in our records for such a retailer of corn. Pat. 1 Ed. 3. par. 3. m. 13. See tit. Clothier.
BLADE, blade.] In the Saxon signifies generally fruit, corn, hemp, flax, herbs, &c. Will. de Mowen is held to his brother the mayor of ? ? ? ? Saxon inflans for $ & blade. &. excepting his flock and corn on the ground. Hence blade is taken for an ingreeter of corn or grain.
BLANCHFIRMES, In ancient times the crown rents were many times reserved in libris alias, or blanch firmes: In which case the buyer was held de-albina firma, viz. his base money or coin, worse than standard, was mellowed down in the Exchequer, and reduced to the fines of standard silver; or instead thereof, he paid to the King 12 d. in the pound by way of addition. Leconardus Effegy upon China, p. 9.
BLANDFORD, An act was passed for rebuilding the town of Blandford in the county of Dorset, burnt down by fire in the year 1731. Stat. 5 Geo. 4. c. 16.
BLANCHHORNUM, A little bell. Leg. Addition. c. 8.
BLANK-BAR, is used for the same with what we call a common bar, and is the name of a plea in bar; which in an action of trespass is put in to oblige the plaintiff to affign the certain place where the trespass was committed; 2 Geo. 594.
BLANKS, Were a kind of white money coined by Hen. 5, in those parts of France which were then subject to England, the value whereof was 6d. Exchequer's Annual, p. 588. These were forbidden to be current in this realm, 2 Hen. 6. c. 9. See tit. Alba Firma.
BLANKS,
BLANS, In judicial proceedings, certain void spaces sometimes left by mistake. A blank (supposing something material wanting) in a declaration, abates the same. 4 Ed. 4, 14: 20 H. 6, 18. And such a blank is a good cause of demurrer. Blanks in the imparlance-roll acted after verdict for the plaintiffs. Hob. 70; Parker v. Parker.

BLASARIUS, Is a word used to signify an incendiary. Blas.

BLASPHEMY, blasphemia.] Is an injury offered to God, by denying that which is due and belonging to him, or attributing to him what is not agreeable to his nature. Lib. 1. cap. 1. And blasphemies of God, as denying his being, or providence, and all contumelious reproaches of Jesus Christ, &c. are offences against the Common Law, punished by fine, imprisonment, pillory, &c. 1 Hask. P. C. And by statute 3 & 4 W. 3, c. 32, if any one shall by writing, speaking, &c. deny any of the Persons in the Trinity to be God; offend there are more Gods than one, &c. he shall be incapable of any office, and for the second offence, he shall be disabled to sue any action, to be executor, &c. and suffer three years, imprisonment. Likewise by Stat. 3 Jac. 1. c. 21, persons unfairly or profanely using the name of God, or of Jesus Christ, or of the Holy Ghost, or of the Trinity, in any vile play, &c. incurs a penalty of 10l.

BLE, Signifies fight, colour, &c. And ble is taken for corn: As Boughs under the Ble, &c.

BLECH, BLECH-HOLDING. See tit. Alba Firma.

BLEHEIM. See Marlborough Duke ef.

BLETA. Fr. belote.] Peat or combustible earth dug up and dried for burning. Rot. Parl. 35 Ed. 1.

BLINKS, Boughs broken down from trees, and thrown in a way where deer are likely to pass.

BLISSOM, Corruptly called blissom, is when a ram goes to the ewe, from the Teutonic, bliss, the bough.

BLOATED FISH OR HERRING, Are those which are half-dried. See tit. Fishe.

BLODEUS, Sax. blod.] Deep red colour; from whence comes blood and bloate, viz. fanguine and high coloured, which in Kent is called a blooding colour; and a bleue is there a red-faced wench. The prior of the king's foles, A.D. 1425; gave his livories of this colour. Paroch. Antq. 376.

BLOOD, sanguis.] Is regarded in descents of lands; for a person is to be the next and most worthy of blood to inherit his ancestor's estate. Co. Lit. 13: See Junc. Cent. 203: See tit. Defeas, Heir.

BLOODWIT, or bloodwit, compounded of the Sax. blod, i.e. sanguis; and wite, old English, misverdicta. Is often used in ancient charters of liberties for an amercement for bloodshed. Stone writes it bloodwit; and says wite in English is injustice; and that bloodwit is an amercement or unlaw (as the Scotch call it) for wrong or injury, as bloodshed is: for he that hath bloodwit granted him, hath free liberty to take all amercements of courts for effusion of blood. Plato faith, 29d sanguisque sicut instans misericordiae pro effusione sanguinis. Lib. 1. cap. 1. And according to some writers, bloodwit was a customary fine paid as a composition and atonement for shedding or drawing of blood; for which the place was unfavoured, if the party was not discovered; and therefore a privilege or exemption from this fine or penalty, was granted by the King, or suprimus Lord, as a special favour. So king Henry II. granted to all tenants within the honour of Wiltshire, Ut quiest iste dicter, &c. — Paroch. Antq. 144.

BLOODY-HAND, Is one of the four kinds of circumstances by which an offender is supposed to have killed deer in the king's forest, and is where a trespasser is apprehended in the forest, with his hands or other parts bloody, though he be not found chasing or hunting of the deer. Maxim. In Scotland, in such like crimes, they play taken in the fact, or with the red hand. See Bloodhilt.

BLOOMER. Whale oil, before it is thoroughly boiled and brought to perfection. It is mentioned Stat. 12 Car. 2. c. 18.

BOCK-HORD, or book-board, liberum homenum.] A place where books, evidences, or writings are kept.

BOCKLAND, Sax. giupf-bockland.] A possession or inheritance held by evidence in writing. See L. Alberni, cap. 36. Bockland signifies deed land or charters land; and it commonly carried with it the absolute property of the land; whereof it was preferred in writing, and poissibled by the Thane or nobler fort, as Freisland noble, liberum & c. seferitas uskurgical & servicialibus, and was the same as aluidem, descemible unto all the fons, according to the common course of Nations and of Nature, and therefore called gazekland; desexible by will, and thereupon termed Terra Testamentalis. Spec. of Lands. This was one of the titles which the English Saxons had to their lands, and was always in writing: there was but one more, and that was Folkland, i.e. Terra Popularis, which passed from one to another without any writing. See Squire on the Anglo-Saxon Government, and this Dict. tit. Tenure.


BOIS, Fr.] Wood, and job-bois, underwood. See Difera.

BOLLAGIUM, or bolzagium, a little house or cottage. Blunts.

BOLT, A bolt of silk or stuff, seems to have been a long narrow piece: in the accounts of the priory of Buckforre. It is mentioned, Paroch. Antq. p. 574.

BOLTING, A term of art used in our Imis of Court, whereby is intended a private arguing of cafes. The manner of it at Gray's Inn is thus: An ancient and two barristers sit as judges, three students bring each a cafe, out of which the judges choose one to be argued, which done, the students first argue it, and after them the barristers. It is inferior to mooting, and may be derived from the Sax. bol, a house, because done privately in the house for instruction. In Lincoln's Inn, Mondays and Wednesdays are the bolting days, in vacation time; and Tuesdays and Thursdays the most days.

BONA FIDE. That we say is done bona fide, which is done really, with a good faith, without any fraud or deceit.

BONA GESTURA, Good abearing, or good behaviour. See Good Behaviour.

BONAGH, or bonagh, Was an exaction in Ireland, imposed on the people at the will of the lord, for relief of the knights called bonaghii, who served in the wars. Antq. Hibem. p. 60.

BONA NOTABILIA. See title Excursiv. V. 3.
BONA PATRIA, An affr's of country-men or good neighbours. It is sometimes called affr's bona patria, when twelve or more men are chosen out of any part of the county to pass upon an affr', otherwise called juratores, because they are to swear judicially in the presence of the party, &c. according to the practice of Scotland. See Affr's.

BONA PERITURA, Goods that are disposable. The Stat. Wills, 1, 3 E. 1, cap. 4, as to wrecks of the sea, ordains, that if the goods within the ship be bona peritura, such things as will not endure for a year and a day, the sheriff shall sell them, and deliver the money received to answer it. See this Dict. tit. Wrecks.

BONCHA. A bunch, from the old Lat. bona or bumba, a rising bank, for the bounds of fields: and hence brown is used in Norfolk, for dwelling or rising up in a bunch or tumour, &c.

BOND, A Bond or Obligation, is a deed whereby the obligor or person, bound obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another (the obligee) at a day appointed.


II. Who may be obligors, and Obligees.

III. The Components necessary to constitute a Bond or Obligation.

IV. Of the Conditions; and what shall be a Performance or Breach thereof.

V. Of the Discharge and Satisfaction of Bonds; 1, by the Act of the Party; or 2, by the Act of Law.

VI. Of Actions and Pleadings, on Bonds.

I. If the bond be without a condition, it is called a single one, simplex obligatio; but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force: as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money borrowed of the obligee, with interest; which principal sum is usually one half of the penal sum specified on the bond. In case this condition is not performed, the bond becomes forfeited, or absolute at law, and charges the obligor while living, and after his death the obligation devolves on his heir, who (on defect of personal effects) is bound to discharge it, provided he has real assets by descent as a recompense. So that it may be called, though not a direct, yet a collateral charge upon the lands.

The condition may be either in the same deed, or in another, and sometimes it is included within, and sometimes indorsed upon the obligation: but it is commonly at the foot of the obligation. Bro. Obl. 67. A memorandum on the back of a bond may restrain the same by way of exception. Mort. 67.

This security is also called a specie; the debt being therein particularly specified in writing, and the party's seal; acknowledging the debt or duty, and confirming the contract; rendering it a security of a higher nature than those entered into without the solemnity of a seal.

As to the alignment of bonds, See tit. Alignment.

If the condition of a bond is impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive; or if it be uncertain or indeterminable, the condition alone is void, and the bond shall remainingle and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is malum in se, the obligation itself is void; for the whole is an unlawful contract, and the obligee shall take no advantage from such a transgression. And if the condition be possible at the time of making it, and afterwards becomes impossible by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved; for no prudence or foresight of the obligor could guard against such a contingency. Co. Lit. 206. See post, IV; and tit. Condition.

On the forfeiture of a bond, or its becoming specie, the whole penalty was formerly recoverable at law, but here the courts of equity interposed, and would not permit a man to take more than in confidence he ought, viz., his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed, the damages sustained, upon non-performance of covenants; and the like. And this practice having gained some footing in the courts of law, (See 2 Keb. 553; Salt. 556, 7: 30 Mod. 11, 60, 101:) the Stat. 4 & 5. Ann. c. 16, at length enacted, in the same spirit of equity, that in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited, and suit commenced thereon, shall be a full satisfaction and discharge.

And this rule of compelling the party to do equity who seeks equity, seems to be the reason why an obligee shall have interest after he has entered up judgment; for tho' in strictness it may be accounted his own fault why he did not take out execution, and therefore not intitled to interest; yet, as by the judgment he is intitled to the penalty, it does not seem reasonable that he should be deprived of the advantage from paying him the principal and interest, which incurred as well before as after the entering up of the judgment. Ab. Eq. 92, 288.

The Court of Chancery will not generally carry the debt beyond the penalty of a bond. Yet where a plaintiff came to be relieved against such penalty, though it was decreed, it was on the payment of the principal money, interest and costs; and notwithstanding they exceeded the penalty, this was affirmed. 1 Per. 350: 1 Eq. Ab. 92: 16 Vin. tit. Penalty: 3 Comm. 435. And where the condition of a bond is to perform a collateral act, damages may be recovered beyond the penalty, and the court of A. B. will not stay the proceedings on payment of the money into court. 2 Term Rep. 388. See White v. Scoley, Doug. 49, Semb. contra; but the authority of which is much shaken by the case in 2 Term Rep. 388, where Bullers, J. remarked, that there were several cases where the judgment had been carried beyond the penalty. In Ellis v. Davis (Land. 23,) interest on a bond was decreed (in Stock.,) to be paid, though it exceeded the penalty. See 2 Selw. Collins v. Collins, the case of an annuity. Bur. 830: Philip v. Oracy, 2 Sway. 166: Decall v. Price, Sway. P. C. 15.
K NOW all men by these presents, That I David Edwards, of Lincoln's Inn, in the county of Middlesex, esquire, am bold and firmly bound to Abraham Barker, of Dale Hall, in the county of Norfolk, esquire, in the penal sum of ten thousand pounds, of lawful money of Great Britain, to be paid to the said Abraham Barker, or his certain attorney, executors, administrators or assigns, for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the fourth day of September, in the twenty-first year of the reign of our sovereign Lord George the Third, by the grace of God, of Great Britain, France and Ireland, king defender of the faith and so forth, and in the year of our Lord one thousand seven hundred and —.

The condition of this obligation is such, that if the above bounden David Edwards, his heirs, executors or administrators, do and shall well and truly pay, or cause to be paid unto the above-named Abraham Barker, his executors, administrators or assigns, the full sum of five thousand pounds of lawful money of Great Britain, with lawful interest for the same, on the fourth day of March next ensuing the date of the above written obligation, then this obligation shall be void, and of none effect, or else shall be and remain in full force and virtue.

Sealed and delivered being first duly sealed in the presence of A. B.

For irregular forms of bonds or obligations, See 1 Lev. 25; 3 Lev. 299: Cro. Jac. 202, 607: Bro. tit. Obligation, &c. from whence, and other authorities, which the regularity of modern practice has rendered unintertesting, it appears that the courts always inclined to support the justice of the plaintiff's case, without much regard to mere errors in form, or arising from accident.

II. All persons who are enabled to contract, and whom the law supposes to have sufficient freedom and understanding for that purpose, may bind themselves in bonds and obligations. 5 Co. 119: 4 Co. 124: 1 Rol. Abr. 340.

But if a person is illegally restrained of his liberty, by being confined in a common gaol or elsewhere, and, during such restraint, enters into a bond to the person who causes the restraint, the same may be avoided for dures of imprisonment: Co. Lit. 253: 2 Knt. 432: v. tit. Dures.

So in respect of that power and authority which a husband has over his wife, the bond of a feme covert is ipso facto void, and shall neither bind her nor her husband. See tit. Baron and Feme.

So though an infant shall be liable for his necessaries, such as meat, drink, clothes, physic, schooling, &c. yet if he bind himself in an obligation, with a penalty for payment of any of those, the obligation is void. Bots. and Stad. 115: Co. Lit. 172: Co. Jul. 494, 560: 1 Sdb. 112: 1 Salk. 279: Cro. Eliz. 920. See tit. Infants.

BOND II.

Form of a Bond of Obligation, with Condition for the Payment of Money.

Also though a person non capaci mens re shall not be allowed to avoid his bond, by reason of infancy and distraction, yet may a privity in blood, as the heir, and privies in representation, as the executor and administrator, avoid such bonds; also if a lunatick after office found, enters into a bond, it is merely void. 4 Co. 124, Beverley's case. But see 2 Stra. 1104, that money may be given in evidence on the general issue. See tit. Lunctick.

But if an infant, feme covert, &c. who are disabled by law to contract, and to bind themselves in bonds, enter, together with a stranger, who is under none of these disabilities, into an obligation, it shall bind the stranger, though it be void as to the infant, &c. 1 Rol. Rep. 41.

If a servant makes a bill in form, "Memorandum, that I have received of A. B. to the use of my master C. D. the sum of 40l. to be paid at Michaelmas following," and thereto let his seal, this is a good obligation to bind himself; for though, in the beginning of the deed, the receipt is said to be to the use of his master, yet the money is to be paid, and must necessarily bind him who sealed it; and the rather, because otherwise the obligee would lose his debt, he having no remedy against the master. Peth. 137, Teldes & Godale.

Infants, idiots, as also feme coverts may be obligees; and here the husband is supposed to attend, being for his advantage; but if he disagrees, the obligation hath lost its force; so that after the obligee may plead non est factum; but if he neither agrees nor disagrees, the bond is good, for his conduct shall be esteemed a tacit consent, since it is to his advantage. 5 Co. 119 b: Co. Lit. 3 a. See tit. Baron and Feme.

An alien may be an obligee, for since he is allowed to trade and traffic with us, it is but reasonable to give him all that security which is necessary in his contracts, and which will the better enable him to carry on his commerce and dealings amongst us. Co. Lit. 127 b: Moore 431: Co. Eliz. 142, 683: Co. Car. 9: 1 Salk. 46: 7 Mol. 15: See tit. Alien.

Sole Corporations, such as bishops, prebends, parsons, vicars, &c. cannot be obligees, and therefore a bond made to any of these, shall entitle to them in their natural capacities; for no sole body politic can take a chattel in succession, unless it be by custom; but a corporation aggregate may take any chattel, as bonds, leases, &c. in its political capacity, which shall go in succession, because it is always in being. Co. Eliz. 404: Dyer 48 a: Co. Lit. 9 a, 46 a: Hob. 64: 1 Rol. Abr. 515.

If a drunken man gives his bond it binds him; and a bond without consideration is obligatory, and no relief shall be had against it, for it is voluntary, and as a gift. Ten. Cont. 159. But see Cole v. Robin, Hil. 2 Amb. per Holt, referred to in Bull. N. P. 172, that on the general issue, defendant may give in evidence that they made him sign the bond when he was so drunk he knew not what he did. A person enters voluntarily into a bond, though there was not any consideration for it, if there be no fraud used in obtaining the same, the bond shall not be relieved against in equity; but a voluntary bond may not be paid in a course of administration, so as to take place of real debts, even by simple contract; yet it shall be paid before legacies. 1 Chit. C. 157. A heir is not bound, unless he be named expressly in the bond: though the executors and administrators are. Dy. 15.
It is clearly agreed that two or more may bind themselves jointly in an obligation, or they may bind themselves severally; in which last case, the obligors may sue them jointly, or he may sue any one of them at his election; but if they are jointly and not severally bound, the obligees must sue them jointly; and, in such case, if one of them dies, his executor is totally discharged, and the survivor and survivors only chargeable. 2 Rel. Abr. 148; Dyer 19, 310; 5 Co. 19; Dal. 85, pl. 42; 1 Salt. 393; Gard. 61; 1 Lart. 696.

If three enter into an obligation, and bind themselves in the words following, Obligamus nos & utrunque nostro pro pro nostro & in solidum, there make the obligation joint and several. Dyer 19 b. pl. 114.

III. It is said, that there are only three things essentially necessary to the making a good obligation, viz. writing in paper or parchment, sealing and delivery; but it hath been adjudged not to be necessary, that the obligor should sign or subscribe his name; and that therefore if in the obligation the obligor be named Edwin, and he signs his name Edwina, that variation is not material; because subscribing is no essential part of the deed, sealing being sufficient. 2 Co. 5 a; Gard. 395; Nov. 21, 85; Mor. 28; Stile 97; 2 Salt. 662; 5 Mod. 281.

And though the seal be necessary, and the usual way of declaring on a bond is, that the defendant by his bond or writing obligatory sealed with his seal, acknowledged &c. yet if the word seal be wanting, it is cured by verdict and pleading over, for all necessary circumstances shall be intended; and if it were not sealed, it could not be his deed or obligation. Dyer 19 a; 2 Co. 5; 1 Fest. 70; 2 Ley. 348; 1 Salt. 141; 6 Mod. 305.

Also though sealing and delivery be essential in an obligation, yet there is no occasion in the bond to mention that it was sealed and delivered; because as Lord Coke says, these are things which are done afterwards. 2 Co. 5 a.

The name of the obligor subscribed, 'tis said, is sufficient, though there be a blank for his christian name in the bond. Co. Jac. 261; Vide Co. Jac. 53; 1 Mod. 107. In these cases, though there be a verdict, there shall not be judgment. Where an obligor's name is omitted to be inserted in the bond, and yet he signs and seals it; the court of Chancery may make good such an accident; and in case a person takes away a bond fraudulently, and cancels it, the obligor shall have as much benefit thereby, as if not cancelled. 3 Chan. Rep. 99, 184.

An obligation is good though it wants a date, or hath a false or impossible date; for the date, as hath been observed, is not of the substance of the deed; but herein we must take notice, that the day of the delivery of a deed or obligation is the day of the date, though there is no day set forth. 2 Co. 5; Gard. 395; Nov. 21, 85, 86; Hol. 249; Stile 97; Co. Jac. 136, 264; Vleb. 193; 1 Salt. 76.

If a man declare on a bond, bearing date such a day, but does not pay when delivered, this is good; for every deed is supposed to be delivered and made on the day it bears date; and if the plaintiff declare on a date, he cannot afterwards reply, that it was first delivered, at another day, for this would be a departure. Co. Eliz.

IV. The condition of a bond was, that A. L. should pay such a sum upon the 25th of December, or appear in Hilary term after, in the court of B. R. He died after the 25th of December, and before Hilary term, and had not paid any thing; in this case the condition was not broken for non-payment, and the other parties is become impossible by the act of God. 1 Mod. Rep. 265. And when a condition is doubtful, it is always taken most favourably for the obligor, and against the obligee; but so as a reasonable construction may be made as near as can be according to the intention of the parties. Dyer 5.

If no time is limited in a bond for payment of the money, it is due presently and payable on demand. 1 Brown. 55. But the judges have sometimes appointed a convenient time for payment, having regard to the distance of place, and the time wherein the thing may be performed. And if a condition is made impossible in respect to time, as to make payment of money on the 30th of February, &c. it shall be paid presently; Jan. 140. See 1 Eyre 101.

A bond made to enfeoff two persons; if one dies before the time is pased, wherein it should be done, the obligor must enfeoff the survivor of them, or the condition will be broken; and if it be that B. and others shall enjoy land, and the obligor and B. the obligee do disturb the rest; by this the condition is broken. 4 Hen. 7. 1; Co. Lit. 384. Where one is bound to do an act to the obligee himself, the doing it to a stranger by appointment of the obligee, will not be a performance of the condition. 2 Bulst. 149. But in such case equity would relieve, and probably a judge, on such action coming before him, would
would order plaintiff to be non-suited. If the act be to be done at a certain place, where the obligor is to go, to Rome, &c. and he is to do the same without limitation of time, he hath term during life to perform the same: if the concurrence of the obligor and obligee is requisite, it may be had by the request of the obligee. 6 Rep. 30: 1 Rob. Abr. 437. Where no place is mentioned for performance of a condition, the obligor is obliged to find out the person of the obligee, if he be in England, and tender the money, otherwise the bond will be forfeited: but when a place is appointed, he need seek no further. Co. Lit. 210: Lit. 330. And if, where no place is limited for payment of money due on a bond, the obligee, at or after the day of payment, meets with the obligor, and tenders him the money, but he goes away to prevent it, the obligor shall be excused. 8 E. 4.

The obligor, or his servant, &c. may tender the money to save the forfeiture of the bond, and it shall be a good performance of the condition, if made to the obligee, though refused by him; yet if the obligor be afterwards sued, he must plead that he is still ready to pay it, and tender the money in court. Co. Lit. 208.

In the performance of the condition of an obligation, the intention of the parties is chiefly to be regarded; and therefore a performance in substance is sufficient, though it differ in words or some material circumstances; as if one be bound to deliver the estate of the testator, if he plead that he had delivered letters testamentary, it is sufficient. Br. Com. 158; 17 E. 4, 31; 1 Rob. Abr. 426.

If the condition of an obligation be to procure a lawful discharge, this must be by a release, or some discharge that is pleadedable, and not by acquittance, which is but evidence. 1 Leav. 739.

If the party, who is bound to perform the condition disables himself, this is a breach; as where the condition is, that the seafe shall inoffend, or make a gift in tail, &c. to the seafe, and the seafe, before he performs it, make a leasement or gift in tail, or leave for life or years in possession or future to another person, or marry or grant a rent charge, or be bound in a statute, or recognizance, or become disqualified; in all those cases the condition is broken; for the seafe has either disabled himself to make any estate, or to make it in the same plentig or freedom in which he received it; and being once disabled, he is ever disabled, though his wife should die, or the rent, &c. should be discharged, or he should be disannulled, &c. before the time of the reconveyance. Co. Lit. 221, 222; P. 110; Co. 25 a; 1 Rob. Abr. 147; 6 Co. 214.

Where the condition is in the conjunctive, regularly both parts must be performed; yet, to supply the intention of the parties, it is held, that if a condition in the conjunctive be not possible to be performed, it shall be taken in the disjunctive; as if the condition be, that he and his executors shall do such a thing; this shall be taken in the disjunctive, because he cannot have an executor in his life-time; so if the condition be, that he and his assigns shall tell certain goods, this shall be taken in the disjunctive, because both cannot do it. 1 Rob. Abr. 444; 1 Owens 52; 1 Leav. 74; Gould's 171.

See further this Dict. t. t. Condition, Consideration, Gaming, Marriage; as to Resignation Bonds, t. t. Pardon.

A bond made with condition not to give evidence against a felon, &c. is void; but the defendant must plead the special matter. 2 Wiffon 341, &c. Condition of a bond to indemnify a person from any legal prosecution is against law, and void. 1 Lev. 607. And if a sheriff takes a bond as a reward for doing of a thing, it is void. 3 Salk. 75.

V. 1. Where a lesser sum is paid before it is due, and the payment is accepted, it shall be good in satisfaction of a greater sum; but after the money is due, then a lesser sum, though accepted, shall not be a satisfaction for a greater sum. Thus in debt upon bond, defendant pleaded payment of 8 l. before the day mentioned in the condition, which the obligee accepted in satisfaction of the bond, and upon demurrer this was adjudged a good plea. Mor. 677; Vide 3 Bulst. 301.—Payment after the day, of a less sum, is not good, as the bond is forfeited, at common law; and there is not any statute to relieve.

Debt upon bond of 15 l. conditioned to pay 81. on a certain day; the defendant pleaded, that, before that day, he, at the request of the plaintiff, paid him 5 l. which he accepted in satisfaction of the debt; and upon demurrer, the plaintiff had judgment, because the defendant had pleaded the payment of the 5 l. generally, without alleging, that it was in satisfaction of the debt. It is true, he fees forth, that it was accepted in satisfaction of the debt, but it ought likewise to be paid in satisfaction. 5 Rep. 117. Debt upon bond, conditioned, that in consideration of the plaintiff had paid 12 l. to the defendant; he became bound to pay the plaintiff 12 l. if he lived one month after the date of that bond; and if not paid at that time, then to pay him 14 l. if he lived six months after the date of the bond; the defendant pleaded, that after the six months he paid the plaintiff 8 l. and then gave him another bond in the penalty of 50 l. conditioned to pay him 10 l. on a certain day, in full satisfaction of the other bond, and that the plaintiff did accordingly accept the said bond; upon a demurrer to this plea it was held ill; for admitting that one bond might be given in satisfaction of another, yet it cannot be after the other is forfeited, as it was in this case; because after the forfeiture, the penalty is vested in the obligee, and a less sum cannot be a satisfaction for a greater. 1 Lev. 404.

It hath been adjudged, that the acceptance of one bond cannot be pleaded in satisfaction of another bond. Cro. Com. 85; 2 Rep. 672; Cro. Eliz. 710, 727; 2 Cro. 579. Thus in debt upon a bond of 100 l. conditioned for the payment of 5 l. 10 s. on a certain day, the defendant pleaded that at the day, &c. he, and his son gave a new bond of 100 l. conditioned for the payment of 5 l. 10 s. on another day, then to come, which the plaintiff accepted in satisfaction of the old bond; and upon demurrer it was adjudged for the plaintiff, because the acceptance of a new bond to pay money at another day, could not be a present satisfaction for the money due on the day when it was to be paid on the old bond. Hub. 68. But it is otherwise where the second bond is not given by the obligor; as in debt upon bond against the defendant as heir, &c. he pleaded that his ancestor, the obligor, died intestate and that W. K. administered, who gave the plaintiff another bond in satisfaction of the former; there was a verdict for the defendant: and it being moved in arrest of judgment, this distinction was
made; that if the obligor, who gave the first bond, had likewise given the second, it would not have discharged the first; but in this case the second bond was not given by him who gave the first, but by his administrator, which had mended the security, because he may be chargeable de bonis propriis; and for that reason the second bond was held to be a discharge of the first. 1 Mod. 275.

V. 2. A bond on which neither principal nor interest has been demanded for 20 years, will be presumed in equity to be satisfied, and be decreed to be cancelled; and a perpetual injunction granted to stay proceedings thereon. 1 Chb. Rep. 79; Finch. Rep. 78; See Mod. Ca. 22.—But satisfaction may be presumed within a less period, if any evidence be given in aid of the presumption; as if an account between the parties has been settled in the intermediate time, without any notice having been taken of such a demand.—Yet length of time is no legal bar, it is only a ground for the jury to presume satisfaction. 1 Term Rep. 370.

If several obligors are bound jointly and severally, and the obligee make one of them his executor, it is a release of the debt, and the executor cannot sue the other obligor. 8 Co. 136: 1 Salb. 300. And vide 1 Jom. 345.

But though it be a release in law, in regard it is the proper act of the obligee, yet the debt by this is not absolutely discharged, but it remains a lien in his hands, to pay both debts and legacies. Co. Cas. 573: Talbo. 160. See tit. Executor. IV. 8.

If a mere folle obligee take one of the obligors to husband, this is said to be a release in law of the debt, being her own act. 8 Co. 136 a: March 128.

If one obligor makes the executor of the obligee his executor, and leaves assets, the debt is deemed satisfied, for he has power, by way of retainer, to satisfy the debt; and neither he nor the administrator de bonis non, &c. of the obligee can ever sue the surviving obligor. Hob. 10.

But if two are bound jointly and severally to A. and the executor of one of them makes the obligee his executor, yet the obligee may sue the other obligor. 2 Lev. 73. See tit. Executor. IV. 8.

If two are jointly and severally bound in an obligation, and the obligee release one of them, both are discharged. Co. Lit. 232 a.

Three were bound jointly and severally in an obligation, and an action was brought against one of them, who pleaded, that the seal of one of the others was torn off, and the obligation cancelled, and therefore void against all. Upon demurrer it was adjudged, that the obligation, by the tearing off the seal of one of the obligors, became void against all, notwithstanding the obligors were severally bound. 2 Lev. 220: 2 Show. 289, Sed qu.

If the condition of a bond be, that a clerk shall faithfully serve, and account for all money, &c. to the obligee and his executors; this does not make the obligor liable for money received by the clerk in the service of the executors of the obligee, who continue the business, and retain the clerk in the same employment, with the addition of other benefits, and an increase of salary. 1 Term Rep. 287.—But such a bond is not discharged by the obligees' taking another partner into their house, it is only a security to the house of the obligees. 16. 291. n.

VI. In a bond where several are bound severally, the obligee is at his election to sue all the obligors together, or all of them apart, and have several judgments and executions; but he shall have satisfaction but once, for if it be of one only, that shall discharge the rest. Dyre 19. 310. Where two or more are bound in a joint bond, and only one is sued, he must plead in abatement, that two more sealed the bond, &c. and aver that they are living, and so pray judgment de bilis, &c. And not demur to the declaration. Sid. 420.

If action be brought upon a bond against two joint and several obligors jointly, and both are taken by capias, here the death or escape of one, shall not release the other; but the same kind of execution must be taken forth against them; it is otherwise when they are sued severally. Hob. 59.

Also, if two or more be jointly bound, though regularly one of them alone cannot be sued, yet if process be taken out against all, and one of them only appears, but the others fland out to an outlawry, he who appeared shall be charged with the whole debt. 9 Co. 119.

If a bond is made to three, to pay money to one of them, they must all join in the action, because they are but as one obligee. Talbo. 177.

So if an obligation be made to three, and two bring their action, they ought to sue the third is dead. 1 Sid. 238. 420; 1 Vent. 34.

Though there be several obligees, yet a person cannot be bound to several persons severally; and therefore an obligation of 200l. to two, to pay the one 100l. to the one, and the other to the other, is a void condition. Dyre 350 a. pl. 20: Hob 172: 1 Broun. 207: Talbo. 177.

If A. bind himself in a sum to B. to pay to C. who is a stranger, a payment to C. is a payment to B. and in an action upon it, the count must be upon a bond payable to B. 1 Sid. 295: 2 Co. 81.

In debt the declaration was, that the defendant became bound in a bond of—, for the payment of— to him, his attorney or assigns, and on over of the bond it appeared, that it was to pay to the plaintiff's attorney or assigns, without mention of himself; and on demurrer for this variance 'twas said that the declaration must not be according to the letter of the obligation, but according to the operation of the law thereupon. 6 Mod. 228, Robert v. Harman.

So if A. makes a bond to B. to pay to such person as he shall appoint; if B. does appoint one, payment to him is a payment to B. and if B. appoint none, it shall be paid to B. himself. 6 Mod. 228.

If A. by his bill obligatory, acknowledges himself to be indebted to B., in the sum of 10l. to be paid at a day to come, and binds himself and his heirs in the same bill in 20l. but does not mention to whom he is bound; yet the obligation is good, and he shall be intended to be bound to B. whom he acknowledged before the 10l. to be due. 2 Rol. Abr. 148. Franklin v. Tanner.

If an infant seal a bond, and be sued thereon, he is not to plead non est factum, but must avoid the bond by special pleading; for this bond is only voidable, and not in itself void. 5 Rep. 119. But if a bond be made by a fema covert, she may plead her coverture, and conclude non est factum, &c. her bond being void, 10 Rep. 119.
**BOND.**

Or plead non est factum, and give coverture in evidence. If a bond depends upon some other deed, and the deed becomes void, the bond is also void.

As to the pleading of performance, the defendant must set forth in what manner he hath performed it. Thus, in debt on a bond, with condition for performance of several things, the defendant pleads that the condition of the said deed was never broken by him, and held an ill plea: because, for having the bond, it is necessary for the defendant to show how he hath performed the condition; and this sort of pleading was never admitted. 2Flem. 136.

So if he had pleaded that he performed every thing, it had been ill; for the particulars being expressed in the condition, he ought to plead to each particularly; but if the condition were for performance of covenants in an indenture, performance were generally a good plea. 1 Lev. 392. This must be understood where the covenants are set forth and appear to be all in the affirmative. For if some are in the affirmative, some in the negative, or any in the disjunctive, the defendant should plead specially.

In debt on an obligation for payment of money, &c. the defendant pleads, that at the time and place, he was ready to pay the money, but that no body was there to receive it; and held ill on a general demurrer, for want of stating a tender, for the tender only is traverseable. 3 Lev. 104.

In debt on a bond with condition, the defendant pleads a collateral plea, which is insufficient; the plaintiff demurrers, and hath judgment, without affixing a breach; for the defendant, by pleading a defective plea, by which he would excuse his non-performance of the condition, saves the plaintiff the trouble of setting forth and appear to be all in the affirmative. For if some are in the affirmative, some in the negative, or any in the disjunctive, the defendant should plead specially.

In debt on an obligation for payment of money, &c. the defendant pleads, that at the time and place, he was ready to pay the money, but that no body was there to receive it; and held ill on a general demurrer, for want of stating a tender, for the tender only is traverseable. 3 Lev. 104.

**BOOKS.**

By Stat. 8 & 9 Wm. 3. c. 11. § 8, In actions on bonds for performance of covenants, the plaintiff may align as many breaches as he pleases, and the jury may affirm damages. The defendant paying the damages, execution may be stayed; but the judgment to remain to answer any future breach, and plaintiff may then have fei, fo against the defendant; and so teste, quod.

In debt on a bond, the defendant may have several pleas in bar; as if the plaintiff sue as executor, the defendant may plead the release of the testator for part, and for the refute the release of the plaintiff, so he may plead payment as to part, and as to the rest an acquittance. 1 Stalk. 180.

But a defendant in an action on a bond, cannot plead non est factum, and a tender as to part. 5 Term Rep. 97.

In debt on an obligation the defendant cannot plead nisi debet, but must deny the deed by pleading non est factum; for the seal of the party continuing, it must be disdolved eo lignamine quo lignatur. Hard. 352: Hol. 218.

In bonds to save harms, the defendant being prosecuted, is to plead non manumissatus, &c.

The sealing of any bond or bill, &c. for money, being the property of any one, made felony, as if offenders had taken other goods of like value. Stat. 2 Geo. 2. c. 25. See title Felony.

**BONDAGE.** Is slavery; and bondmen, in Domesday, are called ferui, but rendered different from villani.—Et de two tenements, quod de 150 trenz in bondagio in feca de Nortone cum partem. Mon. Angl. 2. par. fol. 609. See Nativus.

**BOND-TENANTS,** copy-holders, and custumary-tenants, are sometimes so called. Cal chapters on Copyholds 51, 54. See title Copyhold Tenants.

**BONIS NON AMOVENDIS.** A writ directed to the sheriffs of London, &c. where a writ of error is brought; to charge them that the person against whom judgment is obtained be not suffered to remove his goods, till the error is tried and determined. Reg. Orig. 131.

**BOOKS,** By Stat. 23 Hen. 8. c. 15. No person shall buy any printed books brought from beyond sea to sell the same again, and no one shall buy books by retail brought from beyond sea by any stranger. Likewise the prices of books, excessively increased, shall be qualified by the king's great officers.

By Stat. 7 Ann. c. 14. sect. 10. If any book shall be taken, or otherwise loft out of any parochial library, any justice may grant his warrant to search for it; and if it shall be found, it shall, by order of such justice, be restored to the library.

By Stat. 12 Geo. 2. c. 56. If no person shall import or sell books, first written and printed in this kingdom, and reprinted abroad, under the penalty of £1, and double the value of every book so imported or sold.

The sole right of printing books, bequested to the two Universities of England, the four Universities of Scotland, and the Colleges of Eton, Westminster, and Winchester is secured to them, by Stat. 15 Geo. 3. c. 53.

From the seventh to the eleventh century, books were very scarce. To that was chiefly owing the universal ignorance which prevailed, during that period. After the Saxons conquered Egypt in the seventh century, the communication with that country (as to Europe, &c.) was almost entirely broken off, and the papyrus no longer
BOOK.

in use. So that paper was used, and as the price of that was high, books became extremely rare, and of great value. Vide Robertson's History of Charles the Fifth, 1 Vol. 233, 234.

In the eleventh century the art of making paper was invented, the number of manuscripts was thereby increased, and the study of the Sciences greatly facilitated. See further as to Books, title Literary Property.

BOOK of RATES, See title Customs. BOOKSELLERS, And authors of books, &c. See title Literary Property.

BOOTING, or BOTTING-CORN, Rent-corn, anciently so called. The tenants of the manor of Haddenham in com. Bucks, formerly paid booting-corn to the prior of Rochester. Antiq. of Purveyance, fol. 418. It is thought to be so called, as being paid by the tenants by way ofbote, or boot, viz. as a compensation to the lord for his making them leaves, &c. BORDAGIUM, See Boardhole.

BORDARIA, A cottage, from the Sax. bord, homestead; BORDARI, or BORDIANI. These words often occur in Domesday, and some think they mean bords, hurdlemen, or cottagers. In the Domesday inquisition they were distinct from the villani; and seemed to be those of a less servile condition, who had a bord or cottage, with a small parcel of land allowed to them, on condition they should supply the lord with poultry and eggs, and other small provisions for his board or entertainment. Some derive the word bordari from the old Saxon bord, the limits or extreme parts of any extent; as the bordari of a country, and the bordari's inhabitants in those parts. Spelm.

BORD-HALFFENY, Sax. bord, a table and halfpenny, or half-penny. Spelm. A small toll, by custom paid to the lord of the town for setting up boards, tables, booths, &c. in fairs and markets.

BORDLANDS. The demesne of the lords in the hands for the maintenance of their board or table. Bract. lib. 4. tritt. 3, c. 9: Spelm.

BORDOLE, or BORDAGE. A service required of tenants to carry timber out of the woods of the lord to his house: or it is said to be the quantity of food or provision, which the bordari, or bordmen, paid for their bordlands. The old Scots had the term bord, and meet-bord for victuals and provisions; and borden jack, for a sack full of provender: from whence it is probable came our word burden. Spelm.

BORD SERVICE. A tenure of bord-lands; by which some lands in the manor of Fullham in com. Midd. and elsewhere, are held of the bishop of London, and the tenants do now pay six-pence per acre in lieu of finding provision, anciently for their lord's board or table. Bract.

BORD-BRICCH, bord-bryce, or borg brych, Sax.] A breach or violation of [securely, pledge-breach, or breach of mutual fidelity.

BOREL-FOLK, i.e. Country people, from the Fr. bours, focus, because they covered their heads with such stuffs. Bract.

BOREHOUSE, Fr. burg. Lat. borgius, Sax. borough.] Signifies a corporate town, which is not a city; and also such a town or place as lends burgesses to parliament. Verflagen faith, that burg, or borough, whereof we make our borough, metaphorically signifies a town having a wall, or some kind of inclosures about it: and all places that in old time had among our ancestors the name of borough, were one way or other fenced or fortified. Lit. sect. 174. But sometimes it is used for villa insigniar, or a country town of more than ordinary note, not walled. A borough is a place of safety, protection and privilege, according to Somner; and in the reign of King Hen. 2. boroughs had so great privileges, that if a bond-man or servant remained in a borough a year and a day, he was by that residence made a freeman. Glanville. And why these were called free boroughs, and the tradesmen in them free burgesses, was from a freedom to buy and sell, without disturbance, exempt from toll, &c. granted by charter. It is conjectured that boros, or borough, was also formerly taken for those companies consisting of ten families, which were to be pledges for one another: and we are told by some writers that it is a street or row of houses close to one another. Bract. lib. 3. tritt. 2. cap. 10: Lamb. Dut. of Conf. p. 8. Vide Squire's Anglo-Saxon Government. 236, 247, 251, 254, 262, 264. Trading boroughs were first formed in the time of Alfred. Squire 247, 251.

A borough is now understood to be a town, either corporate or not, that lends burgesses to parliament. 1 Comm. 114. See title Borough-Tenants. Parliament.

BOROUGH COURTS, Vide Courts.

BOROUGH-HOLDERS, BURS HOLDERS, or BURS;OLDERS, free borh-calders, See title Headborough.

BOROUGH-ENGLISH, A custom relative to the descent of lands, in some ancient boroughs, and copyhold manors, that estates shall descend to the youngest son; or, if the owner hath no issue, to his youngest brother's issue. 1 Lib. 165, as in Edmondson, &c. Kitch. 102.

This is so named in contradistinction as it was to the Norman customs, and is noticed by Glanville, lib. 7, c. 5.

Littleton gives the following reason for this custom. Because the youngest son by reason of his tender age, is not so capable as the rest of his brethren to help himself. Other authors have indeed given a much stronger reason for this custom, as if the lord of the fee had anciently a right of concubinage with his tenant's wife on her wedding night; and that therefore the youngest son was most certainly the tenant's offspring. But it does not appear that this custom ever prevailed in England, though it certainly did in Scotland (under the name of Marcheta, or Marcheta) till abolished by Malcolm III. — Possibly this custom of Borough English may be the remnant of the pastoral state of our Britons and German ancestors, in which the youngest child was necessarily most helpless. See 2 Comm. 83.

This custom goes with the land, and guides the descent to the youngest son, although there be a devise to the contrary. 2 Lev. 138. If a man is feised in fee of lands in borough-English, makes a feuement to the use of himself and the heirs male of his body, according to the course of the common law; and afterwards dies seised, having issue two sons, the youngest son shall have the lands by virtue of the custom, notwithstanding the feuement. Dyor. 179.

If a copyhold in borough-English be surrendered to the use of a person and his heirs, the right will descend to the youngest son according to the custom. 1 Rel. 102. And a youngest son shall inherit an estate in tail in borough-English. No. 106. But an heir at common law shall take advantage of a condition annexed to borough-English.
enlightened land; though the youngest son shall be intitled to all actions in right of the land, &c. 1 Nelf. Abr. 356. And the eldest son shall have titles arising out of land borough-English; for titles of common right are not inheritances defeasible to an heir, but come in succession from one clergyman to another. Ibid. 347.

Borough-English land being defeasible to the youngest son, if a younger son dies without issue male, leaving a daughter, such daughter shall inherit pure representations. 1 Nelf. 343. It hath been adjudged where a man hath several brothers, the youngest may inherit lands in borough-English; yet it is said where a custom is, that land shall go to the youngest son, it doth not give it to the youngest uncle; for customs shall be taken strictly; and those which fix and order the defects of inheritances, can be altered only by parliament. Dyrr. 179. 4 Less. 384; Tenk. Cent. 226.

By the custom of Borough-English, the widow shall have the whole of her husband's lands in dower, which is called her free hand; and this is given to her the better to provide for the younger children, with the care of whom hers intrusted. Co. Li. 35; 111; P. N. B. 150; Myn. pl. 566.

Borough-English is one of those customs of which the law takes particular notice; there is no occasion to prove that such custom actually exists, but only that the lands in question are subject thereto. 1 Comm. 76. But the extension of the custom to the collateral line must be specially pleaded. Rolin. on Caveats. 38, 43, 93. And as borough-English may be extended by special custom, so may it be restrained; and therefore the customary defect may be confined to free simple. Myn. 54. Cited Rolin. Appendix. See 1 Inst. 110 b. in n.

BOROUGH GOODS, as to their being defeasible.

See titles Will, Execut. BORROWING, See title Bank. BORROWHOLDERS, See title Headborough. BORSTMAGAD. Sax. Bost, doua & Magad. ancella.]

A house-maid. Spelm.

BOSCAKE, boscaum. That food which wood and trees yield to cattle; as malt, &c. from the Irish, bosca, folon; but Manxwood observeth, to be quic de bosco, is to be discharged of paying any duty of wind-fall wood in the forest. See Spelm., in n.

BOSCARIA, Wood hooes, from bosca; or ox hooes from bos. See Bosca. Mon. Angl. 2, fol. 302.

BOSCUS, An ancient word, signifying all manner of wood. Beo Italian, beq French. Bosca is divided into high-wood or timber, beuods, and coppice or under-woods, fab bosca, fab bois; but the high-wood is properly called fasus, and in Fleta we read it marcenum. Cum una Cavea de morsa bosco. Pat. 10 H. 6.

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


BOTE, Sax. A recompence, satisfaction or amend. The Saxon bote is synonymous to the word eover. See title Common. 3 Bovey is a sufficient allowance of wood to repair, or burn in the hooe; which latter is sometimes called fire-bote. Plough-bote, and cart-bote, are wood to be employed in making and repairing all instruments of husbandry: and hay-bote or hedge-bote, is wood for repairing of hays, hedges, or fences. 2 Comm. 25. Hence also comes man-bote, compensation, or amends for a man slain, &c. In King Eth's laws, it is declared what rate was ordained for expiation of this offence, according to the quality of the person slain. Lamb. cap. 93. From hence likewise we have our common phrase, to-bote, i.e. compensation granted.

BOTELESS, In the charter of H. 1, to Tbo. archbishop of York, it is said, that no judgment or sum of money shall acquite him that committeth sacrilege; but he is in English called botefe, viz. without emendation. Lib. Albus pars. Cap. d. Substit. int. Flar. Trin. 12 Ed. 2, Ebor. 48. We retain the word still in common speech; as it is botefe to attempt such a thing; that is, it is in vain to attempt it.

BOTELLARIA, A battery or cellar, in which the beers and hooes of wine, and other liquors are depofited.

BOTHIA, A booth, hall, or standing in a fair or market. Mon. Angl. 2 par. fol. 132.

BOTHAGIUM, Bothage, an excimerary does paid to the lord of the manor or fey, for the pitching and standing of booths in fairs or markets. Paris. Angl. p. 680.

BOTINA, or butina, seems to be a park where cattle are inclosed and fed. Hast. Bocinum, lib. 7, cap. 123. Bocinum, also signifies a barony, lordship, &c. S. Ew.

BOTILLER OF THE KING, (pinerna regis.) Is an officer that provides the king's wines, who (according to Fleta) may by virtue of his office choose out of every ship laden with wine, one cask before the mast, and one behind. Fleta lib. 2, cap. 21. This officer shall not take more wine than he is commanded, of which notice shall be given by the foreward of the king's house, &c. on pain of forfeiting double damages to the party grieved; and also to be imprisoned and ransomed at the pleasure of the king. Stat. 25 Ed. 3, 2, 5. cap. 21. See title Customs.

BOTOMRY, or botome, faneus nauticus. Is generally where a person lends money to a merchant, who wants it to traffick, and is to be paid a greater sum at the return of a certain ship, standing to the hazard of the voyage; and in this case, though the interest be greater than that allowed by law, it is not usury. See this subject more fully treated under title Insubance.

BOVATUM, or bovaine, An ox-foo. Mon. Angl. 2, fol. 310. Bovanius, a name used in the houses of noblemen, as in the king's court.


BOVETUS, A young steer or castrated bullock. Parch. Antig. p. 287.

BOVICULA, An heifer, or young cow; which in the East-riding of Yorks is called a cobbe, or ruby.

BOUGH or a TREE, Selion land given by it, to hold of the donor, incapsit, Mad. Excit. i. 62. See tit. Entry. Bound, or bounndy, boudin.] The utmost limits of land, whereby the same is known and ascertained, See 4 Inst. 318, and title Abounds.

BOUND BAILIFFS, See title Bailiffs.

BONTIES ON EXPORTATION, See title Navigation Abel.
BOUN

Bounty of Q. Anne, for maintaining poor clergymen. See Fifth Fruits.

Bow-Bearer. An under officer of the forest, whose office is to oversee, and to keep inquiry into, the acts of wild men as unworn in every bailiwick of the forest; and of all manner of trespasses done, either to vert or venison, and cause them to be presented, without any concealment in the next court of attachment, &c. Compt. Tyrif. fol. 201.

Bowyers, One of the ancient companies of the city of London. By Stat. 8 Eliz. c. 10, a bowyer dwelling in London, has always ready fifty boxes of elm, willow, or ash, well made and wrought, on pain of 10s. for every bow wanting; and to sell them at certain prices, under the penalty of 40s. And by Stat. 12 & 13 c. 2, parents and masters were to provide for their sons and servants, a bow and two arrows, and cause them to exercise shooting, on pain of 6s. 8d. &c. See also Stat. 33 H. 2. c. 6; and title Game.

Bracelets, Hounds, or rather beagles of the smaller and flower kind. Pat. 1 Rich. 2. p. 2. m. 1.

Brackenarius, Fr. braceneur.] A huntsman, or master of the hounds. Ann. 26 Ed. 1. Rot. 10. in duos.

Bractetus, A bound: bracteatus is in Fr. bracté, brac canis fugax indicat luporum; fo bracco was properly the large hound; and bracteatus, the smaller hound; and bracteatus the bitch of that kind. Monastic. Aug. tom. 2. pag. 283.

Bracium, A brewing: the whole quantity of ale brewed at one time, for which to sellor was paid in some manors. Braccia a brew-house, MS.

Branding in the hand, or face, with a hot iron, a punishment inflicted by law, for various offenses. After the offender hath been allowed clergy. See title Clergy, benefit of.

Brandy, A liquor made chiefly in France, and extracted from the lees of wine. In the Stat. 20 Car. 2. cap. 1, upon an argument in the Exchequer Anno 1668, whether brandy be a strong water or spirit, it was resolved to be a spirit: but in the year 1669, by a grand committee of the whole House of Commons, it was voted to be a strong water perfectly made. See also the Stat. 22 Car. 2. cap. 4.

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

Brasium, Malt: in the ancient statutes brastrae is taken for a brewer, from the Fr. braieur; and at this day is used for a maltster or malt-maker. Paroch. Antiq. p. 556.

Brass, is to be sold in open fairs and markets, or in the owners' houses, on pain of 10s. and to be worked according to the goodness of metal wrought in London, or shall be forfeited: also smelters of brass and pewter are to be appointed in every city and borough by local officers, and in counties by justices of peace, &c. and in default thereof, any other person skillful in that mystery, by oversight of the head officer, may take upon him the search of defective brass, to be forfeited, &c. Stat. 19 H. 7. c. 6. brass and pewter, half metal, &c. shall not be sent out of the kingdom, on pain of forfeiting double value, &c. Stats. 33 Hen. 8. c. 7: 2 & 3 Ed. 6. c. 37.

Breach of close, See title Trespass.

Breach of Covenant, The not performing of any covenant, expressed or implied in a deed; or the doing an act, which the party covenanting not to do. See title Covenant.

Breach of Duty, The not executing any office, employment, or trust, &c. in a due and legal manner. See title Clerk.

Breach of Peace, Offences against the public peace, are either such as are an actual breach of the peace or constuctive, or breaking a breach of the peace. See title Peace.

Breach of Pound, The breaking any pound or place where cattle or goods distrained are deposited, to refuse such distrain. See title Distress; Pound-breaching.

Breach of Prison, See title Escape; Prison-breaking.

Breach of Promise, violatur fiducia.] A breaking or violating a man's word, or undertaking, as where a person commits any breach of the condition of a bond, or his covenant, &c. entered into, in an action on the bond, &c. the breach must be suffered. In debt on bond, conditioned to give account of goods, &c. a breach must be alleged, or the plaintiff will have no cause of action. 1Sound. 102. See titles Bond; Condition, Covenant.


By Stat. 31 Geo. 2. c. 29, containing regulations concerning the aylde of bread, and to prevent adulteration, so much of Stat. 51 H. 3, intitled, adfide paonis & corneum, as relates to the aylde of bread, and the Stat. 3 An. c. 18, and all amendments by subsequent acts are repealed—

The weight of the peak loaf, when well baked, is fixed at 17lb. 6oz. Audiot. and the rest in proportion. The weight of a fack of flour, 2 cwt. 2 qr. or 286lb. net, which is to produce twenty peak leaves, weighing 34lb. 8oz. So that 3 lb. 6oz. is added to the weight of the flour by the materials of each peak loaf, when baked. And see farther Stat. 32 Geo. 2. c. 18, how penalties not appropriated by Stat. 31 Geo. 2. c. 29, shall be distributed. See also Stat. 3 Geo. 3. c. 6. (for Scotland) &c. Wherein there are farther regulations concerning the aylde of bread, and for preventing the adulteration thereof.

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

Under these statutes, bread deficient in weight or quality, may be seized by justices, mayors, &c. and bread is to be marked by the bakers according to its quality, W. for wheaten, and H. for household.

Bread of Treet, or Triticum, panis tricide.] Is bread mentioned in the statute 52 Hen. 3, of aylde of bread and ale; wherein are particularized wheaf bread, coket bread, and bread of treet, which answer to the three sorts of bread now in use, called white, wheaten, and household bread. In religious houses they heretofore distinguished bread by these several names, panis armigerum, panis communicati, panis praecocis, & panis famulorum. Antiq. No.

Brecca, from the Fr. breche.] A breach or decay. In some ancient deeds there have been covenants for repairing
The duty on beer fell because, for their family or to give away, frauds by brewers. Private persons may brew beer as granted and approves of strong and solid cider. Licences from the officers of excise. Brewers are by law entitled to a commission or mandate to a tenant of the honour of Pembroke. The sovereign, where the debt is directed either to the chancellor or by any person concerned. An act or mandate to a sheriff is called breve breve. Where the debt is directed either to the chancellor, judges, sheriffs, or other officers. It signifies a bribe of money, though small, is a great fault; and judges' servants may be punished for receiving bribes. If a judge refuse a bribe offered him, the offerer is punishable. Breviary in inferior judicial or ministerial officers is punished by fine and imprisonment, which may also be inflicted on those who offer a bribe though not taken. In the reign of King James I., the Earl of Middlesex, Lord Treasurer of England, being impeached by the Commons for refusing to hear petitions referred to him by the king; till he had received great bribes, was, by sentence of the Lords, deprived of all his offices, and disabled to hold any for the future, or to fit in parliament; also he was fined fifty thousand pounds, and imprisoned during the king's pleasure. 1 Hen. P. C. c. 67. § 7. But the fine was remitted on the accession of C. I. and the proceedings appears to have been indicted rather by revenge than justice. In the reign of King George I. the lord chancellor was impeached by the Commons with great zeal, for bribery, in selling the places of masters in chancery, for exorbitant sums, and other corrupt practices, tending to the great loss and ruin of the suitors of that court; and the charge being made good against him, being before divested of his office, he was sentenced by the Lords to pay a fine of thirty thousand pounds, and imprisoned till it was paid. See 6 S. T. 112.

By Stat. 12 R. 2. c. 2, the chancellor, treasurer, judges of both benches, barons of the exchequer, &c. shall be sworn not to ordain or nominate any person in any office for any gift, bribery, &c. and the sale of offices concerning the administration of public justice, &c. is prohibited on pain of forfeiture and disability, &c. by 5 & 6 Ed. 6. c. 16. In the construction of the last mentioned statute, it has been resolved that the offices of the ecclesiastical courts are within the meaning of that act, as well as the offices in the courts of Common law; but no office in fee is within the statute, and it hath been adjudged, that one who contracts for an office, contrary to the purport of the said statute 5 & 6 Ed. 6. c. 16, is so disabled to hold the same, that he cannot be restored to a capacity of holding it by any grant or dispensation...
BRIEBOY.

whender. Co. 46. 259, 336: 1 Hatch. P. C. c. 24. — It is said the Stat. does not extend to the plantations.

To bribe persons either by giving money or promises, to vote at elections of members of corporations, which are erected for the sake of publick government, is an offence for which an information will lie. 12 Med. 354.

A. R. R. M. 1377: 1 Black. 346. — But the Court will grant such information very cautiously, since the additional penalties by Statute. 1 Black. 380. See title Parliament.

An attempt to induce a man to advise the king, under the influence of a bribe, is criminal, though never carried into execution. 2 Burr. 2490. — Offering money to a privy-councillor, to procure the reversion of an office in the gift of the crown, has been adjudged a misdemeanour and punishable by information. Rev. Vaughan, 1 Hatch. P. C. 397. in note.

To officers of the Customs, &c. taking bribes. See dir. Customs.

Taking money to excuse persons from serving on juries, subjects the offender to a fine, not exceeding ten pounds, at the discretion of the judge. Stat. 3 Geo. 2. c. 35, sect. 6.

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

BRIBOUR, Fr. briewr.] Seems to signify in some of our old statutes, one that pilfers other men's goods.

BRICKS. An engine mentioned in Blount by which walls were beat down.

BRICKS AND TILES.—By Statute 17 El. 4. c. 4. The earth for tiles is to be dugged up and cast up before the 1st of November yearly, stoned and turned before the 1st of February, and wrought before the 1st of March following. — Every common tile must be 6 1/2 inches long, 6 1/2 broad, and 1/2 inch thick. — Roof tiles 13 inches long, &c. And persons selling tiles contrary hereto, forfeit double the value, and are liable to fine.

By Stat. 17 Geo. 3. c. 42. Bricks when burnt are to be 8 1/2 inches long, 2 1/2 thick and 4 wide. — Contracts for ingrossing and inhancing the price of bricks made void, and a penalty of 20 l. imposed on the parties.

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

BRIDGE, poss. A building of stone or wood erected a-croes a river, for the common safety and benefit of travellers. Public bridges, which are of general convenience, are of common right to be repaired by the whole inhabitants of that county in which they lie. Hall on P. C. 143: 13 Co. 33: 34. Co. 365.

Where a particular district re-built a foot-bridge over a more convenient part of the stream, and converted it into a bridge for horses, carts and carriages; as the district was not bound by custom to build or repair such a bridge, but a foot-bridge only, and as they built quite a different bridge in a different place, which proved of common publick utility to the county, the County, and the district, are bound to repair it. Burr. 2594: Black. 685.

But a corporation aggregate, either in respect of a special tenure of certain lands, or in respect of a special prescription; also any other person, by reason of such a special tenure, may be compelled to repair them. Hal on P. C. 143: Dall. c. 14: 6 Med. 357.

A tenant at will of a house which adjoins to a common bridge, although he is not bound as between landlord and tenant to repair the house, yet if it become dangerously ruinous to the necessary intercourse of the bridge, the tenant is bound by reason of his possession, to repair it so far as to prevent the Public being prejudiced. Ln. Raym. 726.

At Common law those who are bound to repair public bridges, must make them of such height and strength, as shall be answerable to the course of the water; and they are not trespassers if they enter on any land adjoining to repair them, or lay the materials necessary for the repairs thereon. Dan. c. 16. If a man erects a bridge for his own use, and the people travel over it as a common bridge, he shall notwithstanding repair it: though a person shall not be bound to repair a bridge, built by himself for the common good and public convenience, but the county must repair it. 2 Inst. 701: 1 Salk. 350.

Where inhabitants of a county are indicted for not repairing a bridge, they must first show who ought to repair the same, and transvers that they ought. 1 Inst. 356.

Unless perhaps, where the real question is, whether it be a public or a common bridge.

A will may be indicted for a neglect in not repairing a bridge; and the justices of peace in their sessions may impose a fine for defaults. And any particular inhabitant of a county, or tenant of land charged to repairs of a bridge, may be made defendants to an indictment for not repairing it, and be liable to pay the fine assessed by the court for the default of the repairs, who are to have their remedy at law for a contribution from those who are bound to bear a proportionable share of the charge. 6 Med. 357.

If a mayor is held by tenure of repairing a bridge, or highway, which mayor afterwards comes into several hands, in such case every tenant of any parcel of the demesnes and services, is liable to the whole charge, but shall have contribution of the rent; and this though the lord may agree with the purchasers to discharge them of such repairs, which only binds the lord, and doth not alter the remedy which the Public hath. 1 Brow. Abr. 749: 1 Salk. 358.

So if a mayor, subject to such charge, comes into the hands of the crown, yet the duty upon it continues; and any person claiming afterwards under the crown, the whole mayor, or any part thereof, shall be liable to an indictment or information, for want of due repairs. 1 Salk. 358.

If part of a bridge lie within a franchise, the owners of the franchise be charged with the repairs for so much; also, by a special tenure, a man may be charged with the repairs of one part of a bridge, and the inhabitants of a county are to repair the rest. 1 Hatch. P. C. c. 77: Raym. 384, 385.

Indictments for not repairing of bridges, will not lie but in case of common bridges on highways; though it hath been adjudged they will lie for a bridge on a common footway. Med. Cas. 250. Not keeping up a ferry, being a common passage for all the King's people, is indictable, as well as not keeping up bridges. 1 Salk. 12.

By Stat. 22 H. 8. c. 5. All householders dwelling in any county or town, whether they occupy lands or not; and all persons who have land in their own possession, whether
whether they dwell in the same county or not, are liable
be taxed as inhabitants, towards the repair of a
publick bridge. Where it cannot be discovered who
ought to repair a bridge, it must be presented by the
grand jury in quarter-sessions; and after their inquiry,
and the order of sessions upon it, the Justices may send
for the tallies of every parish, to appear at a fixed time
and place, to make a tax upon every inhabitant, &c., but
it has been usual, in the levying of money for repairs of
bridges, to charge every hundred with a sum in gross, and
to send such charge to the high constables of each hun-
dred, who send their warrants to the petty constables, to
gather it, by virtue whereof they affix the inhabitants
of parishes in particular sums, according to a fixed rate,
and collect it; and then they pay the same to the high
constables, who bring it to the sessions.

This method of raising money was long observed; but
by statute 14 Geo. 2. c. 33, the justices at their general
sessions, may purchase or agree with persons for any piece of
land, not above one acre, near to any county-bridge, in order
to enlarge or more conveniently rebuild it; and the
ground shall be paid for out of the money raised by
 subsidy of 32 Geo. 2. c. 29, for better affixing, collecting
and levying of county rates, &c. See tit. County-Rates.

By the said Stat. 12 Geo. 2. c. 29, § 14. When any
publick bridges, &c., are to be repaired at the expense
of the county, the justices at their general or quarter
sessions, after presentment made by the grand jury, of their
want of repair, may contract with any person for
rebuilding or repairing the same, for any term not
exceeding 7 years, at a certain annual sum. They are
to give publick notice of their intention to make such
contracts, which are to be made at the most reasonable
prices, and security given by the contractors for perform-
ance; which contracts are to be entered with the clerk
of the peace.

No persons are compellable to make a new bridge but
by act of parliament; and the inhabitants of the whole
county cannot, of their own authority, change a bridge
from one place to another.

If a man has toll for men and cattle passing over a
bridge, he is to repair it; and toll may be paid in these
cases, by prescription, or statute.

BRIDGE-MASTERS. There are bridge-masters of
London-bridge, chosen by the citizens, who have certain

fee and profits belonging to their office, and the care of
the said bridge, 8c. Lex Londin. 283.

BRIDGE, &c. An abridgment of the client's case,
made out for the instruction of council, on a trial at law;
wherein the case of the party is to be briefly but fully
stated, the proofs must be placed in due order, and pro-
per answers made to whatever may be objected against the
client's cause, by the opposite side; and wherein great care
is requisite, that nothing be omitted to endanger the cause.

An attachment has been granted against a party and
his attorney for surreptitious getting possession of the
brief of a counsel on the other side, and applying the
same to an improper purpose in his defence. See Bates-

Though a brief is not of itself evidence against the
party for whom it is prepared, yet, as a discovery of the
secrets and merits of his case, may be productive of per-
jury or subornation of perjury, and thereby obstruct the
justice of the court in which the suit is depending; the
obtaining of it in a surreptitious manner is an offence
highly deserving of punishment. 4d.

BRIEF AL EVISQUE. A writ to the bishop, which in
Quare Impedit, shall go to remove an incumbent, unless
he recover, or be preseit in eadem lite. 1 K. B. 386.

BRIEFS, or licences to make selection for repairing
churches, restoring by fire, &c. See tit. Churchwardens.

BRIGA, Fr. brique. Debate or contention.

BRIGANDINE. Fr. Lat. lorica.] A coat of mail or
ancient armour, consisting of many jointed and scale-like
plates, very pliant and easy for the body. This word is
mentioned in Stat. 4 & 5 P. & M. cap. 2, and some have
confounded it with haubergeon, and others with brigantine,
a long but low-built vessel, swift in falling.

BRIGANTIES. The ancient name for the inhabitants
of Yorkshire, Lancashire, bishopric of Durham, Welsh-
land, and Cumberland. Blom. 1.

BRIGBOTES, or BRUG-BOTE. Sax. brig, pontus,
and bate, campesfoun.] The contribution to the repair of
bridges, [walls and calice] which by the old laws of the
Anglos-Saxons might not be remitted; but by degrees
immunities were granted by the kings, even against this
duty; and then to be quitted of brigote signified to be
exempt from tribute or contribution towards the mending
or re-erecting of bridges. Finis, lib. 1. c. 47; Selden's
Titules of Honour, fol. 622.—Splein v. Brigbote and
Burgiove.

BRISTOL, A great city, famous for trade: the
mayor, burgesses and commonalty of the city of Bristo,
are conservators of the river Avon from above the bridge
to King-road, and so down the Severn to the two
islands called Holme; and the mayor and justices of the
city, may make rules and orders for performing the
river, and regulating pilots, masters of ships, &c. Also for
the government of their markets; and the streets are to
be kept clean and paved; and lamps or lights hung out at
night. Stat. 11 & 12 W. 3. c. 23.—No person shall act
as a broker in the city of Bristol, till admitted and li-
censed by the mayor and aldermen, &c. on pain of for-
feiting 500$. and those who employ any such, to forfeit
50$. &c. by Stat. 5 Geo. 3. c. 31.—By the Stat. 22 G. 2.
c. 20, the Stat. 11 & 12 W. 3. 13 is rendered more effectual
to so far as it relates to the paving and enlightening the
streets; and diverse regulations are made in relation to the
hackney-coachmen, hatters, draymen, and carriers, and
the
the markets and sellers of hay and straw, within the said

city and liberties thereof.

BROCAGE, brocadage.] The wages or hire of a brocker: which is also termed borcage. 12 R. 2. c. 3.

BROCELLA, This word, as interpreted by Dr. Thorow, signifies a wood; and is said to be a

thicket or covert of bushes and brush wood, from the obsolete Lat. bruca, terra brucofo & brocia. Fr. broce, brocule: and hence is our broce of wood, and broothing

cattle.

BROCHA, Fr. broche.] An awl, or large packing

needle. A spit in some parts of England is called a

broche; and from this word comes to pierce or broach a barrel.

BROCHIA, A great can or pitcher. Brad. lib. 2. part. 1. cap. 6. Where it seems that he intended success to carry dry, and brochus liquid things.

BRODEHALPENY, or BROADHALPENY. See Broadhalfpenny.

BROKERS, broscas, brosockeri & acupuncturei.] Are those that contrive, make and conclude

contracts between merchants and traders, in matters of

money and merchandise, for which they have a fee or re-

ward. There are Exchange brokers; and by the Stat. 10 R. 2. cap. 1. they are callediggers; also brokers of corn is used in a proclamation of Queen Elizabeth, for

bargain, Baker's Chron. fol. 511. The original of the word is from a trader broken, and that from the Sax. broc, misfortune, which is often the true reason of a man's

breaking; so that the name of broker came from one who was a broken trader by misfortune, and none but such were formerly admitted to that employment; and they were to be freemen of the city of London, and allowed and

approved by the lord mayor and aldermen, for their ability and honesty.

By the Stat. 6 Ann. c. 16, they are to be annually li-

cenced in London by the lord mayor and aldermen who ad-

minister an oath, and take bond for the faithful execu-

tion of their offices: if any persons shall act as brokers,

without being thus licensed and admitted, they shall forfet

the sum of 500 l. And persons employing them 50 l. and brokers are to register contracts, &c. under the like penalty: also brokers shall not deal for themselves, on

pain of forfet 100 l. They are to carry about them a silver medal, having the king's arms and the arms of the city, &c. and pay 40 s. a year to the chamber of the city.

As to brokers in Brexit. See tit. Brexit. — And as to

Provincial brokers, see that title. As to brokers illegally dealing in the funds or stocks, who are usually known by the ap-
pellation of stock-jobbers, See that title. Funds.

BROK. An old sword or dagger.

BROSSUS, Broasted or injured with blood, wounds, or other calamity. Cawd.

BROTHELL-HOUSES, Lewd places, being the common habitats of prostitutes. A brothelm was a

loose idle fellow; and a fence broker or brotheler, a common whore. And brothel is a contraction of brothel-man, courser. See Deputy Stage.

BRUDDO. See Breddite.

BRUER, Lat. aurum.] Signifies heath ground; and

brouer, broues, burn, or brouch, from the Sax. breor, brouer. Parol. Antiq. 410.

BRUILLUS, a wood or grove; Fr. brou, breuil, a

thicket or clump of trees in a park or forest. Hence the

office of bruier, in the forfeit of Wickenwood in cam. Oxen.

and Bruel, Brebul, or Bruil, a hunting seat of our ancient

kings in the forest of Burnwood in com. Buckh.

BRUILETUS, a small coppice or wood.

BRUNETA, properly Bruneta which fee.

BRUSIA, Seems to signify a wood. Manqu. tom. 1.


BUBELLIS. The South-sea project, and various

other schemes, similar in the end intended, that of de-

frauding the subject, though different as to the means,

were called by the name of bubbles. The Stat. 6 Gen. 1.

c. 18, makes all unwarrantable undertakings by un-

lawful subscriptions subject to the penalties of a specu-

lum. See title, Funds.

BUCILLARIUM, A buckler. Cla. 26 Ed. 3 m. 8.

BUCKSTALL, A toil to take deer, which by the

Stat. 19 Hen. 7. cap. 11, is not to be kept by any person that hath not a park of his own, under penalties. See also

3 Jac. 1. c. 13. There is a privilege of being quit of amercaments for buckstalls. Privileg. de Simplantam. See 4 Edw. 3. 306.

BUCKWHEAT, French wheat, used in many coun-

ties of this kingdom; in Essex it is called brand; and in

Worc. Sheriff. cap. 1. It is mentioned in the Stat. 15 C. 2.

c. 5.

BUCINUS, A military weapon for a footman. Ten-

uren. pag. 74.

BUGGERY, or Sodomy, Comes from the Italian bagare or bagarene, and it is defined to be a carnal co-

putation against nature, and this is either by the confusion of species; that is to say, a man or a woman with a brute

beast; or of sexes, as a man with a woman, or a man unnatu-

rally with a woman. 3 Edw. 3. 128 Rep. 35. It is this fin against God, nature, and the law, it is said was brought

into England by the Lombards. Rot. Parl. 50 Ed. 3.

numb. 56. In ancient times, according to some authors,

it was punishable with burning, though, others say with

breaking alive; but at this day it is felony excluded clergy

and punished as other felonies by Stat. 25 H. 6. cap. 9,

confirmed by 5 Edw. 17.

By the articles of the navy, (Art. 29, Stat. 22 Geo. 2. c.

33,) If any perfon in the fleet shall commit the unnatural

detestable sin of buggerry or sodomy, with man or beast; he shall be punished with death by the sentence of a court martial.

It is felony both in the agent and patient consenting,

except the perfon on whom it is committed be a boy under the age of discretion; (which is generally reckoned at fourteen:) when it is felony only in the agent: all

persons present, aiding and abetting to this crime, are

all principals, and the factures make it felony generally.

There may be assestries before and after the fact;

but though none of the principal offenders shall be ad-

mitted to clergy, the assestries are not excluded. 1 Hen. 6. H. P. C. 670.

In every indictment for this offence, there must be the

words, carn habuet unumquam & carnem carnem cognovit, &c.

and of consequence some kind of penetration and emission

must be proved; but any the least degree is sufficient. 1 Henh. P. C. c. 4. The general words of these indictments are, that A.B. on such a day, at, &c. with force and

arms, made an assault upon C.D. and then there

wickedly, devilishly, feloniously, and against the order
of nature, committed the venereal act; with the said C. D. and carnally knew him, and then and there wickedly, &c. did with him that sodomitical and detestable in called buggery, (not to be named among Christians) to the great displeasure of God, and disgrace of all mankind, &c. This crime is excepted out of our acts of general pardon. This says Blackstone a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so liable charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for if false, it deferves a punishment inferior only to that of the crime itself.

BUILDINGS. If a house new built exceeds the ancient foundation, whereby that is the cause of hindering the lights or air of another house, action lies against the builder. *Ab. 151.* In London a man may place ladders or poles upon the ground, or against houses adjoining for building his own; but he may not break ground; and builders of houses ought to have licence from the mayor and aldermen, &c. for a house in the streets, which are not to be incumbered. *C. Lit. 19.* In new building of London, it was ordained, that the outsides of the buildings be of brick or stone, and the houses for the principal front to be four stories high, having in the front, balconies; &c. by Stat. 19 Geo. 2. c. 3.

The laws for regulating all buildings in the cities of London and Westminster, and other parishes and places in the weekly bills of mortality, the parishes of St. Mary-le-bone, and Paddington, St. Peter's and St. Luke at Chelsea, for preventing mischief by fire, are reduced into one act by Stat. 14 Geo. 3. c. 78. The regulations of this law being very minute and technical, we must refer the reader to the statute itself.—See title Fire.

BULL, bull. A brief or mandate of the pope or bishop of Rome, from the lead or sometimes gold seal affixed thereto, which was Mist. Paris, anno 1237, thus describes: In bulla dominii papae, furt immago Pauli aequalis crucis in medie bullae figurata, & Petri a jurisdiction. The decrees of the pope are often mentioned in our statutes, 22 Ed. 3. 26 H. 8. cap. 16: 1 & 2 P. & M. c. 8. and 13 Eliz. cap. 2. They were heretofore used, and of force, in this land: but by the statute 28 Hen. 8. c. 16, it was enacted, That all bulls, briefs and dispensations had or obtained from the bishop of Rome, should be void. And by Stat. 13 Eliz. c. 2. (See Stat. 22 Eliz. c. 1.) if any person shall obtain from Rome any bull or writing to absolve or reconcile such as forsook their due allegiance, or shall give or receive abstraction by colour of such bull, or use or publish such bull, &c. it is high treason. See Rome, Papal.

BULL AND BOAR. By the custom of some places, a parson may be obliged to keep a bull and a boar for the use of the parishioners, in consideration of his having tithes of calves and pigs, &c. 1 Rol. Abr. 599: 4 Mist. 241.

BULLIO SALIS. As much salt as is made at one working or boiling; a measure of salt, supposed to be twelve gallons. *Mon. Aug. tom. 2.*

BULLION, Fr. bilon. The ore or metal whereof gold is made; and signifies us with gold or silver in bullion, in the mass before it is coined. *Anno 9 Ed. 3. ft. 2. c. 2. See title Coin, Money.

BULTEL. The bran or refuse of meal after dressed; also the bag wherein it is dressed is called a bulter, or ra-

BUNDEL, The brand, burgh, &c. from the Fr. burde. A kind of gun used in forests.

BURCHER REGIS, Purse-bearer, or keeper of the king's privy purse. *Par. 17.*


BURGAGE TENURE. See title Tenures. III. 11.

BURGAGE. See Gloudon, Lib. 7. c. 3. and is expressly said by Littleton, § 162, to be but tenure in socage: And it is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain. *Litt. § 162.*

It is indeed only a kind of town-socage; as common socage by which other lands are held, is usually of a rural nature. A borough is usually distinguished from other towns by the right of sending members to parliament; (See title Boroughs) and where the right of election is by burgage-tenure, that alone is a proof of the antiquity of the borough. Tenure in Burgage or Burgage-Tenure therefore is, where houses, or lands which were formerly the sites of houses, in an ancient borough, are held of some lord in common socage by a certain established rent. 2 Comm. 82.

The free socage in which these tenements are held seems to be plainly a remnant of Saxon liberty: which may also account for the great variety of customs, affecting many of these tenements to be held in ancient burgage, the principal and most remarkable of which is, that called Borough-English.—See that title.

Other special customs there are, in different burgage tenures; as in some, that the wife shall be endowed of all her husband's tenements, and not of the third part only, as at common law. *Litt. § 165.—In others that a man might (previous to *Stat. 3. H. 3.*) dispose of his tenements by will. *Litt. § 167.*—Though this power of dispossession was allowable in the Saxon times—a pregnant proof that these liberties of socage tenure were fragments of Saxon liberty. 2 Comm. 84.

BURG, A small walled town, or place of privilege, &c. See Borough.

BURG-BOTE, from burgo, castrum, and bate, consensus. Is a tribute or contribution towards the building or repairing of castles, or walls of a borough or city: from which divers had exemption by the ancient charters of the Saxon kings. *Rud. burgh-bote significant quidem regnantem reparationem suorum civitatis vitis burgi.* Flodo, *lib. 1. c. 47.* Spelm. v. Burgage.

BURGESSES, burgarii et burgenses. Properly men of trade, or the inhabitants of a borough or walled town; but this name is usually given to the magistrates of corporate towns.

In Germany, and other countries, they confound burgesses and citizens; but we distinguish them, as appears by the
the St. 5 R. 1. c. 4, where the classes of the commonwealth are thus enumerated, count, baron, banester, chevalier of comity; citizen of cities, burgess of borough. See Ca. Litt. 80. These are also called burkers, who serve in parliament, for any borough or corporation. See title Parliament. Burgers of our towns are called, in Domini, the bonnier of the king, or of some other great man; but this only shows whose protection they were under, and is not any infringement of their civil liberty. Square Lex. Sex. Go. 206. Burgesses & bonnetsburgare & scalum. Muns. Excheg. 1 P. C. 333. The aid of burgars, is 21 R. Soc. 60. See title Borough.

BURGH BREECH. Fidejussio violatia. A breach of pledge, Splem.] It is used for a fine imposed on the community of a town, for a breach of the peace, &c. Leg. Conuni, cap. 55.

BURGERTRUSTHE, or burgherste, Used in Domini-day-book, for a breach of the peace in a city. Blaut.

BURGHBOTE. See Burgote.

BURGEMOTHE, A court of a borough. L. Conuni, MS. cap. 44.—Burghbote is different, which see.

BURGBRAKHE, quaest burgarum.] A citizen or burgars.

BURGLARY, Burgi latrinaciun; by our ancient law called homeseque, as it is in Scotland to this day. 4 Comm. 222.] A Felony at common law, in (1) breaking and entering (2) the mansion house, of another, or the walls or gates of a walled town, or a church, (3) in the night, (4) in the intent to commit some felony within the same; whether the felonious intent be executed or not. 1 Hask. P. C. c. 38. § 1, 10: 4 Comm. 224.

It seems the plainest method to consider the subject according to the four parts of the above definition; and 5. to add something on the punishment of this offence.

1. There must be both a breaking and an entry to complete this offence. 1 Hask. P. C. c. 38. § 3.

Every entrance into the house by a trespasser is not a breaking in this case, but there must be an actual breaking. As if the door of a manor house stand open, and the thief enters, this is no breaking. So it is if the window of the house be open, and a thief with a hook or other engine draweth out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief breaketh the glass of the window, and with a hook or other engine draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house. 3 Inft. 64. But the following adds amount to an actual breaking, viz. opening the ealcement, or breaking the glass window, picking open the lock of a door, or putting back the lock, or the leaf of a window, or unlatching the door that is only latched. 1 Hal. H. P. C. 552.

Having entered by a door which he found open, or having lain in the house by the owner's content, unlatching a chamber door; or coming down the chimney. 1 Hask. P. C. c. 38. § 4.

If thieves pretend business to get into a house by night, and thereupon the owner of the house opens his door, and they enter and rob the house, this is burglary. Kel. 42.

So if persons designing to rob a house, take lodgings in it, and then fall on the landlord and rob him; or where persons intending to rob a house, raise a hue and cry, and prevail with the constable to make a search in the house, and having got in by that means, with the owner's content, bind the constable, and rob the inhabitants; in both these instances they are guilty of burglary, for these evasions rather increase the crime. 1 Hawk. P. C. c. 38. § 5.

If a person be within the house and steal goods, and then open the house on the inside, and go out with the goods, this is burglary, though the thief did not break the house. 3 Inft. 64. But this was not admitted to be lawful with any certainty; and therefore by Stat. 12 Ann. c. 7, it is enacted, 'that if any person shall enter into the mansion house of another, by day or by night, without breaking the same, with an intent to commit felony, or being in such house shall commit any felony, and shall in the night-time break the said house to get out, he shall be guilty of burglary, and obliged of the benefit of clergy, in the same manner as if he had broken and entered the house in the nighttime, with intent to commit felony.'

Any one that enters, either with the whole, or with but part of the body, or with any instrument or weapon, shall satisfy the word entered in an indictment for burglary: as if one do put his foot over the threshold, or his hand, or a hook, or pitchfork, within a window, or turn the key of a door which is locked on the outside, or discharge a loaded gun into a house, &c. 1 Hask. P. C. c. 38, § 7, and the authorities there cited.—But where thieves had bored a hole through the door, with a center-bit, and part of the chips were found in the inside of the house, yet as they had neither got in themselves, nor introduced hand or instrument for the purpose of taking the property, the entry was ruled incomplete. Id. ib. is note.

When several come with a design to commit burglary, and one does it, while the rest watch near the house, here his act is, by interpretation, the act of all of them. And upon a like ground, if a servant confederating with a rogue, let him in to rob a house, it has been determined by all the judges, upon a special verdict, that it is burglary both in the servant and the thief. Lord Thos. Hawk. P. C. i. c. 38. § 9, and n.

2. It is certainly a dangerous, if not an incurable fault to omit the word dwellinghouse in an indictment, for burglary in a house. But it seems not necessary or proper in an indictment for burglary in a church, which by all the ancient authorities is taken as a distinct burglary. See 1 Hask. P. C. c. 38. § 10, and the authorities there cited.

If a man hath two houses, and resides, sometimes in one of the houses, and sometimes in the other, if the house he doth not inhabit is broken by any person in the night, it is burglary. Popb. 52.

A chamber in an inn of court, &c. where one should lodge, is a manor-house; for every one hath a several property there. But a chamber where any person doth lodge as an inmate, cannot be called his mansion; though if burglary be committed in his lodgings, the indictment may lay the offence to be in the mansion-house of him that let them. 3 Inft. 65. Kel. 83. If the owner of the house breaks into the rooms of his lodgers, and deals their goods, it cannot be burglary to break into his own house, but it is felony to steal their goods. Wood's Inft. 378. But see contra, 1 Hask. P. C. c. 38. § 13, 14, 15.

If the owner live under the same roof with the inmates, there must be a separate outer door, or the whole is the mansion of the owner; but if the owner inhabit no part of the house; or even if he occupy a shop, or a cellar in
BURGLARY.

it, but do not sleep therein, it is the mansion of each lodger, although there be but one outer door. Leach's Hawk. P. C. c. 38. § 15. n. — There being only one door in common to all the inhabitants, makes no difference, where the owner does not sleep in any part of the house, for in that case, each apartment is a separate mansion. Id. ib. § 14. n.

Chambers, in inns of court, &c. have separate outward doors, which are the extremity of obstruction, and are enjoyed as separate property, as estates of inheritance, for life, or during reversion. So a house divided into separate tenements, with a distinct outward door to each, will be separate houses. Id. ib. § 13. n.

Part of a house divided from the rest, having a door of its own to the street, is a mansion-house of him who hires it. K. H. 84.

To break and enter a shop, not parcel of the mansion-house, in which the shopkeeper never lodges, but only works or trades there in the day-time, is not burglary, but only larceny; but if he, or his servant, usually or often lodge in the shop at night, it is then a mansion-house, in which burglary may be committed. 1 H. H. P. C. 557, 558. — But see Stat. 13 Geo. 3. c. 38, respecting burglary in the work shops of the plate-glass manufactory, which is made single felon, and punishable with transportation for seven years. If the shop-keeper sleep in any part of the building, however distant that part is from the shop, it may be alleged to be his mansion house; provided the owner does not sleep under the same roof also. Leach's Hawk. P. C. c. 38. § 16. n.

A lodger in an inn hath a special interest in his chamber, so that if he opens his chamber door, and takes goods in the house, and goes away, it seems not to be burglary. And where A enters into the house of B. in the night, by the doors open, and breaks open a chest, and steals goods without breaking an inner door; it is no burglary by the common law, because the chest is no part of the house; though it is felony out of the shop by statute 3 W. & M. c. 9; and if one open a counter or cupboard, fixed to a house, it is burglary. 1 Hale's Hil. P. C. 554.

All out-buildings, as barns, stables, ware-houses, &c. adjoining to a house, are looked upon as part thereof, and consequently burglary may be committed therein. And if the ware-house, &c. be parcel of the mansion-house, and within the same, though not under the same roof, or contiguous, a burglary may be committed therein. But an out-house occupied with, but separated from the dwelling-house by an open passage eight feet wide, and not within or connected by any fence, including both, is not within the curtilage or homestead. Leach's Hawk. P. C. c. 38. § 12. n. 4 Comm. 225.

No burglary can be committed by breaking into any ground inclosed, or booth, or tent, &c. but by Stat. 5 & 6 E. 6. c. 9, clergy is taken from this offence.

3. In the day-time there is no burglary. — As to what is reckoned night, and what day for this purpose, antiently the day was accounted to begin only at sun rising, and to end immediately upon sunset; but the better opinion seems to be, that if there be day light, or creeping enough begun or left to discern a man's face without, it is no burglary. But this does not extend to moonlight; the malignity of the offence, not so properly arising from its being done in the dark, as at the dead of night, when sleep has disarmed the owner, and rendered his cattle defenseless. 4 Comm. 224: 1 Hawk. P. C. c. 38. § 1.

4. The breaking and entry must be with a felonious intent, otherwise it is only theft; and it is the same whether such intent be actually carried into execution, or only demonstrated by some attempt, of which the jury is to judge. And therefore such breaking and entry, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary. Nor does it make any difference, whether the offence were felony at common law, or only created so by statute. 4 Comm. 227: 1 Hawk. P. C. c. 38. § 18, 19.

One of the servants of the house opened his lady's chamber door, which was fastened with a brass bolt, with design to commit a rape; and it was ruled to be burglary, and the defendant was convicted and transported. Stran. 481: K. H. 67.

A servant embezzled money intrusted to his care; left ten guineas in his trunk; quitted his master's service; returned; broke and entered the house in the night, and took away the ten guineas, and adjudged no burglary. Leach's Hawk. P. C. c. 38. § 18 n. Statute 1 Show. 53-5. Every man's house is considered as his castle, as well for defence against injury and violence, as for repose. 5 Co. 92. — To violate this security is considered of such atrocious a nature, that the alarmed inhabitants, whether he be an owner or a mere inmate, (Cro. 544.) is by Stat. 24 H. 8. c. 5, expressly permitted to repel the violence by the death of the assailant, without incurring the penalties even of excusable homicide. — For a course of time however, the life of a burglar was saved by the plea of clergy; but as the increase of national opulence furnished further temptations, additional terrors became necessary; therefore by Stat. 18 Eliz. c. 7, clergy is taken away from the offence; and by Stat. 3 & 4 W. & M. c. 9, from accusations before the fact.

Still farther to encourage the prosecution of offenders, it is enacted by Stat. 10 & 11 W. 3. c. 23, that whoever shall convict a burglar, shall be exempted from parish and ward offices, where the offence was committed. To this, Stat. 5 Ann. c. 31, and 6 Geo. 1. c. 23, have superadded a reward of 40l. And if an accomplice, being out of prison, shall convict two or more offenders, he is entitled also to a pardon of the felonies as enumerated in the act. See title Accesary.

See likewise Stati. 25 Geo. 2. c. 36: 27 Geo. 2. c. 3, and 18 Geo. 3. c. 19, which provide, That the charges of prosecuting and convicting a burglar shall be paid by the treasurer of the county where the burglary was committed, to the prosecutor, and poor witnesses.

To remove one inducement to the frequent commission of burglaries, Stat. 10 Geo. 3. c. 48, provides, that buyers or receivers of stolen jewels, gold, or silver plate, where the stealing shall have been accompanied by burglary, (or robbery) may be tried and transported for fourteen years, before the conviction of the principal.

And to check this offence in its progress, Stat. 23 Geo. 3. c. 88, enacted, That any person apprehended, having upon him any pick-lock key, &c. or other implement, with intent to commit a burglary, shall be deemed a rogue and vagabond, within Stat. 17 Geo. 2. c. 5.

For further matter, See titles Clergy, Felony, Laurence. BURL, Hubnaden. Mon. Angl. iom. 5. p. 183.
BURIALS, Persons dying are to be buried in woollen, on pain of forfeiting 5l. And affidavit is to be made of such burying before a justice, &c. under the like penalty. Stat. 30 Car. 2. c. 5.

BURNET, Cloth made of dyed wool. A burnet colour must be dyed; but bruna color may be made with wool without dyeing, which are called medleys or ruffs. Linen wool. Thus much is mentioned because this word is sometimes written brunto.

BURNT, Burning on.

BURSTING IN THE HAND, Vide Branding.

BURSARIA, A burdock, or small weed over a river, where wheels are laid for the taking of fish. Consul. BURS, A parke. Ex Chart. or it.

BURSARI, The bury, or exchequer of collegiate and conventual bodies; or the place of receiving and paying; and accounting by the buryari, or buryers. P. 228. But the word buryari did not only signify the buryers of a convent or college, but formerly stipendiary scholars were called by the name of buryari, as they lived on the burs or fund, or public block of the University. At Paris, and among the Cistercian monks, they were particularly termed by this name. John Major. Cat. Est. 13. c. 15.

BURU, bucc, cambium, bacillo.] An exchange, or place of meeting of merchants.

BUSINESSCOMITATUS, Brevit. lib. 3. tract. 2. cap. 1. Blount says bussis is used for business.

BUSASY, A ship. Blount's Dict. The vessels used in the herring fisheries are called buses and smacks.

BUSELLUS, A butcher; from bussa, bfrica, bfrica, a standing measure: and hence buticella, buticellus, bfrica, a less measure. Some derive it from the old Fr. bunts, leather continent of wine; whence come our leather buttons and bottles. Kennet's Gloss.

BUSTA and BUSTUS, busca, and bursa, &c. See Bursa and Bursula.

BUSTARD, A large bird of game, usually found on downs and plains, mentioned in the Stat. 25 Hen. 8. c. 11. See title Game.

BUCHERS. These were anciently compelled by statute to sell their meat at reasonable prices, or forfeit double the value, to be levied by warrant of two justices of peace. &c. And were not to buy any fat cattle to sell again, on pain of forfeiting the value; but this not to extend to selling calves, lambs, or sheep dead, from one butcher to another. Stat. 23 Ed. 3. c. 6. — By Stat. 2 & 3 E. 6. c. 15. (revived, continued and confirmed by Stat. 22 & 23 Car. 2. c. 19, which is now expired.) Butchers (and others) conspiring to sell their victuals at certain rates, are liable to 10l. penalty, or twenty days imprisonment, for the first offence—20l. or pillory for the second—and 40l. or pillory, and loss of ear for the third. — The offence to be tried by the felons or leet.

See title Conspiracy.—By Stat. 4 Hen. 7. c. 3, no butcher shall lay any beard within any walled town, except Cornw. and Berwick. — By the ordinance for bakers, mercers, temples, butchers are not to sell swine's flesh mealed or flesh-dead of the murrain. — By Stat. 3 G. 1. c. 1, butchers are not to fell or kill meat on Sunday. — By Stat. 1 Jac. 1. c. 22, and 9 Ann. c. 11, regulations are made as to the warming and gadding hides and the selling purified and rotten hides by butchers; and by the said Stat. 1 Jac. no butcher shall be a tanner, or currier.

See further titles Cattle; Forcalfalling; Virtuals.

BUTLER, See Butler.


BUTTER AND CHEESE. — By Stat. 9 H. 6. c. 8, A weigh of cheese shall contain thirty-two coves, each to weigh 7½ lb. = 2 cwt. Every kildeer of butter shall contain 121 pounds, the firkin 56, and pot 14 pounds of good butter, (every pound 10s. 6d.) besides the casks and pots; and old bad butter shall not be mixed with good, nor shall butter be repacked for sale, which incurs forfeiture of double value, &c. And sellers and packers of butter shall pack it in good casks, and let their names thereon, with the weight of the cask and butter, on pain of 10s. 6d. c. 15. — Butters of butter are to put marks on casks, and persons opening them afterwards, or putting in other butter, &c. shall forfeit 20s. 4s. 6d. &c. c. 7. The said Stat. 4 & 5 W. & M. c. 7, also contains regulations to compel warehouse-keepers, weighers, searchers, and shippers, to receive all butter and cheese for the Landa market, without undue preference.—The States 8 Geo. 1. c. 27: and 17 Geo. 2. c. 3, regulate the sale of butter; the former in the city of York, the latter at New Holland. — See titles Weights and Measures.

BUTTONS, Foreign buttons are not to be imported on penalty of 100l. on the importer, and 50l. on the seller, by Stats. 13 & 14 C. 2. c. 13; and 4 W. & M. c. 10. — And by the same statutes, a justice may issue his warrant to search for and seize the same.

By Stat. 10 W. 3. c. 2. No person shall make, sell, or set on, any buttons made of wood only, and turned in imitation of other buttons, under penalty of 40s. a dozen. A shank of wire being added to the button makes no difference. Ed. Regn. 712.

By the said Stat. W. 3; no person shall make, sell, or set on, button, made of cloth, or other stuffs of which clothes are usually made, on penalty of 40s.

By Stat. 8 An. 6. c. 10, or other perch, shall make, sell, or set on, ½d. or bit, on any clothes, any buttons or button holes of cloth, &c. on pain of £1 a dozen. — By this act no power is given to make distinctions.

Stat. 4 Geo. 1. c. 7, is said in Bury's Justice, (title Buttons) to be a book, injudicious, ungrammatical, &c., and which by its title may seem to have been drawn up by taylors, or button makers. This act imposes (indefinitively enough) 40s. a dozen, on all such buttons and button
BUT

button holes, with an exception of velvet; it seems levelled against the tailors only, but clothes with such buttons and button holes exposed to file, are to be forfeited and seized.

By Stat. 7 Geo. 1. c. 7, sect. 12. No person shall use or wear, on any clothes, (velvet excepted) any such buttons or button holes, on pain of 40s. a dozen, half to the witness on whose oath they are convicted; an application of the penalty deferredly reprotested as nearly singular, and on a principle not reconcileable to the usual rules of evidence. This statute is also incorrect, particularly in making no provision of a moiety of the penalty, in case of conviction or confession by the party.

These acts are seldom enforced, and do not seem very consistent with general policy. See title Tailors.

BUTTS, The place where archers meet with their bows and arrows to shoot at a mark, which we call shooting at the butts. All bows are the ends or short pieces of land in arable ridges and furrows; butt enume, a butt of land. See title Abbatales.

BUTLERAGE or WINES, See title Customs.

BUTHSCARLE, husts, hufters, (husts & hustlices.) Mariners or seamen. See title Man Class of seamen, 1. Scicl. 184.

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

BY, Words ending in by or be, signify a dwelling place or habitation, from the Sax. by, habitation.

BY-LAWS, Billingae, from Sax. by, pagens, civitas. and lege, lex. i.e. the laws of cities, Stat. 5. 10 leges. Perhaps laws made by the by. Certain orders and constitutions of corporations, for the government of their members; of courts-leet and court-baron; commoners or inhabitants in towns, &c. made by common affent, for the good of those that made them, in particular cases, whereby the public law doth not extend; so that they lay reprobation on the parties, not imposed by the common or statute law: guide and fraternities of trades, by letters-patent of incorporation, may likewise make by-laws, for the better regulation of trade among themselves, or with others. 1 Kitch. 45. 72. 6 Rep. 63.

In Scotland those laws are called laws of birlaw, or bornlaw; which are made by inhabitants elected by common consent in the birlaw courts, wherein knowledge is taken of complaints between neighbour and neighbour; which men chose are judges and arbitrators, and filled birlaw-men. And bornlaw, according to Skene, are leases of towns, laws made by hereditarymen, or townships, concerning membership amongst them. Skene, p. 33.

The power of making by-laws, being included in the very act of incorporating a corporation, and that by laws being made by corporations, it seems more regular to consider the nature and effect of them under that head. See title Corporation.

In this place therefore we shall chiefly consider, 1. who may make by-laws, and 2. the general requisites of them.

1. The inhabitants of a town, without any custom, may make ordinances or by-laws, for repairing of a church, or highway, or any such thing, which is for the general good of the Public; and in such cases, the greater part shall bind all; though if it be for their own private profit, as for the well ordering of their common, or the like, they cannot make by-laws without a custom to warrant it, and if there be a custom, the greatest part shall not bind the rest in these cases, unless it be warranted by the custom. 5 Rep. 63. A custom to make a by-law, may be alluded in an ancient city or borough. See in an upland town, which is neither city nor borough, 1 Inf. 116. 4 Cro. Cas. 498; Hob. 212.

The fireholders in a court-leet may make By-laws relating to the public good, which shall bind every one within the leet. 2 Darm. 457. Mo. 757, 584. And a court-baron may make By-laws, by custom, and add a penalty for the non-performance of them. So by custom the tenants of a manor may make by-laws for the good order of the tenants. 1 Ro. Ab. 166. 1. 35. Mo. 75. Hob. 212. So may the homage. 1 Ro. Ab. 232 (2). But not without a custom. See 74. And a custom that the steward with the consent of the homage may make them, is not good. 3 Leav. 49.

2. All By-laws are to be reasonable, and ought to be for the common benefit, and not private advantage of any particular persons; and must be consonant to the public law and statutes, as subordinate to them. And by Stat. 19 H. 7. c. 7. By-laws made by corporations are to be approved by the Lord Chancellor, or Chief Justices, &c. on pain of 40s.

A By-law may be reasonable, though the penalty be to be paid to those who make the by-law. 1 Salk. 597. And generally it shall be reasonable, if it be for the public good of the corporation. Carth. 482.

By-laws made in restraint of trade are not favoured, but the distinction between such as are made to restrain, and those made to regulate trade seems very nice. See tit. Corporation. Under a general power to make by-laws, a by-law cannot be made to restrain trade. 1 Barr. 12. A custom that no foreign tradesman shall use or exercise a trade in a town, &c. will warrant that which a great cannot do; and where custom has restrained, a by-law may be made that upon composition foreigners may exercise a trade. Caser 120. See 4 Barr. 1951.

So By-laws may regulate, but not totally restrain a private right, as in cases of common. &c. See Comm. Dig. title By-law, (D. 2) and (C. 4).

If a By-law impose a charge without any apparent benefit to the party, it will be void. R. R. 148. And a By-law being abusive, if it be unreasonable for any particular, shall be void for the whole, 2 East. 183.

A By-law cannot impose an oath, nor impose any person to administer it. Stoa. 535.

Where By-laws are good, notice of them is not necessary, because they are presumed for the better government and benefit of all persons living in the particular limits where made; and therefore all persons therein are bound to take notice of them. 1 Luton. 404. 4 Cro. Cas. 493. 5 Mod. 442. 1 Salk. 142; Curb. 484.

If a By-law does not mention how the penalty shall be recovered, debts lies for it. 1 Ro. Ab. 356. 1. 28. See S. Ca. 63. Hob. 279. Orallution on the place on the affamant. 2 Lev. 272. It seems that a By-law to levy the penalty by distraint, suit, or imprisonment, is void, unless by custom. See Comm. Dig. title By-law, (D. 2) (E. 1, 2).

The court of K. B. will not enter into a question on the validity of a By-law, on the return of a hab. cor. com. from any Corporation except the city of London, where it always doth; but the plaintiff must declare there, and defendant may demurr if he has objections to the By-law. 1 Barr. 775.