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AS WELL AS FOR

GENTLEMEN OF THE PROFESSION.

By RICHARD BURN, LL. D.

LATE CHANCELLOR OF THE DIOCESE OF CARLISLE.

AND CONTINUED TO THE PRESENT TIME

By JOHN BURN, Esq. his Son,

ONE OF HIS MAJESTY'S JUSTICES OF THE PEACE FOR THE COUNTIES OF
WESTMORLAND AND CUMBERLAND.

DUBLIN:

PRINTED BY BRETT SMITH,



FOR MESSRS. E. LYNCH, G. BURNET, P. BYRNE, P. WOGAN,
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M, DCC, XCII.

P R E F A C E

9-ft
THE work now presented to the public, is
carefully printed from a fair manuscript, in the
author's own hand-writing; to which there
doth not appear to be any preface, or hint of
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It is now offered to the world, in the pleas-
ing confidence, that it will answer the end for
which,

A 2

which,

which, I have reason to think, it was originally intended; I mean, for the use and information of those, who wish to have a rational knowledge of matters relating to their lives, properties, and other essential interests; to the critical knowledge of which, they are not professionally bred.

The author early discovered the want of such a Guide as might enable all ranks and professions of men, to act consistently, and prudently, in their respective paths of life. How far he hath contributed to this great end, in his *JUSTICE OF THE PEACE*, and *ECCLESIASTICAL LAW*, seems to be determined, by the general approbation with which those publications have been received; and in what degree his present work may be thought essential to the same purpose, is submitted to the wisdom and candor of all competent judges.

My

P R E F A C E

My Father's very considerable attainments, not only in the learned and gothic languages, and in the law of the land; but also in matters of antiquity; seem to have induced him, to depend upon his own strength; and to produce an ORIGINAL WORK, not copying (as is too often done) from other books of the kind; in some of which the fervility of transcribing, from one work to another, is but too obvious: And I am joined in opinion by a learned friend, well acquainted with my Father's literary pursuits, that the present book hath no particular reference, except it be to his own previous publications; and that his real motive was, to facilitate the understanding of them; and to effect such an acquaintance with the necessary terms, and technical language of the laws of his country, as might be profitable to those persons for whose use and advantage he had compiled his former works.

It

It is unnecessary to assign the reasons, why this publication hath been so long postponed; but it may be proper to observe, that the delay hath caused a necessity of accommodating certain particulars to the present state of the law, wherein some material changes, and additions, are annually made; and these additions, where necessary, I have carefully endeavoured to supply.

Finally, I beg leave to inform the reader, that the present publication is by the advice, and earnest solicitations, of my good friend Dr. CHARLES MORTON, of the British Museum, whose uniform friendship, and intimacy with my late Father, for a period of forty-eight years, have rendered him sufficiently acquainted with the end and purpose of most of his literary labours. To that gentleman, therefore, I dedicate this posthumous publication, as a memorial

morial of the friendly intercourse and harmony, which subsisted, for near half a century, between him and my honoured Father.

JOHN BURN.

Orton in Westmorland,

Jan. 1, 1792.

A B A

A BATEMENT is derived from the French, and signifies quashing, beating down, or destroying; and is used by our law in three senses: The first is that of removing or *beating down a nuisance*. In which respect, the person aggrieved by the nuisance may abate or remove the same, without the formality of an action, so as he commit no riot in the doing of it. If a house or wall is erected so near to mine, that it stops my ancient lights (which is a *private nuisance*), I may enter my neighbour's land, and peaceably pull it down. Or if a new gate be erected across the king's highway (which is a *public nuisance*), any of the king's subjects passing that way may cut it down and destroy it. And the reason why the law allows this summary method of doing one's self justice is, because injuries of this kind require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice.

3 *Black. 5.*

The second signification of abatement is, the defeating or overthrowing of an *action*, by some defect in the proceedings; as where exception is taken to the insufficiency of the matter; to the uncertainty of the allegation, by misnaming either of the parties, or the place; to the variance between the writ and the specialty or record; to the uncertainty of the writ or declaration; or to the death of either of the parties before judgment had. For these and many other causes, the defendant oftentimes prays, that the suit of the plaintiff may for that time cease. And in case of abatement in these respects, all writs and process must begin *de novo*. In the case of an *indictment*, on a criminal process, the defendant may plead in abatement, that his name is not as in the indictment specified, or that they have given him a wrong addition, as yeoman instead of gentleman; and if the jury find it so, the indictment shall abate. But in the end, there is little advantage accruing to the defendant by means of this kind of dilatory plea; because, if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his plea avers to be the true name and addition. For it is a rule, upon all pleas in abatement, that he, who takes advantage of a flaw, must at the same time shew how it may be amended. 4 *Black. 335.*

B

The

The third species of abatement is, where the rightful possession or freehold of the *heir* or *devisee* is defeated or overthrown by the intervention of a stranger. And herein it differs from *intrusion*, which is the entry of a stranger after a particular estate of freehold is determined, before him in *remainder* or *reversion*. An *abatement* is always to the prejudice of the *heir* or immediate *devisee*; an *intrusion* is always to the prejudice of the *remainder-man* or *reversioner*. For example: If a man dieth seised of lands in fee simple, and before the entry of his heir, a stranger enters thereon, this is an *abatement*; but if a man be tenant for life, with remainder to another in fee, and after the death of the tenant for life a stranger enters, this is an *intrusion*. The remedy in abatement or intrusion may be by entry, without the parties being put about to bring their action: for as the original entry of the wrong-doer was unlawful, this may therefore be remedied by the mere entry of him who hath right; unless a descent hath been cast, which gives the heir of the abator or intruder a colourable title, and therefore he shall not be ousted but by another making out a better claim. 3 *Black.* 175.

ABBNEY, *abbatia*, is a society of religious persons, having an abbot or abbess to preside over them. Some of these were so considerable in this kingdom, that the abbots of them were called to parliament, and had seats and votes in the house of lords. Of abbots and priors who stately and constantly enjoyed this privilege, there were twenty-nine in all; *viz.* the abbot of Tewkesbury, the prior of Coventry, the abbots of Waltham, Cirencester, St. John's at Colchester, Croyland, Shrewsbury, Selby, Bardney, St. Bennet's of Hulme, Thorney, Hide, Winchelcomb, Battel, Reading, St. Mary's in York, Ramsfey, Peterburg, St. Peter's in Gloucester, Glastonbury, St. Edmundsburg, St. Austin in Canterbury, St. Alban's, Westminster, Abingdon, Evesham, Malmesbury, and Tavistock, and the prior of St. John's of Jerusalem, who was styled the first baron of England, but it was with respect to the lay barons only, for he was last of the spiritual barons.

Abbey lands, before the dissolution of the monasteries, were many of them discharged from the payment of tithes; either by the pope's bulls, or by real composition with the parson, patron, and ordinary; or by their order, as Cisterians, Templars, Hospitalars, and Præmonstratenses: But this was only so long as the lands remained in the hands of the several religious societies, and were cultivated by them, and not in the hands of their tenants or lessees. These exemptions by the dissolution had been abolished, if they had not been continued by the act of parliament 31 *H. 8. c. 13.* with respect to such of the monasteries as were dissolved by that act; which enacts, that they who shall have any lands belonging to the said religious houses, shall enjoy them discharged of the payment of tithes, in like manner as the abbots

abbots and others enjoyed the same at the time of their dissolution. Which act also created a new discharge, which was not before at the common law, that is, *unity of the possession* of the parsonage and land tithable in the same hand : for if the monastery, at the time of the dissolution, was seised of the lands and rectory, and had paid no tithes within the memory of man for the lands ; those lands shall now be exempted from payment of tithe, by a supposed perpetual unity of possession ; because the same persons that had the lands, having also the parsonage, could not pay tithes to themselves. And now, though the titles of discharge under the 31 *Hen. 8.* are many of them lost, and cannot be made out at this day ; yet if the lands of a religious house have been held since the dissolution freed from the payment of tithes, it shall be intended that they were held so before. *Wood, b. 2. c. 2.*

ABBREVIATION. By statute 4 *G. 2. c. 26.* all law proceedings shall be in the English tongue, and written in a common legible hand and character, and in words at length and not abbreviated : but by 6 *G. 2. c. 14.* this is somewhat mitigated, which allows, that they may be written in the like manner of expressing numbers by figures as hath been commonly used, and with such abbreviations as are now commonly used in the English language.

ABDICATION, *abdicatio*, in general, is where a magistrate or person in office renounces and gives it up. So on king James the Second's leaving the kingdom, the commons voted that he had *abdicated* the government, and thereby the throne was become vacant. The lords would have had the word *deserted* to be made use of, but the commons thought it was not comprehensive enough, for then the king might have liberty of returning.

ABET, *abettare*, is to stir up or incite, encourage or set on ; one who promotes or procures a crime. *Abettors* of murder, are such as command, procure, or counsel others to commit a murder ; and in case they are present when the murder is committed, they shall be taken as principals, but if absent at the time of committing the fact, they shall be considered as accessories only.

ABEYANCE, from the French *bayer*, to expect, is that which is in expectation, remembrance, and intendment of law. By a principle of law, in every land there is a fee simple in somebody, or else it is in *abeyance* ; that is, though for the present it be in no man, yet it is in expectancy belonging to him that is next to enjoy the land. Thus if a man be patron of a church, and presenteth a clerk to the same ; the fee of the lands and tenelements pertaining to the rectory is in the parson : but if the parson die, and the church becometh void, then is the fee in *abeyance*, until there be a new parson presented, instituted, and inducted.

inducted. 1 *Inst.* 342. And though where no person is seen or known in whom the inheritance can vest, it may be in abeyance, as in a limitation to several persons, and the survivor, and the heirs of such survivor, because it is uncertain who will be survivor: yet the freehold cannot, because there must be a tenant to the præcipe always. 1 *Vezey*, 174.

ABJURATION. Anciently, if a person had committed a felony, and did fly to a church or churchyard before he was apprehended, he could not be taken from thence to be tried for his crime; but on confession thereof before the coroner, he was admitted to his oath to abjure the realm. But by the 21 *J. c.* 28. all privilege of sanctuary, and abjuration consequent thereupon, is utterly abolished. 2 *Inst.* 628.

But there is one kind of abjuring the realm which yet remains, as not depending on any privilege of sanctuary; and that is, with respect to popish recusants convicted, removing from the place of their habitation without licence, and not conforming in three months after notice: in which case, they are required by statute 35 *Eliz. c.* 2. to abjure the realm before two justices of the peace or the coroner; the form of which abjuration according to the old books, is this: *This hear you, Sir coroner, that I, A. B. am a popish recusant, and in contempt of the laws and statutes of England I have and do refuse to come to their church. I do therefore, according to the intent and meaning of the statute made in the 35th year of queen Elizabeth late queen of this realm of England, abjure the realm of England. And I shall haste me towards the port of C. which you have given and assign to me, and that I shall not go out of the highway leading thither, nor return back again; and if I do, I will that I be taken as a felon of the king. And that at C. I will diligently seek for passage, and will tarry there but one flood and ebb, if I can have passage; and unless I can have it in such place, I will go every day into the sea up to my knees, assaying to pass over. So help me God and his doom.* *Stamf.* 116. *Offic. Cor.* 49.

There is also an oath of abjuration, whereby every person in any office, trust, or employment abjures the pretender, and recognizes the right of his majesty under the act of settlement, engaging to support him, and promising to disclose all treasons and traitorous conspiracies against him.

ABSQUE HOC, when the proceedings were in Latin, were words of exception made use of in a traverse; as where the defendant pleads that such a thing was done at such a place, *without this*, that it was done at such other place.

ABUTTALS are the buttings and boundings of lands, shewing by what marks they are distinguished: the *sides* of the lands are properly said to be *adjoining*, and the *ends abutting*, to the thing contiguous.

ACCEPT.

ACCEPTANCE is the taking and accepting of any thing, and is as it were a tacit agreement to a preceding act, which might have been defeated and avoided, were it not for such acceptance had. For example: If a bishop before the statute of 1 *Eliz.* leased part of his bishoprick for term of years, reserving rent, and then died; and afterwards another is made bishop, who accepts and receives the rent when due, by this acceptance the lease is made good, which otherwise the new bishop might have avoided. So if *husband and wife*, seised of lands in right of the wife, join and make a lease, reserving rent, and the husband dies, after whose death the wife receives or accepts the rent; by this the lease is confirmed, and it shall bind her. So if *tenant in dower* leases for years, and dies, and the heir accepts the rent. But if a *parson* make a lease for years not warranted by the statute 32 *H. 8.* and which consequently is void by his death; acceptance of rent by a new parson or successor will not make it good. 1 *Saund.* 241. And if a *tenant for life* make a lease for years, there no acceptance will make the lease good, because the lease is void by his death. *Dyer*, 46. 239. But if *tenant in tail* makes a lease for years, rendering rent, and dies, and the issue accepts the rent, it shall bind him. But if such tenant in tail makes a lease for years to commence after his death, rendering rent; in such case, acceptance of rent by the issue will not make the lease good to bar him, because the lease did not take effect in the life of his ancestor. *Plowd.* 418. If an *infant* accepts of rent at his full age, it makes the lease good and shall bind him. If a lease is made on condition that the lessee shall do no *waste*, and he commits waste, and afterwards the lessor accepts the rent, he cannot enter for the condition broken; because he thereby affirms the lease to have continuance. 1 *Inst.* 211. If the lessor accepts from his tenant the last rent due to him, and gives the lessee a re-lease for it; all rent in arrear is by law presumed to be satisfied. 1 *Inst.* 373.

Acceptance of a *bill of exchange* by the person on whom it is drawn (so as to charge the drawer with costs) must be in writing, under or on the back of the bill. But if he accepts it, either verbally or in writing, he thereby makes himself liable to pay it. If he refuses to accept it, and it is of the value of 20*l.* or upwards, and expressed to be for value received, the person to whom it is made payable, or to whom it is indorsed, may protest it for *non-acceptance*; which protest must be made in writing, under a copy of such bill of exchange, by a notary public; or, if no notary public be resident in the place, then by any other substantial inhabitant in the presence of two witnesses: and notice of such protest must, within 14 days after, be given to the drawer. But if the bill be accepted, and afterwards the acceptor fails or refuses to pay it within three days after it becomes due (which three days

are called the days of grace), the same must for non-payment be protested and notified, in like manner as for non-acceptance. And on producing the protest, either of non-acceptance or non-payment, the drawer is bound to make good to the payee or indorsee, not only the amount of the bill (which he is bound to do within a reasonable time after non-payment, without any protest, by the rules of the common law), but also interest and all charges, to be computed from the time of making the protest. 2 *Black.* 469.

ACCESSARY. I. *Accessary* (quasi *accedens ad culpam*) is he that is not the chief actor, but one that is concerned in the felony by commandment, aid, or receipt.

• In the highest capital offence, namely, high treason, there are no accessaries, neither before nor after; for the consenters, aiders, abettors, and knowing receivers and comforters of traitors are all principals. 1 *Hale's Hist.* 613.

Also in cases that are criminal, but not capital, as in petit larceny and trespass, there are no accessaries: for the accessaries before are in the same degree as principals; and accessaries after, by receiving the offenders, cannot be in law under any penalties as accessaries, unless the acts of parliament that induce those penalties do expressly extend to receivers or comforters, as some do. *Id.*

Accessaries therefore relate only to capital felonies; in which cases there may be accessaries, either by the common law, or by act of parliament.

II. *Accessary before* the fact committed, is he that being *absent* at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony. For if he is *present*, although another actually commits the felony, he is a principal offender; as if one present moves another to strike, or if one present did nothing, but yet came to assist the party if needful; or if one hold the party while the felon strikes him; or if one present deliver his weapon to the other that strikes. *Hale's Pleas*, 216.

So if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him, some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favour (if need be) the escape of those who are more immediately engaged: they are all, provided the fact be committed, in the eye of the law *present* at it. For it was made a common cause with them; each man operated in his station at one and the same instant towards the same common end; and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and

and to insure the success of their common enterprize. *F3ff. Cr. Law, 350.*

III. Accessary *after* the fact is, where a person knowing the felony to be committed, relieves, comforts, or assists the felon. Generally, any assistance whatever given to a felon, to hinder his being apprehended or punished, makes the assister an accessary : as furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him. So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man accessary to the felony. 4 *Black. 37.*

To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions : it was therefore at common law a mere misdemeanor, and made not the receiver accessary to the theft, because he received the *goods* only, and not the *felon*. But now by the statutes 5 *An. c. 31.* and 4 *Geo. c. 11.* all such receivers are made accessaries, and may be transported for fourteen years ; and, in the case of receiving linen goods stolen from the bleaching grounds, are by the statute 18 *G. 2. c. 27.* declared felons without benefit of clergy. *Id. 38.*

IV. If the principal and accessary appear together, and the principal plead the general issue, the accessary shall be put to plead *also* ; and if he likewise plead the general issue, both may be tried by one inquest : but the principal must be first convicted, and the jury shall be charged, that if they find the principal not guilty, they shall find the accessary not guilty. But if the principal plead a plea in bar, or abatement, or a formal acquittal, the accessary shall not be forced to answer till that plea be determined ; for if it be found for the principal, the accessary is discharged ; if against the principal, yet he shall after plead over to the felony, and may be acquitted. 2 *Haw. 323.* 1 *Hale's Hist. 624.*

In the case of stolen goods, if the principal cannot be taken, the buyer or receiver maybe prosecuted as for a misdemeanor, to be punished by fine and imprisonment, or other such corporal punishment as the court shall think fit, although the principal be not convicted ; which shall exempt the offender from being punished as accessary, if the principal be afterwards taken and convicted. 1 *An. st. 2. c. 9.* 5 *An. c. 31.*

ACCIDENTS are properly relievable in a court of equity. But are there many accidents which are also supplied in a court of law ; as, loss of deeds, mistakes in receipts or accounts, wrong payments, deathswich make it impossible to perform a condition literally, and a multitude of other contingencies. And there are many which cannot be relieved even in a court of equity ; as, if by accident a recovery is ill suffered, a devise ill executed, a contingent

tingent remainder destroyed, or a power of leasing omitted in a family settlement. 3 *Black.* 431.

ACCORD is an agreement between the party injuring and the party injured, where one is injured by a trespass or offence done, or on a contract, to satisfy him with some recompence ; which, if executed and performed, shall be a good bar in law, if the other party after the accord performed bring any action for the same. As if a man contract to build a house or to deliver a horse, and fail in it ; this is an injury, for which the sufferer may have his remedy by action : but if the party injured accepts a sum of money or other thing as a satisfaction, this is a redress of that injury, and entirely takes away the action. 3 *Black.* 15.

The accord must be executed before the action be commenced ; and therefore an accord to do a thing at a day to come is not good. But if it be executed before the action commenced, it is good, although it was executory only at the time of the accord. 1 *Roll's Rep.* 129.

If a man plead an accord, the safest way is to plead it as a satisfaction, and not by way of accord ; and therefore he need say no more than that the defendant gave so much to the plaintiff in satisfaction, which the plaintiff received. 9 *Co.* 80.

The defendant must plead that the plaintiff accepted the thing agreed upon in full satisfaction ; and if it be on a bond, it must be in satisfaction of the money mentioned in the condition, and not of the bond itself, for that cannot be discharged but by writing under hand and seal. *Cro. Ja.* 254.

ACCOUNT is a writ or action, commanding the defendant to render a just account to the plaintiff, or shew to the court good cause to the contrary. In this action, if the plaintiff succeeds, there are two judgments ; the first is, that the defendant do account (*quod computet*) before auditors appointed by the court ; and when such account is finished, then the second judgment is, that he pay to the plaintiff so much as he is found in arrear. This action, by the old common law, laid only against the parties themselves, and not their executors ; because matters of account rested solely in their own knowledge. But this defect was remedied by statute 4 *An. c.* 16. which gives an action of account against the executors and administrators. But however it is found by experience, that the most ready and effectual way to settle these matters of account, is by bill in a court of equity, where a discovery may be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce. Therefore actions of account, to compel a man to bring in and settle his accounts, are now very seldom used ; though when an account is once stated, nothing is more common than an action upon the implied *assumpsit* to pay the balance. 3 *Black.* 162.

A plea

A plea of a stated account is bad, unless it shews the account was in writing, and what the balance was. 2 *Atk.* 399.

A stated account is not an extinguishment of the original debt; therefore it cannot be pleaded in bar of an action for the debt. *Bur. Mansf.* 9.

AC ETIAM are words or a clause in a writ, where, in order to intitle the court to jurisdiction, an additional cause of action is alledged; as where, upon the usual complaint of *trespass*, the defendant is required to be brought in to answer the plaintiff of a plea of *trespass*, and also (*ac etiam*) to a bill of debt: or where, to the usual complaint of breaking the plaintiff's close, a clause is added containing the real cause of action.

ACOLITE, *acolythus*, in our old English called a *colet*, was an inferior church servant, who, next under the subdeacon, *followed* or waited on the priests and deacons, and performed the meaner office of lighting the candles, carrying the bread and wine, and paying other servile attendance.

ACQUITTAL (Fr. *acquitter*, from the Latin *acquietare*) signifies a discharge or being at *rest* from the suspicion of a crime; as he that is upon a trial and judgment given thereon discharged of a felony, is said to be acquitted of the felony: and if he be drawn in question again for the same felony, he may plead *auterfoits acquit*. For one shall not be brought into danger of his life upon the same accusation more than once. 1 *Inst.* 100. Acquittal is of two kinds; acquittal *in deed*, and acquittal *in law*. Acquittal *in deed* is, when a person is cleared by verdict. Acquittal *in law* is, as if two be indicted of felony, the one as principal, and the other as accessary, and the jury acquits the principal, in this case by law the accessary also is acquitted. 2 *Inst.* 384.

AN ACQUITTANCE is a sort of release, being a discharge in writing of a sum of money or other duty, which ought to be paid or performed. As if one is bound to pay money upon an obligation, or rent reserved upon a lease, and the party to whom it is due, upon receipt thereof, gives a writing under his hand, witnessing that he is paid. This is such a discharge in law, that he cannot demand and recover the sum or duty again, if the acquittance is produced. *T. L.*

The obligor is not bound to pay money upon a single bond, unless the obligee will make him an acquittance. Nor is he bound to pay it before he has the acquittance. And in this case the obligor may compel the obligee to make him an acquittance. But otherwise it is in case of an obligation with a condition; for there one may aver payment. *Wood, b. ii. c. 3.*

But an acquittance is only an evidence of payment, and by the common law was not pleadable, because it is no deed. But now, by the statute of 4 *An. c.* 16. where an action of debt shall be brought on a single bill or on a judgment, if the defendant hath

hath paid the money due thereupon, such payment may be pleaded in bar of such action : and where an action of debt is brought upon a bond conditioned to be void on payment of a lesser sum, at a day and place certain ; if the defendant hath paid, before the action brought, the principal and interest due by the condition of such bond, though not strictly according to the condition, yet it may be pleaded in bar of the action : and on payment into court of principal, interest, and costs, the same shall be a full discharge of the bond. *f. 12, 13.*

An acquittance in full of all *accounts*, shall be extended only to accounts. *Wood, b. ii. c. 3.*

An acquittance in full of all *demands*, will discharge all debts except such as are upon specialty under seal : for these can only be destroyed by some other specialty of equal force, as a general release. *Cro. Ja. 650.*

If a rent is behind for a number of years, and the landlord makes an acquittance of the last that is due, all the rest are presumed to be paid, and the law will admit no proof against this presumption. *1. Inst. 373.*

ACRE (*ager*) is commonly understood to be a quantity of land, containing in length 40 perches, and in breadth 4 perches ; or in proportion thereto, be the length or breadth more or less : but by custom it differs in different places. The word anciently meant any open ground or field, as *castle-acre*, *west-acre*, and the like, and not a determinate quantity of land : so there was *acre-fight*, a sort of duelling in the open field.

ACTIONS are of three kinds ; *real*, *personal*, and *mixed* :

Action *real* is that which concerns real property only ; whereby the plaintiff or demandant claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee simple, fee tail, or for term of life. *3 Black. 117.*

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. *Id.*

Action *mixed* is an action that lieth as well for the thing demanded, as against the person that hath it ; on which, the thing is recovered, and likewise damages for the wrong sustained. *Id.*

ACTON BURNEL, a statute so called, made 13 *Ed. 1.* ordaining the *statute merchant* : it was so termed from a place named *Acton Burnel*, where it was made ; being a castle sometime belonging to the family of *Burnel*, and afterwards of *Lovel*, in *Shropshire*.

ACT OF PARLIAMENT is a statute, act, or edict, made by the king with the advice and consent of the lords spiritual and temporal and commons in parliament assembled. The oldest of these now extant, and printed in our statute books, is the famous *magna charta*, as confirmed in parliament 9 *Hen. 3.* though doubtless there

there were many acts before that time, the records of which are now lost, and which possibly at present pass for parts of the ancient common law. 1 *Black.* 85.

An act of parliament is the exercise of the highest earthly authority that this kingdom acknowledges. It hath power to bind every subject in the land, and the dominions thereunto belonging; nay even the king himself, if particularly named therein: and it cannot be altered, amended, dispensed with, suspended, or repealed, but by the same authority of parliament; for it is a maxim in law, that it requires the same strength to dissolve as to create an obligation. 1 *Black.* 186.

The method of citing acts of parliament is various. Many of the ancient statutes are called after the name of the place where the parliament was held that made them; as the statutes of *Merton*, and *Marleberge*, of *Westminster*, *Gloucester*, and *Winchester*. Others are denominated entirely from their subject; as the statutes of *Wales* and *Ireland*, the *Articuli cleri*, and the *Prerogativa regis*. Some are distinguished by their initial words, as the statute of *quia emptores terrarum*, and that of *circumspecte agatis*. But the most usual method of citing them, especially since the time of *Ed. 2.* is by naming the year of the king's reign in which the act was made, together with the chapter or particular act according to its numeral order. *Id.* 85.

Statutes are either *general*, or *special*; *public*, or *private*. A *general* or *public* act is an universal rule that regards the whole community; and of this the courts of law are bound to take notice judicially and *ex officio*; without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. *Special* or *private* acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns; and of these the judges are not bound to take notice, unless they be formally shewn and pleaded. *Ibid.*

There are three points to be considered in the construction of an act of parliament; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act, what the mischief was for which the common law did not provide, and what remedy the parliament hath provided to cure this mischief. *Id.* 87.

Where the common law and a statute differ, the common law gives place to the statute; and an old statute gives place to a new one. *Id.* 89.

If a statute that repeals another is itself repealed afterwards, the first statute is thereby revived, without any formal words for that purpose. *Id.* 90.

A statute made in the affirmative, without any negative expressed or implied, doth not take away the common law; and therefore

fore the party may waive his benefit by such statute, and take his remedy by the common law. 2 *Inst.* 200.

Regularly, a statute in the affirmative doth not repeal a precedent affirmative statute; but if the latter is contrary to the former it amounts to a repeal of the former. *L. Raym.* 160.

Penal statutes must be construed strictly: but statutes against frauds are to be construed liberally and beneficially. 1 *Black.* 88.

One part of a statute must be so construed by another, that the whole (if possible) may stand together: but a saving totally repugnant to the body of the statute is void. *Id.* 89.

Where things of an inferior degree are first mentioned in a statute, those of a higher dignity shall not be included under subsequent general words; as where a statute speaks of indictments to be taken before justices of the peace, or others having power to take indictments, it shall be understood only of other inferior courts, and not of the king's bench or other courts at *Westminster.* 2 *Co.* 46.

All felonies by the common law have the benefit of clergy; therefore where a statute enacts a felony, and says, the offender shall suffer death, clergy lies notwithstanding, and is never ousted without express words. 3 *Inst.* 73.

Saving of dower in a statute making an offence felony is superfluous; for by the 1 *Ed.* 6. c. 12. dower is not lost by the felony of the husband.

Where no particular penalty is appointed for disobedience to an act of parliament, it is punishable as a contempt, by fine and imprisonment at the discretion of the king's courts of justice. 4 *Black.* 122.

ACTOR, the proctor or advocate in the civil law courts. So there was *actor dominicus*, the lord's bailiff or attorney; *actor villa*, the steward or head bailiff of a town or village. *Cowel.*

ACTUARY, the register or clerk that enters the acts of a court.

ADDITION signifies a title given to a man, besides his christian and surname, setting forth his estate or degree, his trade, and the place where he inhabits; and this is, to prevent the inconvenience of mistaking one person for another. Additions of *estate or degree* are, yeoman, gentleman, esquire, knight, and the like. Additions of trade or occupation are those of merchant, clothier, carpenter, taylor, husbandman, labourer, and all other lawful occupations. Additions of *place* are, of such a town or hamlet, and of such a county. If there be a corporation of one sole person, he may be named by the common law by his christian name without any surname, as *Thomas* bishop of *Exeter.* 2 *Inst.* 666. So a duke, marquis, earl, viscount, or baron, might by the common law be named by his christian name, and by the name of his dignity, as *John* duke of *Marlborough.* *Id.* An addition after an *alias dictus* is ill; for if the party is not sufficiently named in the first part, the *alias dictus* will

not

not help it. 3 *Salk.* 20. Where there are several persons of different names, and the same addition, it is safest to repeat the addition after each of their names, applying it particularly to every one of them. 2 *Haw.* 187. If a man hath divers trades or occupations, he may be named by any of them; but if a gentleman by birth be a tradesman, he shall not be named by his trade, but by the degree of a gentleman; because it is worthier than the addition of any trade or mystery: and in general, a man shall be named by his worthiest title of addition. 2 *Inst.* 668, 9. Where a son hath the same name and the same addition with his father, the addition of *the younger* is necessary to be made to the other additions of the son; but it is not necessary to add *the elder* to the additions of the father. 2 *Haw.* 187. The eldest sons of peers, in the life-time of their fathers, though frequently titular lords, yet are only esquires. And foreign noblemen in *England* have only the legal title of esquire. 2 *Haw.* 187. Clerk is a good addition of a clergyman; and if a man hath taken any degree in either of the universities, he may be named by that degree. 1 *Black.* 405. Widow, single-woman, spinster, and (as some say) wife of such an one, are good additions; and the place of the habitation of a wife is sufficiently shewn, by shewing that of her husband. 2 *Haw.* 190. If a man lives in a hamlet of a town, he may be named either of the hamlet or of the town: But the addition of parish, if there be two or more towns in it, is not good; but if there be but one town, the addition of parish is good. 2 *Inst.* 669.

ADEMPTION, or taking away, of a legacy, arises from a supposed alteration of the testator's intention; as where a man bequeaths money due upon a certain bond, and afterwards calls it in; or bequeaths to the legatee such a horse, and afterwards sells the horse.

ADJOURNMENT, is a putting off until another day, or to another place. The court of parliament is frequently adjourned from time to time, as also the courts of law from day to day, and from one term to another.

ADJUDICATION, a giving or pronouncing judgment.

ADMEASUREMENT, *admensuratio*, is a writ brought for remedy against such persons as usurp more than their share, to bring them to reason. It lies in two cases; one is, *admeasurement of dower*, where a man's widow after his decease holds from the heir more land as dower than of right belongs to her; in which case, the heir shall have this writ against the widow, whereby she shall be *admeasured*, and the heir restored to the overplus. The other is, *admeasurement of pasture*, where a man has common appendant or appurtenant to his land, or common in gross, the quantity of which common hath never yet been ascertained: in which case, as well the lord, as any of the commoners is intitled to the *writ of admeasurement*; which is one of those writs that are called *vicontiel*, being directed to the sheriff (*vicecomiti*), and not to be returned to any

any superior court, till finally executed by him. It recites a complaint, that the defendant hath furcharged the common; and therefore commands the sheriff to *admeasur* and apportion it, that the defendant may not have more than belongs to him, and that the plaintiff may have his rightful share. And upon this suit the commoners shall be admeasured, as well those who have not as those who have furcharged the common, as well the plaintiff as the defendant. The execution of this writ must be by a jury of twelve men, who are upon their oaths to ascertain, under the superintendance of the sheriff, what and how many cattle each commoner is intitled to put upon the common. And the rule for this admeasurement is generally understood to be, that the commoner shall not turn more cattle upon the common, than are sufficient to manure and stock the land to which his right of common is annexed; or, as our ancient law expressed it, such cattle only as are *levant* and *couchant* upon his tenement; which being a thing uncertain before admeasurement, has frequently, though erroneously, occasioned this unmeasured right of common to be called a common without stint or without number; a thing which, though possible in law, doth in fact very rarely exist. If, after the admeasurement has thus ascertained the right, the same defendant furcharges the common again, the plaintiff may have a writ of second furcharge, *de secunda superoneratione*, which is given by the statute 13 *Ed. 1. c. 8.* and thereby the sheriff is directed to inquire by a jury, whether the defendant has in fact again furcharged the common, contrary to the tenor of the last admeasurement; and if he has, he shall then forfeit to the king the supernumerary cattle put in, and shall also pay damages to the plaintiff. 3 *Black.* 238.

ADMINISTRATION is the management of the goods and chattles of one that died intestate, committed unto him by the ordinary. He or she to whom the administration is committed, is called the administrator or administratrix. *Terms of the Law.*

Administration of the goods and chattels of the wife shall be granted to the husband or his representatives; and of the husband's effects, to the widow, or next of kin, or to both. Among the kindred, those are to be preferred that are the nearest in degree to the intestate; but, of persons in equal degree, the ordinary may take which he pleases. This nearness of degree shall be reckoned according to the computation of the civilians, and not of the canonists, which the law of *England* adopts in the descent of real estates; because in the civil computation the intestate himself is the *terminus* from which the several degrees are numbered; and not the common ancestor, according to the rule of the canonists. And therefore, in the first place, the children, or (on failure of children) the parents of the deceased, are intitled to the administration: both which are indeed in the first degree, but with us the children are allowed the preference.

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Then follow brothers, grandfathers, uncles or nephews (and the females of each class respectively), and lastly, cousins. 2 *Black.* 504.

The *half blood* is admitted to the administration equally with the whole blood ; but not so in the descent of lands, for in that case the half blood can never inherit.

If none of the kindred will administer, the ordinary may grant administration to a creditor, or he may grant letters *ad colligendum bona defuncti*, and thereby take the goods of the deceased into his own hands, and therewith pay the debts of the deceased ; in which respect the ordinary becomes liable in law as other administrators.

If a *bastard*, or any other who has no kindred, dies intestate ; the goods belong to the king, and administration shall be committed to the king's grantee.

There are also several other kinds of administration, which do not strictly follow the rule of the next of kin. As, administration *durante minori etate* ; which is, where an infant is made executor (for so he may be how young soever) : in which case, administration with the will annexed is granted to another, until the executor shall attain the age of seventeen years ; at which age of the executor the administration *durante minori etate* ceaseth.

So also, administration *durante absentia*, during absence out of the kingdom : which is, where the next of kindred is beyond sea, in which case administration is grantable, lest the goods perish or the debts be lost : and this stands upon the same reason as an administration during the minority of an executor ; namely, that there shall be one to manage the estate of the testator, till the person appointed by him is able.

Administration *pendente lite*, pending a suit, is, where a suit is commenced in the ecclesiastical court concerning the validity of a will ; in which case the ordinary grants administration until the suit shall be determined : otherwise there would be no person to take care of the estate of the deceased.

Also, if the testator makes his will, without naming any executor, or if he names a person incapable, or if the executor named refuses to act ; in all these cases, the ordinary must grant administration with the will annexed.

The duty of an administrator is, to make an inventory, and to pay the debts of the deceased : and if there be a deficiency of assets, the general order of preference or priority in payment is, first, debts of record, as judgments, statutes, and recognizances ; next, specialties, as bonds or other writings under seal ; and lastly, debts on simple contract, as notes unsealed, and verbal promises.

If there is a surplus, the administrator must distribute it amongst the kindred of the deceased, according to the statutes of distribution, and in some particular places according to the local customs. The general rules upon the statutes of distribution are, that one
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third shall go to the widow of the intestate, and the residue in equal proportions to his children, or, if dead, to their representatives, that is, their lineal descendants: if there are no children or legal representatives, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go to the children: if neither widow nor child, the whole shall be distributed amongst the next of kindred in equal degree and their representatives; but no representatives are admitted among collaterals, farther than the children of the intestate's brothers and sisters. The father succeeds to the whole personal effects of his children, if they die intestate and without issue; but if the father be dead, and the mother survives, she shall only come in for a share equally with each of the remaining children.

If an administrator die, his executor or administrator doth not represent the first intestate, but a new administration shall be granted *de bonis non*, that is, of the goods of the deceased not administered by the former executor or administrator. And this administrator *de bonis non* is the only legal representative of the deceased in matters of personal property.

ADMIRALTY: The word *admiral*, according to lord Coke, comes from the Saxon *aen mere al* (over all the sea), the *praefectus maris*; and in ancient time the office of the admiralty was called *custodia marina Angliae*, or *maritima Angliae*. 1 *Inst.* 260.

The court of admiralty is held before the lord high admiral or his deputy, who is called the judge of the admiralty. It was first of all erected by king *Ed. 3*. Its proceedings are according to the method of the civil law, and is usually held at doctors' commons. 3 *Black.* 69.

This court hath power to try and determine all maritime causes, or such injuries which, though they are in their nature of common law cognizance, yet being committed on the high seas, out of the reach of the ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. *Id.* 106.

Beneath the low-water mark, the admiral hath sole and absolute jurisdiction: but between the high-water mark and the low-water mark, the common law and the admiral have jurisdiction by turns; one upon the water, the other upon the land. But if the water is within a county, the common law hath the jurisdiction. 5 *Co.* 107.

Wreck of the sea shall be tried and determined by the laws of the land; but this cannot be extended to flotsam, jetsam, or lagan; for they are in or upon the sea, and therefore cannot be tried and determined by the common law, but are to be determined before the admiral. *Id.* 106.

For convenience of seamen, the admiralty hath been allowed to hold plea for mariners' wages; but yet with this limitation, that
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if there be any special agreement, by which the mariners are to receive their wages in any other manner than is usual, or if the agreement be under seal, so as to be more than a parol agreement, in such case they will be prohibited. This indulgence was permitted them, because the remedy in the admiralty is easier and better: easier, because they must sever at the common law, whereas here they may join; and better, because the ship itself is answerable. 1 *Salk.* 33.

But although pure maritime acquisitions, which are earned and become due on the high seas, are one proper object of the admiralty jurisdiction, even though the contract be made upon land; yet, in general, if there be a contract made in *England*, and to be executed upon the seas, as a charter party or covenant that a ship shall sail to *Jamaica*, or shall be in such a latitude by such a day; or a contract made upon the sea to be performed in *England*, as a bond made on shipboard to pay money in *London*, or the like; these kinds of mixed contracts belong not to the admiralty jurisdiction, but to the courts of common law. And it is not unfrequent for the plaintiff to feign that a contract, really made at sea, was made at some inland place, and thereby draw the cognizance of the suit from the courts of admiralty to those of Westminster-hall. 3 *Black.* 107.

From the sentence of an inferior court of admiralty, an appeal lies to the court of the lord high admiral. And from the sentence of the admiralty judge, an appeal lies to the delegates. But in case of prize vessels taken in time of war, in any part of the world, and condemned in any courts of admiralty as lawful prize, the appeal lies to certain commissioners of appeals, consisting chiefly of the privy council, and not to judges delegates: and this, by virtue of divers treaties with foreign nations; by which, particular courts are established in all the maritime countries in *Europe*, for the decision of this question, whether lawful prize or not. For this being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country to determine it. 3 *Black.* 69.

And sentence in a foreign court of admiralty is to be credited here, as ours is to be credited there; and the party may libel here for the execution of a sentence in a foreign court of admiralty.

The high court of admiralty is also a court not only of civil, but of criminal jurisdiction. It hath cognizance of all crimes and offences committed either upon the sea, or on the coasts out of the body or extent of any *English* county. And heretofore they were determinable by the sole sentence of the judge of the admiralty; but by the 28th *Hen.* 8. c. 15. all felonies committed on the sea shall be tried by commissioners nominated by the lord chancellor, viz. the judge of the admiralty and three or four more

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(among whom two common-law judges are constantly appointed, who in effect try all the prisoners), the indictment being first found by a grand jury of 12 men, and afterwards tried by another jury, as at common-law. 4 *Black.* 268.

ADMISSION to a benefice is, when the bishop upon examination approves of the person presented, as a fit person to serve the cure of the church to which he is presented; as institution is that act whereby he commits to him the cure of souls.

ADMITTANCE is the giving possession of a copyhold estate, as livery of seisin is of a freehold. And it is of three kinds: 1. Upon a *voluntary grant by the lord*, where the land hath escheated or reverted to him. In this case, though he might keep the land in his own hand, or might grant the same in fee, and so infranchise it, yet if he will dispose of it as copyhold, he is bound to grant the usual estate, and reserve the usual rent, and observe the ancient custom precisely in every point; otherwise it would be to create a new copyhold. 2. Upon *surrender by the former tenant*. In this case, the lord is not proprietor, but only a necessary instrument of conveyance; the party claiming his estate under him that made the surrender. But until his admittance, the tenant hath no estate, and therefore cannot surrender it again to a stranger before admittance. 3. *Admittance by descent*; which is, where an heir is tenant immediately on the death of his ancestor. The lord here is a mere instrument; for the heir may enter upon the land, take the profits, bring actions of trespass, and surrender to whose use he pleases, before admittance; though, before admittance, he cannot be sworn of the homage. This admittance of the heir is not to strengthen his estate, but to intitle the lord to his fine. And if the heir will not come in and take his admittance, he shall forfeit his estate, or be subject to a penalty, according as the custom of the manor may be. *Wood, b. ii. c. 1.*

AD QUOD DAMNUM is a writ, issuing out of and returnable into the chancery, directed to the sheriff, to enquire by a jury, of *what damage* it will be to the king, or any other, to grant a liberty, fair, market, highway, or the like. And according to the sheriff's return thereof, the grant is issued or withheld.

ADVENTURE, a thing sent to sea; the *adventure* whereof the person sending it stands to out and home. *Lex Mercat.*

ADULTERY is a crime left by our laws to the coercion of the spiritual courts; yet considered as a civil injury, the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary. 3. *Black.* 139.

ADVOCATE is the patron of a cause, assisting his client with advice, and who pleads for him. It is the same, by the civil and eccle-

ecclesiastical laws, as a counsellor by the common law. The ecclesiastical or church advocate was originally of two sorts; either an advocate of the causes and interest of the church, retained as a counsellor and pleader of its rights; or an advocate or patron of the presentation or advowson. Both these offices at first belonged to the founders of churches and convents, and their heirs, who were bound to protect and defend their churches, as well as to nominate or present to them.

ADVOW, *advocare*, to justify or maintain an act formerly done. As if one takes a distress for rent, and he that is distrained sues a replevin; in this case, the distrainer justifying or maintaining the act, is said to *advow* or *avow*: and hence come *advowant*, and *advowry*. This word is also used to signify to bring forth any thing: anciently, when goods stolen were brought by one, and sold to another, it was lawful for the right owner to take them wherever they were found; and he, in whose possession they were found, was bound *advocare*, that is, to call in or produce the feller to justify the sale, and so on till they found the thief.

ADVOWSON is the right of presentation to a church or ecclesiastical benefice. It signifies being *advocate* of the church, or taking it into protection; and therefore is synonymous with *patronage*: and he who has the right of advowson is called the patron of the church. For when lords of manors first built churches on their own demesnes, and endowed them with glebe or other possessions, every such lord had of common right a power annexed of nominating a minister to officiate in that church of which he was the founder, endower, maintainer, or, in one word, the *patron*. 2 *Black.* 21.

Advowsons are either *appendant*, or in *gross*. Lords of manors being originally the only founders, and of course the only patrons of churches, the right of patronage or presentation, so long as it continues annexed to the possession of the manor, as some have done from the foundation of the church to this day, is called an advowson *appendant*; and it will pass or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words. But where the property of the advowson hath been once separated from the property of the manor, by legal conveyance, it is called an advowson *in gross*, or at large, and never can be appendant any more; but is for the future annexed to the person of its owner, and not to his manor or lands. *Id.* 22.

Advowsons are also either *presentative*, *collative*, or *donative*. An advowson *presentative* is, where the patron hath a right of presentation to the bishop or ordinary, and moreover to demand of him to institute his clerk, if he finds him canonically qualified. An advowson *collative* is, where the bishop and patron are one

and the same person : in which case the bishop cannot present to himself ; but he doth, by the one act of collation or conferring the benefice, the whole that is done in common cases by both presentation and institution. An advowson *donative* is, when the king, or any subject by his licence, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron, subject to his visitation only, and not to that of the ordinary ; and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction. *Id.*

An advowson in fee is affets by descent, to satisfy bond creditors. 3 *Atk.* 465.

AERIE is a proper term for hawks, which for other birds is called a *nest*. The liberty of keeping aerys of hawks was a privilege granted to great men ; and the preserving the aerys in the king's forests, was one sort of tenure of lands by service.

ÆTATE PROBANDA was a writ that lay to inquire, whether the king's tenant holding *in capite* by knight's service, 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 were by statute taken away.

AFFERORS (from *affeur*, to tax) are those in the court leet or court baron that settle and moderate the fines and amercedments imposed on such persons as have committed faults for which no express penalty is prescribed by statute. The persons nominated to this office affirm upon their oaths, what penalty they think in conscience ought to be inflicted upon the offenders.

AFFIANCE is the plighting of troth between a man and a woman upon their agreement of marriage. It is derived from the Latin word *affidare*, and signifies as much as *fidem dare*, to pledge one's faith or fidelity. *Litt. sect.* 39.

AFFIDAVIT signifies in law an oath in writing, sworn before some person who hath authority to take it. The plaintiff or defendant may make affidavit in a cause depending, but it will not be admitted in evidence at the trial, but is only admitted upon motion. 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. An affidavit regularly ought to be before the judges of the court wherein the cause is depending : but by the statute 29 *C. 2. c. 5.* the judges of the courts of king's bench, common pleas, and exchequer, may grant commissions to persons in the country to take affidavits concerning any matter depending in the respective courts, in like manner as may be done by masters extraordinary of the court of chancery. When an affidavit hath been read in court, it ought to be filed, that the other party may see it and take a copy of it.

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AFFIRM signifies to ratify or confirm a former law or judgment.

AFFINITY is relation by marriage, as consanguinity is relation by blood.

AFFIRMATION is an indulgence allowed by law to the people called *Quakers*, who, in cases where an oath is required from others, may make a solemn affirmation of the truth: and if they make a false affirmation, they are subject to the penalties of perjury. But their affirmation is not allowed in any criminal cause, nor shall they by virtue hereof be allowed to serve on any juries, or to bear any office or place of profit in the government. 7 & 8 W. c. 34. 8 G. c. 6. 22 G. 2. c. 46.

AFFRAY (from *affraier*, to terrify) is the fighting of two or more persons in some public place, to the terror of his majesty's subjects: for, if the fighting be in private, it is no affray, but an assault. 4 Black. 145.

Affrays may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever consequence may ensue. But more especially the constable, or other like officer, is bound to keep the peace; and for that purpose may break open doors to suppress an affray, or apprehend the affrayers; and may carry them either before a justice, or imprison them by his own authority for a convenient time, till the heat be over. *Id.*

It is said, that no quarrelsome or threatening words whatsoever shall amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows; yet it seemeth that the constable may, at the request of the party threatened, carry the person who threatens to beat him before a justice, in order to find sureties. 1 Haw. 135.

Also it is certain, that it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge; or even barely to endeavour to provoke another to send a challenge or to fight, as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight. *Id.*

All affrays in general are punishable by fine and imprisonment. 1 Haw. 138.

AGE is particularly used in law for those special times which enable persons of both sexes to do certain acts, which before, through want of years and judgment, they are prohibited to do. As for example, a man at twelve years of age ought to take the oath of allegiance to the king; at fourteen, which is his age of discretion, he may consent to marriage, and chuse his guardian; and at twenty-one he may alienate his lands: a woman at nine years of age is dowable, at twelve she may consent to marriage,

at fourteen she is of years of discretion, and may chuse a guardian, and at twenty-one she may alienate her lands. The age of twenty-one is the full age of man or woman; which enables them to contract and manage for themselves, in respect of their estates: until which time they cannot act with security to those that deal with them, for their acts are in most cases either void or voidable. 1 *Inst.* 78.

AGE PRAYER is, where an action is brought against a person under age, for lands which he hath by descent, and he by petition or motion shews the matter to the court, and *prays* that the action may stay *till his full age*. See *Parol demurrer*.

AGISTMENT is where other men's cattle are taken into any ground, at a certain rate for their feeding: it comes from the *French* word *gcyser* (*jacere*) to lie down, because the beasts that feed there are levant and couchant, that is, lying and rising. In the king's forests, there were anciently officers called *agisters*, *agitatores*, or *gyst takers*; who took in cattle to graze in the forest, or to be fed upon the pawnage, and who tended and looked after the said cattle agisted, and collected and received the money paid for the agistment. 4 *Inst.* 293. The tithe of agistment of cattle is due of common right, because the grass which is eaten is *de jure* tithable, and must have paid tithe if cut when full grown. And it is to be paid by the occupier of the ground, and not by the owner of the cattle: for if the occupier in such case were not liable, it would be greatly inconvenient to sue every owner of the beasts, and it might be hard to be known, and infinite. Where there is no special custom concerning the manner of paying this tithe, it is usual to pay the tenth part of the money received: but this is only for convenience, for the tenth part of the produce, and not a sum of money, is due *de jure*. 2 *Inst.* 651. 1 *Roll's Abr.* 656. *Watf. c.* 50.

AGNATI are the kindred by the father's side, as *cognati* are kindred by the mother. 2 *Black.* 235.

AGNUS DEI is a piece of white wax in a flat oval form, like a small cake, stamped with the figure of the lamb, and consecrated by the pope. By statute 13 *El. c.* 2. to import any *Agnus Dei*, or other superstitious thing pretended to be hallowed by the bishop of *Rome*, incurs the penalty of a *premunire*.

AGREEMENT is of three kinds: 1. An agreement executed already at the beginning; as where money is paid for the thing agreed on, or other satisfaction made. 2. An agreement after an act done by another; as where one doth such a thing, and another person agrees to it afterwards, which is executed also. 3. 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; the other, when, the certainty not appearing at the first, the parties agree that the thing shall be performed upon the certainty known. *Terms of the Law*.

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An agreement put in writing only for remembrance, doth not change its nature ; but if it be put in writing, sealed and delivered, it is of greater force. *Hob.* 79.

By the statute of frauds, 29 C. 2. c. 3. All agreements for lands shall be in writing signed by the parties, otherwise they shall only have effect as estates at will. And no action shall be brought, to charge any person upon any special promise to answer for the debt of another person, or upon any contract of marriage, or upon any agreement not to be performed within a year, unless the same be put in writing, and signed by the party charged therewith.

AIDS were originally made benevolences, granted by the tenant to his lord, in times of difficulty and distress : but in process of time they grew to be considered as a matter of right, and not of discretion. These aids were principally three ; 1. To ransom the lord's person, if taken prisoner. 2. To make the lord's eldest son a knight. 3. To marry the lord's eldest daughter, by giving her a suitable portion. The aids for making the eldest son a knight, and for marrying the eldest daughter, were fixed by act of parliament at 20s. being the supposed twentieth part of every knight's fee. The aid for ransoming the lord's person was in its nature uncertain and incapable of being ascertained. 2 *Black.* 64.

AID-PRAYER is a word made use of in pleading, for a petition in court to call in help from another person that hath an interest in the thing contested. As tenant for life, being impleaded, may pray in aid him in the reversion ; that is, desire the court that he may be called by writ, to alledge what he thinks proper for maintenance of the right of the person calling him, and of his own. *F. N. B.*

AILE (of the French *aieul*, avus, a grandfather) is a writ that lies, where a man's grandfather, or great grandfather (called *befaille*), being seized of lands and tenements in fee simple on the day that he died, a stranger abateth or entereth the same day, and dispossesses the heir of his inheritance. *F. N. B.*

ALBA FIRMA, a white rent, paid in silver, in distinction from rent paid in corn, cattle, or the like.

ALDERMAN, *ealderman*, *elder*, was anciently a person, who from his age and experience was appointed to preside in certain affairs requiring prudence and judgment ; but now chiefly restricted to towns corporate, where they are associates to the mayor or other chief magistrate.

ALE-CONNER, *ale-taster*, is an officer appointed in the court leet sworn to look to the assize and goodness of ale and beer within the precincts of the leet. *Kitch.* 46.

ALEHOUSES :

1. Every inn is not an alehouse, nor is every alehouse an inn : but if an inn uses common selling of ale ; it is then also an alehouse ;

house; and if an alchouse lodges and entertains travellers, it is also an inn.

2. By several statutes, licences to keep inns and alehouses shall be granted yearly at a general meeting of the justices of the division, on the first day of *September*, or within twenty days after, and at no other time: except in cities and towns corporate. And the persons licensed shall enter into recognizance to keep good order and rule. And if any person shall sell ale without licence, he shall forfeit for the first offence 40s. for the second offence 4l. for the third and every other offence 6l. 5 *G. 3. c. 46.* And by 27 *G. 3. c. 13.* several excise duties are imposed on ale and beer brewed in *Great Britain*, according to a schedule set forth in the act.

3. If one who keeps a common inn refuses either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his tendering him a reasonable price for the same; he is not only liable to render damages for the injury, in an action on the case at the suit of the party grieved, but also may be indicted and fined at the suit of the king. 1 *Harv. 225.*

4. An innkeeper may detain the person of the guest who eats, or the horse which eats, till payment. For it would be hard to oblige him to sue for every little debt; and a greater hardship, that he might not be able to find his guest. *Bac. Abr. Inns.*

But an horse committed to an innkeeper may be detained only for his own meat, and not for the meat of the guest, or of any other horse. Also if the innkeeper or alehouse keeper shall refuse to give in the reckoning in particulars, or shall sell in measures unsealed, he shall not be permitted to detain for the reckoning, but shall be left to his action at law. 11 & 12 *W. c. 15.*

In like manner if the innkeeper gives credit to the party for that time, and lets him go without payment; then he hath waived the benefit of the custom, and must rely on his other agreement. 8 *Mod. 172.*

An innkeeper that detains a horse for his meat cannot use him; because he detains him as in custody of the law: and by consequence, the detention must be in the nature of a distress, which cannot be used by the distrainer. But by custom in particular places, if the horse eat out his price, the innkeeper may take him as his own, on the reasonable appraisement of several of his neighbours: but the innkeeper has no power to sell the horse, by the general custom of the realm. *Bac. Abr. Inns.*

5. An innkeeper shall answer for those things which are stolen within his inn, though not specially delivered to him to keep; for it shall be intended to be through his negligence, or occasioned by the default of his servants. So if he puts a horse to pasture, without the direction of his guest, and the horse is stolen,

stolen, he must make satisfaction: but otherwise, if with his direction. 8 *Co. Caley's case*.

6. A guest in an inn, arising in the night, and carrying goods out of his chamber into another room, and from thence to the stable, intending to ride away with them, is guilty of felony, although there was no trespass in taking them (which is generally required in cases of felony). *Dalt. c. 40*.

ALE SILVER is a rent or tribute annually paid to the lord mayor of *London*, by those that sell ale within the liberty of the city.

ALESTAKE, a stake set up at fairs or merry meetings in the country, with a sign thereon, denoting that ale is sold there.

ALIAS is a second or further writ, after a former writ hath been sued out without effect: "We command you as we formerly have commanded you," *sicut alias precipimus*.

ALIAS DICTUS is used in the description of a defendant, where his true name is not certainly known.

ALIEN:

1. Alien is one that is born out of the dominions of the crown of *England*. 1 *Black. 366*.

2. But children of the king's ambassadors born abroad have always been held to be natural subjects. *Id. 373*.

3. An alien born may purchase lands or other estates, but not for his own use; for the king, upon such purchase, is intitled to them. *Id. 371*.

4. But an alien may acquire a property in goods, money, and other personal estate, or may hire a house for his habitation. *Id. 372*.

5. Also aliens may trade as freely as other people; only they are subject to certain higher duties at the custom-house; which is what is now called the alien's duty; to be exempted from which, is one principal cause of the frequent applications to parliament for acts of naturalization. *Id. 316*.

6. An alien may bring an action concerning personal property, and may make a will and dispose of his personal estate. *Id. 372*.

7. By several acts of parliament, all children born out of the king's allegiance, whose fathers (or grandfathers by the father's side) were natural born subjects, are now deemed to be natural born subjects themselves to all intents and purposes; unless such ancestors were attainted, or banished beyond sea for high treason: yet so as that the grandchildren of such ancestors shall not be privileged in respect of the alien's duty, except they be protestants, and actually reside within the realm; nor shall be able to claim any interest, unless the claim be made within five years after the same shall accrue. *Id. 373*.

8. If

8. If an Englishman living beyond sea marries a wife there, and has a child by her, and dies; this child is born a denizen, and shall be heir to him, notwithstanding that the wife was an alien. *Cro. Cha.* 601.

9. Aliens can have no heirs, because they have not in them any inheritable blood. *2 Black.* 249.

10. If an alien be made a denizen by the king's letters patent, and then purchases lands, his son, born before his denization, shall not inherit those lands; but a son born afterwards may, even though his elder brother be living; for the father, before denization, had no inheritable blood to communicate to his eldest son; but by denization it requires an hereditary quality, which will be transmitted to his subsequent posterity. Yet if he had been naturalized by act of parliament, such eldest son might then have inherited; for that cancels all defects, and is allowed to have a retrospective energy, which simple denization hath not. *2 Black.* 249.

11. The necessity of trade has mollified the too rigorous rules of the old law, in the restraint and discouragement of aliens. A *Jew* may bring an action, though heretofore he could not; but commerce has taught the world more humanity. And therefore it is held, that an alien enemy commorant here, by licence of the king, and under his protection, may maintain an action of debt upon a bond, even though he did not come with safe conduct. *L. Raym.* 282. *1 Atk.* 43.

On a bill in chancery, brought for an account against the representatives of an *East India* governor, who pleaded that the plaintiff was an alien born, and an alien infidel, and therefore could have no suit here, lord *Hardwicke* said, as the plaintiff's was a mere personal demand, it was extremely clear that he might bring a bill in this court, and overruled the defendant's plea, without hearing counsel of either side. *1 Atk.* 51.

An alien enemy, who was the captain of a *French* privateer, took an *English* ship, upon the high seas, in time of open war; and ransomed the ship and cargo; and had the mate given to him as an hostage; which hostage died in prison. The ransom bill was signed by both captains, and by the hostage; and by it the captain obliges himself and his owners to pay to the *French* captain the ransom money within two months. By the court: An action is maintainable by the *French* captain against the *English* captain upon this ransom bill; notwithstanding the death of the hostage, and notwithstanding the plaintiff's being an alien enemy. And the like law prevails both in *France* and *Holland*. *Burr. Mansf.* 1741.

12. An alien whose sovereign is in amity with the crown of *England*, residing here, and receiving the protection of the law, owes a local allegiance to the crown during the time of his residence;

fidence; and if, during that time, he commits an offence, he shall be liable to be punished for the same, even as a natural born subject. For his person and personal estate are as much under the protection of the law, as the natural born subject's; and if he is injured in either, he has the same remedy at law for such injury. *Fost.* 185.

So also, an alien whose sovereign is at enmity with us, living here under the king's protection, committing offences, may be proceeded against in like manner; for he oweth a temporary local allegiance. *Id.*

ALIENATION is a transferring the property of any thing from one man to another. It chiefly relates to lands and tenements; as, to aliene land in fee, it is to sell the fee simple thereof; to aliene in mortmain, is to make over lands or tenements to a charitable use.

All persons who have a right to lands may, generally, aliene them to others. But some alienations are prohibited; as alienation by tenant for life, tenant for years, tenant in dower: if these aliene for a greater estate than they have in the lands, it is a forfeiture of their estate. 1 *Inst.* 251.

Conditions in deeds that the purchaser shall not aliene, are void. But one may grant an estate in fee, on condition that the grantee shall not aliene to a particular person. Also estates in tail, for life, or years, where the whole interest is not parted with, may be made with condition not to aliene to others, for preservation of the reversion. *Lit.* 361.

By the 12 C. 2. c. 24. All fines for alienation are taken away, except fines due by particular customs of particular manors.

ALIMONY is that maintenance, which, after a divorce of husband and wife, *a mensa et thoro*, the ecclesiastical judge allows to the woman out of her husband's estate. But in case of elopement, and living with an adulterer, the law allows her no alimony; for as that amounts to a forfeiture of her dower after his death, it is also a sufficient reason why she should not be partaker of his estate when living. 3 *Black.* 94.

ALLAY is a word used for the tempering and mixture of other metals with silver or gold. In the mint, a pound weight of gold is coined into 44 guineas and an half, which is equal to 46l. 14s. 6d.: An ounce therefore of such gold coin is worth 3l. 17s. 10½d. in silver. A pound weight of standard silver bullion is coined into 62s. Therefore an ounce of silver bullion is worth 5s. 2d. *Smith's Wealth of Nations*, vol. 1. p. 49, 50.

ALLEGIANCE is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject. And it is of two kinds; the one *natural*, the other *local*; the former being also perpetual, the latter temporary. *Natural* allegiance is such as is due from all men born within

within the king's dominions immediately upon their birth. *Local* allegiance is that which is due from an alien, or stranger born, for so long time as he continues within the king's dominions and protection; and it ceases, when such stranger transfers himself from this kingdom to another. 1 *Black.* 366. 370. —By the common law, every layman, above the age of twelve years, was obliged to take the oath of allegiance at the tourn or leet; and it was a high contempt to refuse it. 1 *Inst.* 68.

ALLODIAL, from *all*, and *odh* property, signifies intire or absolute property; in contradistinction to *feudal*, *fee-odhall*, which denotes stipendiary property, for which the tenant performed certain stipulated services. 2 *Black.* 45.

ALLUVION is the *washing* of the sea or of a river; in which case the law is, that if land be gained of the sea by the washing up of sand and earth, by small and imperceptible degrees, so as in time to make it *terra firma*, it shall go to the owner of the land adjoining; but if the alluvion be sudden and considerable, it belongs to the king by his prerogative: so that the quantity of the ground gained, and the time during which it is gaining, are what make it either the king's or the subject's property. In the same manner, if a river, running between two lordships, by degrees gains upon one of them, and leaves the other dry; the owner who loseth his ground thus imperceptibly has no remedy: but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loseth his ground, he shall have what the river has left in another place, as a recompence for this sudden loss. 2 *Black.* 262.

ALMANACK is part of the law of *England*, of which the courts must take notice in the returns of writs, &c. but the *almanack* to go by, is that annexed to the book of common prayer. *Mod. Caf.* 41. 81.

And by several statutes a stamp duty is imposed on almanacks. See *Burn's Just.* tit. ALMANACK.

ALNETUM, a place where *alders* grow.

ALTARAGE comprehends not only the offerings made upon the altar, but also all the profit which accrues to the priest by reason of the altar, *obventio altaris*. Out of these, the religious assigned a portion to the vicar; and sometimes the whole altarage was given to him by the endowment. In some places, the word *altarage* hath been adjudged to extend to small tithes of divers kinds; but this can only be, where there is a special custom to support it. *Bunb.* 79.

ALTO ET BASSO signifies the intire submission (for high and low) of all differences to arbitration.

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AMBASSADOR. By the 7 *An. c.* 12. all writs and processes, whereby the person of any ambassador or other public minister of any foreign prince or state, or of any of his domestics or domestic servants, may be arrested, or his goods distrained, shall be void. Provided, that no merchant or other trader, within the description of any of the statutes against bankrupts, shall have any benefit of this act; nor any servant of an ambassador, unless the name of such servant be registered in the office of one of the secretaries of state, and by him transmitted to the sheriffs of *London* and *Middlesex*.

Generally, the rights, powers, duties, and privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions: for, as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the controul of the private law of that state wherein they are appointed to reside. 1 *Black.* 253.

If an ambassador grossly offends, or makes an ill use of his character, he may be sent home, and accused before his master; who is bound either to do justice upon him, or avow himself the accomplice of his crimes: but the general practice throughout *Europe* seems now to be, not to punish him in the country where he executes the function of ambassador. *Id.*

AMENABLE (from the French *main*, a hand) signifies tractable, *ad manum*, that may be led or governed. In the modern sense, it signifies to be responsible, or subject to answer in a court of justice.

AMENDMENT (*amendatio*) is the correction of an error committed in any process which may be amended after judgment; but if there be any error in giving the judgment, the party is driven to his writ of error: though where the fault appears to be in the clerk who writ the record it may be amended. *Terms of the Law.* Formerly suitors were much perplexed by writs of error brought upon very slight and trivial grounds, as mis-spellings and other mistakes of the clerks, all which might be amended at the common law, while all the proceedings were in paper, for they were then considered only *in fieri*, and therefore subject to the controul of the courts. But when once the record was made up, it was formerly held, that by the common law no amendment could be permitted unless within the very term in which the judicial act so recorded was done; for during the term the record is in the breast of the court, but afterwards it admitted of no alteration: but now the courts are become more liberal, and, where justice requires it, will allow of amendments at any time while the suit is depending, notwithstanding the record be made up, and the term be past; for they, at present, consider the proceedings as

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in fieri till judgment is given; and therefore, that till then, they have power to permit amendments by the common law, but when judgment is once given and inrolled, no amendment is permitted in any subsequent term. Mistakes are also frequently helped by the statutes of amendment and jeofails, so called, because when a pleader perceives any slip in the form of his proceedings, and acknowledges such error (*jeofaile*, I have failed), he is at liberty by those statutes to amend it; which amendment is seldom actually made, but the benefit of the acts is attained by the court's overlooking the exceptions. 3 *Black.* 406.

AMERCEMENT is, to be at the king's mercy with regard to the *quantum* of a fine imposed. By *magna charta*, c. 14. no man shall have a larger amercement imposed upon him than his circumstances or personal estate will bear, saving to the landowner his land, to the trader his merchandize, and to the husbandman his team and instruments of husbandry; in order to ascertain which, the great charter also directs, that the amercement, which is always inflicted in general terms, shall be set or reduced to a certainty by the oath of a jury. In the court-leet and court-baron, this is usually done by *affeerors*, or jurors sworn to *affeere*; that is, to tax and moderate the general amercement according to the particular circumstances of the offence and the offender. In limitation of which, in courts superior to these, the ancient practice was, to inquire by a jury, when a fine was imposed upon any man, how much he was able to pay by the year, saving the maintenance of himself, his wife, and children. And since the difuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood, but to inflict corporal punishment, or a stated imprisonment, which is better than an excessive fine, for that amounts to imprisonment for life, and by the bill of rights it is particularly declared, that excessive fines ought not to be imposed. 4 *Black.* 372.

AMICUS CURIÆ. If a judge is doubtful or mistaken in matter of law, a stander-by may inform the court as *amicus curiæ*. 2 *Co. Inst.* 178.

AMNESTY, *amnesia oblivio*, an act of pardon or oblivion, such as was granted by king *Charles II.* at the Restoration. *Corwell.*

AMY (*amicus*), a friend. So *prochein amy* is the *next friend* to be trusted for an infant. And infants may sue either by *prochein amy*, or guardian; but must answer by guardian. 3 *Salk.* 196.

ANCESTOR, *anteceffor*, is one from whom an inheritance is derived. It differs from the word *predeceffor*; for *ancestor* is applied to a natural person, *predeceffor* to a body politic or

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corporate. 1 *Inst.* 78. No person can be properly such an ancestor as that an inheritance in lands or tenements can be derived from him, unless he hath had actual seisin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from the lessee of the freehold; or unless he hath had what is equivalent to corporal seisin in hereditaments that are incorporeal; such as the receipt of rent, the presentation to a church, and such like. 2 *Black.* 209.

ANCESTREL is what relates to one's ancestors; as homage ancestrel, a writ ancestrel, and the like.

ANCIENT DEMESNE are those lands which were either reserved to the crown at the original distribution of landed property, or such as came to it afterwards, by forfeiture or other means. They were anciently very large and extensive, comprizing divers honors, manors, and lordships, but they are now contracted within a narrow compass, having been almost intirely granted away to divers subjects. 1 *Black.* 286.

The king's tenants of those lands were bound to divers services, as to plough the king's lands for so many days, to supply his court with such a quantity of provisions, and the like; in consideration whereof, they had many immunities and privileges granted to them, as to try the right of their property in a peculiar court of their own, called a court of ancient demesne, by a peculiar process denominated a *writ of right close*; not to pay tolls or taxes, not to contribute to the expences of knights of the shire, not to be put on juries, and the like. 2 *Black.* 99.

ANGEL, in money, signifies ten shillings in English coin.

ANGILD, Sax. *ane, one*, and *gild*, a tribute or fine; was a single compensation for an offence. So *anblote anscot*, was a single payment of scot and lot.

ANNO DOMINI, the computation of time from the incarnation of our Saviour. The *Romans* began their *era* of time from the building of *Rome*; the *Grecians* computed by *Olympaids*; and the *Christians* reckon from the birth of *Jesus Christ*. *Jac. Diſt.*

AN ANNUITY is a yearly payment of a certain sum of money, granted to another in fee, for life or years, charging the person of the grantor only. 1 *Inst.* 144.

An *annuity* is a thing very distinct from a *rent charge*, with which it is frequently confounded: a *rent charge* being a burthen imposed upon and issuing out of *lands*; whereas an *annuity* is a yearly sum chargeable only upon the *person* of the grantor. Therefore if a man by deed grant to another the sum of 20*l.* a year, without expressing out of what lands it shall issue;

sue; no land at all shall be charged with it, but it is a mere personal annuity. 2 *Black.* 40.

APPARENT HEIR. See HEIR.

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. *Fac. Dict.*

APPEAL hath two significations in law; one is, the removing a cause from an inferior court, or judge, to a superior; as from one or more justices of the peace, to the quarter sessions. The other kind of appeal, is a prosecution against a supposed offender, by the party's own private action; prosecuting also for the crown, in respect of the offence against the public. 2 *Harw.* 155.

In which latter sense, an appeal may be brought in three cases; 1. By a man for a wrong done to his ancestor. 2. By a wife for the death of her husband. 3. For wrong done to the appellants themselves; as in case of robbery, rape, or maihem. *Wood, b. 4. c. 5.*

By statute 6 *Ed. 1. c. 9.* all appeals of death must be sued within a year and a day after the completion of the felony. And if a man be acquitted on an indictment of murder, or found guilty and pardoned by the king, yet he ought not (in strictness) to go at large, but be imprisoned or let to bail till the year and day be past, within which time an appeal may be brought. 3 *H. 7. c. 1.*

If the appellee is convicted, the ancient usage was, so late as Henry the Fourth's time, that all the relations of the slain should drag the appellee to the place of execution. 4 *Black.* 316.

Forasmuch as an appeal is the suit of the party, as well as of the king, hence it is that the king cannot pardon an offender found guilty upon an appeal, as he may when found guilty upon an indictment; for in such case he can only pardon for himself, but not for the party. 2 *Harw.* 155. However the punishment of the offender may be remitted and discharged by the concurrence of all parties interested; and as the king by his pardon may frustrate an indictment; so the appellant by his release may discharge an appeal. 4 *Black.* 316.

If the person appealed be acquitted on the appeal, the appellor shall be imprisoned for a year, and restore damages to the party, and be grievously fined to the king, 13 *Ed. 1. §. 1. c. 12.* that is, if the appeal shall appear to the court to have been malicious. 2 *Harw.* 198. And being acquitted on the appeal, he cannot afterwards be indicted for the same offence. 4 *Black.* 315.

But appeal is now intirely disused, on account of the great nicety required in conducting it, and the charges of prosecution;

cution ; and indictment is the only method now taken. 4 *Black.*

313.

APPEARANCE in the law signifies the defendant's filing *common* or *special* bail, when he is arrested on any process out of the courts at *Westminster*. Anciently, the sheriff, on execution of the writ, was obliged to take the defendant into custody, in order to produce him in court upon the return, however small and minute the cause of action might be. For not having obeyed the original summons, he had shewn a contempt of the court, and was no longer to be trusted at large. But when the summons fell into disuse, and the *capias* became, in fact, the first process, it was thought hard to imprison a man for a contempt which was only supposed ; and therefore in common cases by the gradual indulgence of the courts (at length authorised by the statutes 12 G. c. 29. and 5 G. 2. c. 27), the sheriff or his officer can now only personally serve the defendant with the copy of the writ or process, and with notice in writing to appear by his attorney in court to defend this action ; which in effect reduces it to a mere summons. And if the defendant thinks proper to appear upon this notice, his appearance is recorded, and he puts in sureties for his future attendance and obedience ; which sureties are called *common bail*, being two imaginary persons, as *John Doe*, and *Richard Roe* ; or, if the defendant doth not appear upon the return of the writ, or within four (or in some cases eight) days after, the plaintiff may enter an appearance for him, as if he had really appeared ; and may file common bail in the defendant's name, and proceed thereupon as if the defendant had done it himself.—But if the plaintiff will make affidavit that the cause of action amounts to 10*l.* or upwards, then the defendant upon the arrest must either go to prison, or put in *special* bail ; which is done by entering into a bond to the sheriff, with one or more sureties, (not fictitious persons, as in the former case of common bail, but real, substantial, responsible men), to insure the defendant's appearance at the return of the writ, which is called the *bail bond* ; and on return of the writ, or within four days after, the defendant must appear according to the exigency of the writ. Which appearance is effected by putting in bail *to the action*, and is commonly called putting in bail *above*. This bail above, or bail to the action, must be put in either in open court, or before one of the judges thereof ; or else, in the country, before a commissioner appointed for that purpose by virtue of the statute 4 *W. c. 4.* 3 *Black.* 287. 289. Appearance saves error in *mesne* process. 1 *Vez.* 386.

APPENDANT (*appendens*) is a thing of inheritance belonging to another that is more worthy. As an advowson may be appendant to a manor, land appendant to an office, a seat in a

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church appendant to an house. 1 *Inst.* 121. So there is common appendant; which differs from common appurtenant. Common appendant is a right belonging to the owners or occupiers of arable land, to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Common appurtenant arises from no connection of tenure, but may be annexed to lands in other lordships, or extended to other beasts besides such as are generally commonable, as to hogs, goats, and the like. 2 *Black.* 33. If a thing appendant to another be granted by itself, without the thing to which it is appendant, the appendancy is destroyed, and that which was appendant is become in gross: as if an advowson appendant be granted without the manor to which it is appendant; or the manor be granted, saving the advowson.

APPENDITIA, the *appendages* or pertinencies of an estate. Hence the word *penthouse*, for the appendage of an house.

APPORTIONMENT signifies a division or partition of a rent, a common, or the like; that is, a making of it into parts or *portions*.

If a man hath a *rent charge* to him and his heirs issuing out of certain land, if he purchase any parcel of this to him and his heirs, all the rent charge is extinct, because the rent is entire, and issuing out of every part of the land, and therefore by purchase of part, it is extinct in the whole, and cannot be apportioned. *Lit.* 222.

But if a man, which hath a *rent service*, purchase parcel of the land out of which the rent is issuing, this shall not extinguish all, but only the parcel. For a rent service in such case may be apportioned according to the value of the land. *Id.*

But if one holdeth his land of his lord by the service to render to his lord yearly at such a feast a horse, a spear, a rose, and such like; if in this case the lord purchase parcel of the land, such service is taken away, because such service cannot be severed nor apportioned. *Id.*

If the tenant holdeth by fealty, and a bushel of wheat, or a pound of cummin, or of pepper, or such like, and the lord purchases part of the land, there shall be an apportionment, as well as if the rent were in money: and yet, if the rent were by one grain of wheat, or one seed of cummin, or one pepper corn; by the purchase of part, the whole shall be extinct. 1 *Inst.* 149.

But if an entire service be for the *public good*, as castle-guard, cornage, and the like, or if it be for defence of the realm, or to repair a bridge or a way, or to keep a beacon, or for advancement of justice and peace, as to attend the sheriff in the execution of process; though the lord purchase part, the service remains. *Id.*

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If a man hath common of pasture without number in twenty acres of land, and ten of those acres descend to another person, the common without number is intire and uncertain, and cannot be apportioned, but shall remain. But if it had been a common certain (as for ten beasts), in that case the common should be apportioned. And so it is of common of estovers, turbarry, fishery, and the like. *Id.*

But apportionment of rent or common is usually settled by covenant or special agreement.

APPORTUM (from the French *apport*) signifies properly the revenue or profit which a thing brings in to the owner. It was commonly used for a corody or pension. It was also applied to the payment made by the alien priories here in *England* to the superior house abroad; or sometimes it was what remained over and above the sustenance of such alien priory.

APPOSAL of sheriffs, is the charging them with money received upon their accounts in the exchequer.

APPRAISEMENT. See **INVENTORY.**

APPRENTICES (from *apprendre*, to learn) are usually bound for a term of years, by deed indented, to serve their masters, and be maintained and instructed by them. 1 *Black.* 426.

And hereby an infant is bound, though under age. Nevertheless they cannot bind themselves so as to intitle the master to an action of covenant, or other action for departing the service, or other breaches of the indenture; therefore it is usual for the father or some friend of the apprentice to be bound with him for the faithful discharge of his office, according to the terms agreed on. 8 *Mod.* 190.

The churchwardens and overseers of the poor may bind any such poor children apprentices, whose parents they shall judge not able to maintain them; till such man-child shall attain the age of 21, and such woman-child the age of 21 or marriage. 43 *El.* c. 2. 18 *G.* 3. c. 47.

Also they may, by the consent of two justices, bind out any boy of the age of 10 years who shall be chargeable, or whose parents shall be chargeable, or who shall beg for alms, to be apprentice to the sea service, till he shall attain the age of 21 years. 2 & 3 *An.* c. 6.

A master may by law correct his apprentice for negligence or other misbehaviour, so it be done with moderation; though if the master or master's wife beats any other servant of full age, it may be good cause of being discharged, on complaint to the justices. 1 *Black.* 428.

For, generally, disputes between masters and apprentices are in most cases determinable before the justices of the peace.

Inticing an apprentice to depart from his master, is not an offence for which an indictment will lie; but the party's remedy is

by an action on the case, which he may well maintain. *Bur. Mansf.* 1306.

An apprentice gains a settlement, where he serves the last forty days of his apprenticeship.

An apprenticeship being a personal trust, becomes determined by the death of the master; unless there are special words in the indenture to the contrary. *Bur. Set. Cas.* 320.

Persons having served seven years as apprentices to any trade, have an exclusive right to set up that trade in any part of *England*, except where they are prohibited by the bye-laws or local privileges of divers corporations. And if a man shall in any town exercise a trade, without having served an apprenticeship for seven years, he shall forfeit 40s. a month.

APPROPRIARE COMMUNIAM is to approve or to appropriate and inclose part of a common to a man's own separate use; and this may be done either by the lord of the manor, or by a tenant with the lord's permission; provided they leave sufficient common for the rest of the tenants.

APPROPRIATION is the annexing of a benefice to the proper and perpetual use of some religious house, bishoprick, college, or *spiritual* person, to enjoy for ever. To make an appropriation, the king's licence was to be obtained in chancery, and also the consent of the ordinary, patron, and incumbent. And in this manner the religious houses of old time became possessed of that vast number of advowsons, which they had in this kingdom; when these churches, after the dissolution of the monasteries, came into lay hands, the church so possessed by a *layman* was called an *impropriation*, and himself the *impropriator*. But the words *appropriation* and *impropriation* are often confounded and used for each other.

APPROVEMENT, by the statute of *Merton*, 20 *H.* 3. *c.* 4. is where a man hath common in the lord's waste, and the lord makes an inclosure of part of the waste for himself, leaving sufficient common with egress and regress for the commoners. If there be not sufficient common left for the tenant, he may have a writ of assize, and by 3 & 4 *Ed.* 6. *c.* 3. shall recover treble damages, and a commoner may break down an inclosure, if the lord doth inclose part of the common, and not leave sufficient room in the residue; but if any, upon just title of approvement, do make a hedge or ditch for that purpose, which afterwards is thrown down in the night by persons unknown, the towns adjoining may be distrained to make such hedge at their own charges, for which there is a writ (*noctanter*) in the register. 13 *Ed.* 1. *c.* 46.

But in the case of *Duberley v. Page*. *E.* 28 *G.* 3. it was determined, that the lord has no right under the statute of *Merton* to inclose and approve the wastes of a manor, where the tenants of
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the manor have a right to dig gravel on the wastes, or to take estovers there. *Caf. by Durnford & East. 2 V. 391.*

APPROVER, *prover*, (*probator*), is a person indicted of treason or felony, and in prison for the same, who, upon his arraignment, before any plea pleaded, doth confess the indictment, and takes a corporal oath to reveal all treasons and felonies that he knoweth of, and therefore prays a coroner, before whom he is to enter his appeal or accusation, against those that are partners in the crime contained in the indictment, and this accusation of himself, and oath, makes the accusation of another person of the same crime, to amount to an indictment; and if his partners are convicted he shall have his pardon of course. But as it is in the discretion of the court, whether they will suffer one to be an approver, this method is now out of use; but in many cases we have what amounts to the same thing by statute, where pardon is assured to offenders on discovering and convicting their accomplices. *3 Inst. 129.*

APPURTENANCES (*pertinentia*, *appertaining* or belonging to) signify things both corporeal and incorporeal appertaining to some other thing as principal: as an hamlet to a chief manor, common of pasture to lands, common of estovers to an house, out-houses, yards, orchards, gardens are appurtenant to a messuage; but lands cannot properly be said to be appurtenant to a messuage. *1 Lil. Abr. 91.* Turbary may be appurtenant to an house, but not to lands; a leet may be appurtenant to a manor, but not to an house, for the things must agree in nature and quality. *1 Inst. 121.*

ARBITRATION:

1. Arbitration is, where the parties submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of one, two, or more arbitrators, who are to decide the controversy; or if the two do not agree, it is usual to add, that another person be called in as umpire, to whose sole judgment it is then referred. *3 Black. 16.*

2. Generally all matters of controversy, either of fact, or of a right in things and actions personal and uncertain, may be submitted to arbitration. *9 Co. 78.*

But matters of freehold, or any right and title to a freehold, cannot be submitted to arbitration; yet if the parties enter into mutual bonds to stand to the award relating to lands and tenements, they forfeit their bonds unless they obey it. *1 Roll's Abr. 242. 244.*

Also criminal matters, as felonies and other indictable offences, cannot be submitted to arbitration; and although the submission be by bond, yet the obligation is void, and the parties may be punished for entering into such bonds. *1 Bac. Abr. Arbitrament.*

3. Of submission there are divers kinds:—a submission by words is good, and the party in whose favour the award is made hath a

remedy to enforce the performance of it. Yet it is not expedient that any submission should be by words only, because the party may revoke it any time before the award made, and that by word likewise, besides that it lays a great foundation for perjury. *Compl. Arbitr.* 21.

Submission may also be by *covenant*; but this method is seldom used; for though it contains the same certainty with a bond, yet the method of suing on a covenant is different, and more difficult than suing upon a bond. *Id.* 7. 46.

There may also be a submission *by rule of court*, which is in pursuance of the statute 9 & 10 *W. c.* 15. whereby the parties may agree that their submission be made a rule of such of his majesty's courts of record as the parties shall chuse, which court will thereupon carry the award into execution in the same manner as for contempt of a rule of court.

Or the submission may be by *bond*, which in some respects is preferable to a submission by rule of court; for an award made in pursuance of bonds of submission may bind the parties executors; but if he who refuses to perform an award made pursuant to a rule of court shall die, the statute directing that the prosecution shall be carried on by attachment, the remedy being lost, the award is lost also. *Compl. Arbitr.* 34.

Or the submission may be both by *bond* and *rule of court*, by adding the parties consent at the bottom of the condition of the bond, and this seemeth to be the best way, for then the party may proceed which way he pleases; and it is said, he may proceed both ways, that is, both on the bond, and also have an attachment for the contempt. *1 Salk.* 73.

It hath been usual also, of late years, to insert in the submission a caution that *no bill in equity* shall be filed against the arbitrators; for it would be a very great hardship upon arbitrators if they should be harrassed with suits, and the allowing them to be liable to such suits would effectually discourage persons of worth from accepting the office of arbitrators. *2 Atk.* 395.

4. The award must be made according to the submission: upon which ground it hath been disputed, whether awarding releases to the time of the award, and not to the time of the submission, is good; but it seems to be now settled, that such award is not totally void, but good for so much as is within the submission, and void for the residue. *Bac. Abr. Arbitrament.*

An award that one shall pay for the writings of the award, or the reckoning in the house where the award was made, is void; for such things are plainly out of the submission. *1 Roll's Abr.* 254.

If the submission be, so as the award be ready to be delivered to the parties, or to such of them as shall desire the same, the parties so bound are themselves obliged to take notice of the award

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at their peril ; but if the words of the submission be, so that the award be delivered to each party by such a day, then must it be delivered to each party accordingly. *Wood, b. 4. c. 3.*

The award must be beneficial to either party, for an award of one side only is not good ; for if an award be that one of the parties shall go to *Rome*, when it appears that there is no advantage to the other party by his going, it is void. *Id.*

Also an award must be possible and lawful ; thus, if an award be that money shall be paid to an infant, and that he shall make a release, it is void ; for the infant's release is not good in law.

So also the award must be certain and final, upon which account the arbitrators cannot regularly reserve any thing for their future judgment, when the time allowed is expired. *Cro. Ja. 585.*

Generally, the award shall be expounded according to the intent of the arbitrators, and shall not be unravelled in a court of equity, unless there was corruption in the arbitrators ; for the arbitrators being persons of the parties own choosing, the law presumes that they would choose persons whose understanding and judgment they could rely on. *Bur. Mansf. 701.*

5. Arbitrators cannot proceed on a reference, after they have once named an umpire ; for then their authority ceaseth, though the time for making the award is not yet expired. *Id.*

Form of a Submission by Rule of Court.

‘ WHEREAS divers disputes and controversies have arisen,
 ‘ and are now depending, between *A. B.* of — in the county
 ‘ of — yeoman, of the one part, and *C. D.* of — in the
 ‘ said county, yeoman, of the other part, touching and con-
 ‘ cerning — now for the ending and deciding thereof, it is
 ‘ hereby mutually agreed by and between the said parties, that
 ‘ all matters in difference between them for, touching, and con-
 ‘ cerning, the premises, shall be referred and submitted to the
 ‘ arbitrament, final end, and determination of *A. A.* of — in
 ‘ the said county, gentleman, *B. A.* of — in the said county,
 ‘ yeoman, and *C. A.* of — in the said county, yeoman, or any
 ‘ two of them, arbitrators indifferently elected by the said par-
 ‘ ties, so as the said arbitrators, or any two of them, do make
 ‘ and publish their award in writing ready to be delivered to the
 ‘ said parties, or such of them as shall desire the same, on or
 ‘ before the — day of — next ensuing the date hereof :
 ‘ and it is hereby mutually agreed by and between the said
 ‘ parties, that this submission shall be made a rule of his ma-
 ‘ jesty's court of king's bench at *Westminster*. In witness where-
 ‘ of the said parties to these presents have hereunto set their
 ‘ hands, this — day of — in the year of our Lord —

Bond

Bond of Arbitration.

‘ KNOW all men by these presents, that I *A. B.* of ——— in the county of ——— gentleman, am held and firmly bound to *C. D.* of ——— in the said county, yeoman, in ——— pounds of good and lawful money of *Great Britain*, to be paid to the said *C. D.* or to his certain attorney, his executors, administrators, or assigns, to which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal, and dated the ——— day of ——— in the ——— year of the reign of our sovereign lord *George* the Third, of *Great Britain, France* and *Ireland*, king, defender of the faith, and so forth, and in the year of our Lord ———.

‘ The condition of this obligation is such, that if the above-bound *A. B.*, his heirs, executors, and administrators, and every of them, for and on his and their parts and behalfs, do and shall well and truly stand to, obey, abide, perform, observe, and keep the award, order, arbitrament, final end and determination of *A. A.* of ——— esquire, and *B. A.* of ——— gentleman, arbitrators indifferently named, elected, and chosen, as well for and on the part and behalf of the above-bound *A. B.* as of the above-named *C. D.* to arbitrate, award, order, adjudge, and determine of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, judgments, executions, extents, accounts, debts, dues, sum and sums of money, quarrels, controversies, trespasses, damages, and demands whatsoever, both in law and equity, or otherwise howsoever, which at any time or times heretofore have been had, made, moved, brought, commenced, sued, prosecuted, committed, omitted, done or suffered by or between the said parties, so as the said award be made in writing and ready to be delivered to the said parties, on or before the ——— day of ——— now next ensuing; [and if the said *A. B.* his heirs, executors, or administrators, or any of them, shall not prefer, or cause to be preferred, any bill in equity against the said *A. A.* and *B. A.* or either of them, for or concerning their award in the premises;] then this obligation to be void, otherwise of force.’

If the Parties have a mind to make their submission a Rule of Court, then this may be added:

‘ And the above-bound *A. B.* doth agree and desire, that this his submission be made a rule of his majesty’s court of king’s bench at *Westminster*, pursuant to the act of parliament in such case made and provided.’

Con-

Condition to stand to the Award of Arbitrators, with an Umpire.

‘ THE condition of this obligation is such, that if the above-bound *A. B.* his heirs, executors, and administrators, for and on his and their parts and behalfs, shall and do well and truly stand to, obey, abide, observe, perform, fulfil, and keep the award, order, arbitrament, final end and determination of ———, or any two of them, arbitrators indifferently elected and named, as well by and on the part and behalf of the said *A. B.* as by and on the part and behalf of the above-named *C. D.* to arbitrate, award, order, judge, and determine, of and concerning all and all manner of action and actions, cause and causes of action and actions, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by or between the said parties; so as the award of the said arbitrators, or any two of them, be made and set down in writing, under their or any two of their hands and seals, ready to be delivered to the said parties in difference, on or before the ——— day of ———, now next ensuing; then this obligation to be void, otherwise of force.

‘ And if the said arbitrators shall not make such their award of and concerning the premises, within the time limited as aforesaid, then if the said *A. B.* his heirs, executors, and administrators, for and on his and their part and behalf, do and shall well and truly stand to, observe, perform, fulfil, and keep the award, determination, and umpirage of such person as the said arbitrators shall indifferently chuse for umpire in and concerning the premises; so as the said umpire do make and set down his award and umpirage in writing, under his hand and seal, ready to be delivered to the said parties in difference, on or before the ——— day of ———, now next ensuing; and if the said *A. B.* his heirs, executors, or administrators, or any of them, shall not prefer, or cause to be preferred, any bill in equity, against them the said arbitrators and umpire, or any of them, for or concerning the award of them the said arbitrators or umpire in the premises: Then this obligation to be void, otherwise of force.

‘ [And the above-bound *A. B.* doth agree and desire, that this his submission be made a rule of his majesty’s court of king’s bench at *Westminster*, pursuant to the act of parliament in such case made and provided.]’

Form

Form of an Award.

‘ TO all to whom these presents shall come, We *A. B.* of
‘ _____, and *C. D.* of _____, do send greeting :

‘ Whereas there are several accounts depending, and divers
‘ controversies have arisen, between _____, of _____, yeoman, of
‘ the one part, and _____, of _____, yeoman, of the other part :
‘ and whereas, for the putting an end to the said differences, they
‘ the said _____, and _____, by their several bonds or obligati-
‘ ons bearing date _____ last past, are reciprocally become bound
‘ each to the other, in the penal sum of _____, to stand to,
‘ abide, perform, and keep the award, order, and final determi-
‘ nation of us the said _____, so as the said award be made in
‘ writing, and ready to be delivered to the parties in difference,
‘ on or before _____ next ensuing, as by the said obligations and
‘ conditions thereof may appear : Now know ye, that we the
‘ said arbitrators, whose names are hereunto subscribed and seals
‘ affixed, taking upon us the burden of the said award, and
‘ having fully examined and duly considered the proofs and alle-
‘ gations of both the said parties, do make and publish this our
‘ award 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,
‘ and depending between the said parties in law or equity, for
‘ any manner of cause whatsoever touching the said premises, to
‘ the day of the date hereof, shall cease and be no farther pro-
‘ secuted ; and that each of the said parties shall pay and bear his
‘ own costs and charges in any wise relating to, or concerning,
‘ the premises. And we do also award and order, that the
‘ said _____ shall deliver, or cause to be delivered, to the said
‘ _____, at _____, within the space of _____, &c. And further,
‘ we do hereby award and order, that the said _____ shall, on or
‘ before _____, pay or cause to be paid unto the said _____, the
‘ sum of _____. We do also award and order, &c. And last-
‘ ly, We do award and order, that the said _____ and _____, on
‘ payment of the said sum of _____, shall, in due form of law,
‘ execute each to the other of them, or to the other’s use, gene-
‘ ral releases, sufficient in the law for the releasing by each to
‘ the other of them, his heirs, executors, and administrators, of
‘ all actions, suits, arrests, quarrels, controversies, and demands
‘ whatsoever, touching or concerning the premises aforesaid, or
‘ any matter or thing thereunto relating, from the beginning
‘ of the world, until the _____ day of _____ last past (*viz. the day
‘ of the date of the arbitration bonds*). In witness whereof we have
‘ hereunto set our hands and seals the _____ day of _____.

‘ *Witnesses hereof,*

‘ *A. B.*

‘ *C. D.*’

Form

Form of an Umpirage.

[Recite the Arbitration Bonds as before.]

‘ NOW know ye, that I —, umpire, indifferently chosen
 ‘ by —, having deliberately heard and understood the griefs,
 ‘ allegations, and proofs, of both the said parties, and willing
 ‘ (as much as in me lieth) to set the said parties at unity and
 ‘ good accord, do by these presents arbitrate, award, order, de-
 ‘ cree, and judge as followeth; That is to say, &c.’

ARCHBISHOP :

1. An Archbishop is the chief bishop of the province, who next and immediately under the king hath supreme power, authority, and jurisdiction in all causes and things ecclesiastical; and has the inspection of all the bishops of that province. He hath also his own diocese, where he exercises episcopal jurisdiction, as in his province he exercises archiepiscopal. As archbishop, upon receipt of the king's writ, he calls the bishops and clergy of his province to meet in convocation: but without the king's writ he cannot assemble them. To him all appeals are made from inferior jurisdictions within his province. During the vacancy of any see in his province, he is guardian of the spiritualities thereof; as the king is of the temporalities; and he executes all ecclesiastical jurisdiction therein. If the archiepiscopal see be vacant, the dean and chapter are the spiritual guardians. The archbishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months. And he has a customary prerogative, when a bishop is consecrated by him, to have the next presentation to such dignity or benefice in the bishop's disposal, as the archbishop shall chuse; which is therefore called his *option*. 1 *Black.* 380.

2. If we consider *Canterbury* as the seat of the metropolitan, it hath under it twenty-one bishops; but if we consider it as the seat of a diocesan, it comprehends only some part of *Kent* (the residue being in the diocese of *Recheſter*), together with some other parishes dispersedly situate in several dioceses; it being an ancient privilege of this see, that the places where the archbishop hath any manors or advowsons, are thereby exempted from the ordinary, and are become peculiars of the diocese of *Canterbury*, properly belonging to the jurisdiction of the archbishop of *Canterbury*. *Godolph. Report.* 14.

The archbishop of *Canterbury* has the privilege, by custom, to crown the kings and queens of this kingdom. And by the statute of 25 *H. 8. c. 21.* he has power of granting dispensations, where the pope used formerly to grant them; which is the foundation of his granting special licences to marry at any place

place or time, to hold two livings, and the like. 1 *Black.* 381.

The archbishop of *Canterbury* is stiled primate and metropolitan of *all England*, albeit there is another archiepiscopal province within this realm; partly because of his ancient legatine power, and partly by his being enabled by the aforesaid statute to grant faculties and dispensations in both the provinces alike.

At general councils abroad, the archbishop of *Canterbury* had the precedency of all other archbishops. *Godolph.* 21.

At home, he is the first peer of the realm, and hath precedency, not only before all the other clergy, but also (next and immediately after the blood royal) before all the nobility of the realm, and all the great officers of state. *Id.* 13.

3. The archbishop of *York* hath under him only four bishops, namely, those of *Chester*, *Durham*, *Carlisle*, and *Man*: All the rest are under the archbishop of *Canterbury*. But the archbishop of *York* anciently claimed and had a metropolitan jurisdiction over all the bishops of *Scotland*, whence they had their consecration, and to which they swore canonical obedience, until about the year 1466, when the bishops of *Scotland* withdrew themselves from their obedience to this see; and, in 1470, pope Sixtus the fourth created the bishop of *St. Andrews* archbishop and metropolitan of all *Scotland*. *Id.* 14. 18.

The archbishop of *York* has the privilege to crown the queen consort, and to be her perpetual chaplain; and hath precedency of all dukes not being of the blood royal; and also before all the great officers of state, except the lord chancellor. *Id.* 13, 14.

4. The archbishops are said to be *enthroned*, when they are vested in the archbishoprick; whereas bishops are said to be *installed*. *Id.* 22.

They may retain and qualify eight chaplains, whereas a bishop can only qualify six. *Id.* 21.

In speaking and writing to an archbishop is given the title of *grace* and *most reverend father in God*; whereas bishops have the title of *lord*, and *right reverend father in God*.

And an archbishop writes himself *by divine providence*; whereas bishops only use *by divine permission*.

ARCHDEACON, the chief of the deacons, is one that hath ecclesiastical dignity and jurisdiction over the clergy and laity, next after the bishop, throughout the diocese, or in some part of it only. Generally, the archdeacon hath power, under the bishop, of the examination of clerks to be ordained; and also of induction of clerks instituted to a benefice; likewise of excommunication, injunction of penance, suspension, correction, inspecting and reforming abuses in ecclesiastical affairs: but his power is different in different dioceses, and therefore he is to be regulated according to the usage and custom of his own church and diocese.

ARCHES

ARCHES court, *curia de arcubus*, is so called, because it was anciently held in the church of *St. Mary-le-Bow*, which church had that appellation from the steeple thereof being raised at the top with stone pillars in the manner of an arch or bow. And the judge thereof, for the like reason, is called the *dean of the arches*; whose jurisdiction is properly over the thirteen parishes only belonging to the archbishop of *Canterbury* in *London*: but the office of *dean of the arches* having been for a long time united with that of the archbishop's *principal official*, he now, in right of this last-mentioned office, receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. The same person is likewise *judge of the peculiars*, that is, of all those parishes, fifty-seven in number, which, though lying in other dioceses, yet are no way subject to the bishop or archdeacon, but to the archbishop. From this judge there lies an appeal to the king in chancery, that is, to a court of delegates appointed under the king's great seal. The courts of arches and of the peculiars, as also the admiralty court, the prerogative court, and the court of delegates (for the most part), are now held in the hall belonging to the college of civilians in *London*, commonly called *Doctors Commons*.

ARGENTUM ALBUM, silver coin, or pieces of bullion that anciently passed for money. So there was *white-maile*, or rent paid in silver; in contradistinction from *black-maile*, paid in cattle or other provisions.

ARGENTUM DEI, God's silver; money given in earnest upon the making of any bargain. In several manors, the acknowledgment paid to the lord on the admitting of a tenant, is called the God's penny.

ARIER BAN the *ban* or proclamation of the king, for the *arraying* of his tenants, or their entering into the army.

ARMIGER, *esquire*, *escuyer*, *scutarius*, is a name of dignity, next above the degree of gentleman, and below a knight. Anciently he was one that was attendant on such as had the order of knighthood, bearing their shields and other armour, and helping them to horse, and performing other such like services.

ARMS are ensigns of honour, in latin *insignia*, which were originally intended to distinguish the different commanders in war. For being covered with their defensive armour, they could not be known; 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 *Richard* the first, on his expedition into the holy land. And besides shields with arms, they had also *coats* on which their arms were painted, from whence came the denomination of *coats of arms*.

Arma dare (to present one with armour) was anciently a ceremony in conferring the honour of knighthood: whereby such person

person *adoptabatur in militem*, which the French called *adouber*, and we to *dub* such a person a knight.

Arma libera were arms given to a villain when he was manumitted or made free: which arms were usually a sword and lance.

Arma reversata, arms reversed, was when a man, bearing coat armour, was convicted of treason or felony; his arms were thereupon reversed, and he was degraded from all rank and precedence in title and dignity.

ARPEN, or *arpent*; a measure of land, differing in quantity in different places: It seems to have been generally less than an acre; as in some ancient instruments the computation is made by so many acres and so many *arpents*.

ARRAIGNMENT is the calling an offender to the bar of the court, to answer the matter charged upon him. In Latin it is *ad rationem ponere*, and in French *ad reson*, or abbreviated *a resn*; for as the ancient word *disfrain* or *derayn* imports in Latin *disfrationare*, to disprove or evince the contrary of any thing that is or may be affirmed, so *arraigne* is *ad rationem ponere*, to call to account or answer. 2 *H. H.* 216.

The prisoner, on his arraignment, though under an indictment of the highest crime, must be brought to the bar without irons, and all manner of shackles or bonds, unless there be a danger of escape, and then he may be brought with irons. *Id.* 219.

Also there is no necessity that a prisoner, at the time of his arraignment, hold up his hand at the bar, or be commanded so to do; for this is only a ceremony for making known the person of the offender to the court; and if he answers that he is the same person, it is all one. 2 *Haw.* 308.

ARRAY, *arraia*, an old French word signifying to rank or set in order. In ancient times it was usual for the king, upon any great emergency, to issue commissions of array, directed to several of the principal persons in the respective districts, to muster and array, or set in military order, all the men capable to bear arms. *Array* is also applied to a jury, as set in order by the sheriff in his return of the panel. And when a man intends to challenge the whole jury, as on suspicion of partiality, or some default in the sheriff who made the return, it is called *challenge to the array*.

ARREST:

1. *In civil cases.* Arrest is the restraint of a man's person, depriving him of his own will and liberty, and binding him to become obedient to the will of the law: And it may be called the beginning of imprisonment. *Lamb.* 93.

An arrest must be by corporal seizing or touching the defendant's body. 3 *Black.* 288.

An officer cannot justify the breaking open an outward door or window, in order to execute process. If he doth, he is a tref-

trespasser. But if he finds the outward door open, and enters that way, or if the doors be opened to him from within, and he entereth, he may break open inward doors if he finds that necessary, in order to execute his process. *Foff.* 319.

For a man's house is his castle for safety and repose to himself and family; but if a stranger, who is not of the family, upon a pursuit takes refuge in the house of another, this rule doth not extend to *him*, it is not *his* castle, he cannot claim the benefit of sanctuary therein. *Id.* 320.

Peers of the realm, members of parliament, and corporations, are privileged from arrest: against them the process to compel appearance must be by summons and distress infinite. 3 *Black.* 288.

Attorneys and others attending the courts of justice are not liable to be arrested by the ordinary process of the court, but must be sued by bill (usually called a bill of privilege) as being personally present in court. *Id.* 289.

Clergymen performing divine service, and not merely staying in the church with a fraudulent design, are for the time privileged from arrests; as also suitors, witnesses, and other persons, necessarily attending any courts of record upon business, are not to be arrested during their actual attendance, which includes their necessary going and returning. *Id.*

On a Sunday no arrest can be made, nor process served; except for treason, felony, or breach of the peace. 29 *C. 2. c.* 7.

2. *In criminal cases.* An arrest in criminal cases may be, not only by process out of some court, or warrant from a magistrate, but frequently by a constable, watchman, or private person, without any warrant or precept. As where any persons are present, when a felony is committed, or a dangerous wound given, they are bound without any warrant to apprehend the offender, on pain of fine and imprisonment for their neglect. 2 *Haw.* 74.

So where an affray is made to the breach of the king's peace, any person may, without any warrant from a magistrate, restrain the offenders, to the end the king's peace may be kept: but after the affray is ended, they cannot be arrested without an express warrant. 2 *Inst.* 52.

If a warrant to arrest a person be generally directed to all constables, no one can execute it out of his own precinct; for in such case it shall be taken respectively to each of them within their several districts, and not to one of them to execute it within the district of another: but if it be directed to a particular constable, he may execute it any where within the jurisdiction of the justice, but is not compellable to execute it out of his own constablewick. 2 *Hawk.* 86.

And in such cases a man's house is no protection. For if a felony hath been committed, or a dangerous wound given, or
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even where a minister of justice comes armed with process founded on a breach of the peace, the party's own house is no sanctuary for him. In these cases, the justice which is due to the public must supercede every pretence of private inconvenience. *Foster*, 320.

ARREST OF JUDGMENT is, to stay or stop judgment on sufficient cause shewn. For, in many cases, though there be a verdict, yet no judgment can be had; as for some material defect in pleading, misbehaviour of the jury, want of notice of trial, or other like cause. A motion in arrest of judgment must be supported by proper affidavits.

ARSON, from *ardeo*, to burn. See **BURNING**.

ART AND PART is, where one charged with a crime, in committing the same, was both a *contriver* of, and acted his part in it.

ARTICLE, in one sense, signifies a complaint exhibited in the ecclesiastical court, by way of libel.—*Articles of the peace* are a complaint exhibited in the courts at *Westminster*, in order to compel the defendant to find sureties of the peace; in which case it is usual for the court, on issuing an attachment, to make an indorsement thereon, directing some justice of the peace in the country to take the security of the peace there, specifying the particular sums in which the party and his sureties shall be bound. *Bur. Mansf.* 1040. *Articles of war* are a code of laws made by his majesty from time to time for the regulation of the land forces, in pursuance of the several annual acts against mutiny and desertion.—*Articles of the navy* are rules and orders made by statute 31 G. 2. c. 10. for the government of the royal fleet.—*Articles of religion*, commonly called the 39 articles, are a body of articles drawn up by the convocation in 1562, unto which persons admitted into ecclesiastical offices are to subscribe.—*Articuli cleri*, are statutes containing certain articles relating to the church and clergy, made in the 14 Ed. 3.

ARTIFICERS AND LABOURERS :

1. There are several statutes for rating of wages in almost every kind of work, and penalties enjoined against taking or giving more than the wages so rated. But this hath been seldom put in practice. And indeed there are great objections. For besides that this rating puts good and bad work-men upon a level, and thereby destroys emulation; the easiness or difficulty of the same kind of work in different circumstances renders a certain limited sum very inadequate.

2. Disputes about wages, and almost all other kinds of differences between masters and workmen in the several kinds of labour and manufacture, are determinable in a summary way by justices of the peace.

3. All artificers and labourers, hired at a certain price, shall, between

between the middle of *March* and the middle of *September*, continue at work from five in the morning till seven at night; except half an hour for breakfast, an hour for dinner, and half an hour for drinking, and between the middle of *May* and the middle of *August*, half an hour for sleep: Between the middle of *September* and the middle of *March*, they shall continue at work from the spring of day until night; except half an hour for breakfast and an hour for dinner: On pain of having deducted out of his wages one penny for every hour's absence. 5 *El. c. 4.*

4. In the time of hay or corn harvest, the justices of the peace, and also the constables, may cause all artificers and persons meet to labour, to serve by the day in mowing, reaping, and getting of hay and corn; on pain of imprisonment in the stocks two days and one night. 5. *El. c. 4.*

5. If any artificer or labourer shall leave his work unfinished, except for want of payment of his wages; he shall suffer imprisonment for a month. *Id.*

6. If any artificer, workman, or labourer, shall join in any conspiracy to raise the price of labour, he shall forfeit 5*l.* and if not paid in six days, he shall be imprisoned for 20 days, and have only bread and water for his sustenance; for a second offence 20*l.* or shall be set in the pillory; for the third offence 40*l.* or be set in the pillory, and lose one of his ears. 2 & 3 *Ed. 6. c. 14.*

7. If any person shall contract with or endeavour to persuade any artificer to go into any foreign country, not belonging to the crown of Great Britain, he shall forfeit 500*l.* and be imprisoned 12 months: for a second offence, he shall forfeit 1000*l.* and be imprisoned two years. 23 *G. 2. c. 13.*

And if any artificer shall go, or being there shall not return after notice, he shall be incapable of any legacy, or of being executor or administrator, and of taking any lands by descent, devise, or purchase, and shall forfeit his lands and goods, and be deemed an alien, and out of the king's protection. 3 *G. c. 27.*

And by the 23 *G. 2. c. 13.* 14 *G. 3. c. 71.* and 25 *G. 3. c. 76.* there are large penalties for carrying out of the kingdom tools or utensils in various sorts of manufacture.

ASSART, is land in the forest reduced to tillage. *Spelman* derives it from *exertum*, pulled up by the roots, for sometimes it is written *effart*. Others derive it from *exaratum*, ploughed up. *Mannwood* says, it is an offence committed in the forest, by plucking up the wood by the roots that are thickets and coverts for the deer, and making the ground plain as arable land. This is esteemed the greatest trespass that can be committed in the forest to vert and venison, as it contains in it waste and more;

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for whereas waste of the forest is but felling down the coverts which may grow up again, *assart* is a pulling them up by the roots, and utterly destroying them, so that they can never afterwards spring up again. But this is no offence if done by licence; for a man may have a licence to assart ground in the forest, and make it several for tillage. Assart rents are rents paid in some places for forest lands assarted. *Manw.* 171.

ASSAULT is an attempt or offer to beat another, without touching him; as if one lifts up his cane, or his fist, in a threatening manner, at another; or strikes at him, but misses him; this is an assault, *insultus*: for which, though no actual battery is committed, yet the wrong doer may be indicted at the suit of the king, and fined for the offence; and also the party injured may have an action of trespass *vi et armis*, wherein he shall recover damages as a compensation for the injury. 3 *Black.* 120.

But on an action of assault and battery, where the jury shall give less than 40s. damages, the plaintiff shall have no more costs than damages, unless the judge shall certify on the back of the record, that an actual battery (and not an assault only) was proved upon the trial. 22 & 23 C. 2. c. 9.

ASSAY (Fr. *essay*), a proof or trial, is the examination of weights or measures, by the clerks of markets and others. So the *assayer* is an officer appointed for the trial of and marking of plate, or of the gold or silver coin in the mint.

ASSEMBLY (unlawful) is, when three persons or more assemble themselves together, with intent mutually to assist each other, against any who shall oppose them, in the execution of some enterprize of a private nature, with force or violence, against the peace, or to the terror of the people, whether the act intended was of itself lawful or unlawful. If after their meeting, they shall move forward towards the execution of any such act, whether they put it in execution or not, it is then a *riot*. And if they execute such a thing in deed, then it is a *riot*. 1 *Haw.*

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ASSETS (from the French *assez*, enough) is of two kinds; the one assets *by descent*, the other assets *in hand*. Assets *by descent* is, where a man is bound in an obligation, and dies seized of lands in fee simple, which descend to his heir, then this land shall be called *assets*, that is, *enough*, or sufficient to pay the same debt; whether he remains in possession of the land, or hath aliened it before action brought; therefore if a man covenants for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he hath an estate sufficient for this purpose, or *assets*, by descent from the covenantor; for though the covenant descends to the heir whether he inherits any estate or no, it lies dormant, and

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is not compulsory, until he hath assets by descent. 2 *Black.* 243.

Assets *in hand* is, when a man in like manner indebted makes executors, and leaves them sufficient to pay; or some commodity or profit is come unto them in right of their testator; this is called assets in their hands. *T. L.*

There is also another division of assets, into *legal* and *equitable* assets: *legal* assets are such as are liable to debts and legacies by the course of law; *equitable* assets are such as are only liable by the help of a court of equity.

So also, there are *real* and *personal* assets: *real* assets are such as concern the land; *personal* are such as concern the personal estate only.

An advowson, a mortgage, a lease for years, are assets. So is a reversion expectant upon an estate for life, when it happens. Bonds and other specialties are assets, when the money is received. A debt due from the executor to the testator is assets in equity to pay legacies.

It is a rule in equity, that personal assets must be first applied to satisfy the specialty debt; and, if deficient, the heir shall be charged for the real assets descended to him; and if these are deficient, then the devisee of an estate devised to him by the deceased is liable. 2 *Atk.* 434.

ASSIGNMENT is properly a transfer, or making over to another, of the right one has in any estate; but it is usually applied to an estate for life or years. And it differs from a lease only in this—that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignment he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor. 2 *Black.* 326.

There may be an assignment of an annuity, a mortgage, a rent charge, a judgment, a statute: but an authority or trust cannot be assigned over, unless it hath been specially granted to a man and his assigns. Also a cause of action, a right of entry, a title for condition broken, cannot be assigned over. *Wood, b. 2. c. 3.*

A thing in action, as a bond, or a just debt, are commonly said to be assignable over: but then one must sue for the same in the name of the assignor; so that, in reality, it amounts to little more than a letter of attorney to sue in his name. *Id.*

By several acts of parliament, the estates of bankrupts may be assigned over by the commissioners, and the assignees may bring actions in their own names: the judge's certificate for prosecuting felons to conviction may be assigned over once: also bills of exchange, and promissory notes, may be assigned; and the

assignee may bring an action in his own name to recover the money.

Form of an Assignment of a Bond.

‘ To all to whom these presents shall come, greeting : Whereas
 ‘ *A. B.* of ———, in and by one bond or obligation, bearing date
 ‘ the ——— day of ——— in the year ——— became bound to
 ‘ *C. D.* of ——— in the penal sum of ——— conditioned for the
 ‘ payment of ——— and interest at a day long since past, as by the
 ‘ said bond and condition thereof may appear : and whereas there
 ‘ now remains due to the said *C. D.* for principal and interest on
 ‘ the said bond the sum of ———, now know ye, that he the said *C.*
 ‘ *D.* for and in consideration of the said sum of ——— of lawful
 ‘ British money to him in hand paid by *E. F.* of ———, the receipt
 ‘ whereof the said *C. D.* doth hereby acknowledge ; hath assigned
 ‘ and set over, and by these presents doth assign and set over, unto
 ‘ the said *E. F.* the said recited bond or obligation, and the money
 ‘ thereupon due and owing, and all his right and interest of, in,
 ‘ and to the same. And the said *C. D.*, for the consideration afore-
 ‘ said, hath made, constituted, and appointed, and by these pre-
 ‘ sents doth make, constitute, and appoint, the said *E. F.*, his exe-
 ‘ cutors and administrators, his true and lawful attorney and at-
 ‘ tornies irrevocable, for him and in his name, and in the name
 ‘ and names of his executors and administrators, but for the sole
 ‘ and proper use and benefit of the said *E. F.*, his executors, admi-
 ‘ nistrators, and assigns, to ask, require, demand, and receive of
 ‘ the said *A. B.*, his heirs, executors, and administrators, the mo-
 ‘ ney due on the said bond ; and, on non-payment thereof by the
 ‘ said *A. B.*, his heirs, executors, or administrators, to sue for and
 ‘ recover the same ; and on payment thereof, to deliver up and
 ‘ cancel the said bond and give sufficient releases and discharges
 ‘ for the same ; and one or more attorney or attornies under him
 ‘ to constitute ; and whatsoever the said *E. F.* or his attorney
 ‘ or attornies shall lawfully do in the premises, the said *C. D.*
 ‘ doth hereby allow and affirm. And the said *C. D.* doth co-
 ‘ venant with the said *E. F.* that he the said *C. D.* hath not
 ‘ received, nor will receive, the said money due on the said bond,
 ‘ or any part thereof ; neither shall or will release or discharge
 ‘ the same, or any part thereof ; but will own and allow of all
 ‘ lawful proceedings for recovery thereof ; he the said *E. F.*
 ‘ saving the said *C. D.* harmless, of and from any costs that may
 ‘ happen to him thereby. In witness, &c.’

ASSISE, *assise*, anciently signified in general, a court where the judges or assessors heard and determined causes ; and more particularly upon *writs of assise* brought before them, by such as were wrongfully put out of their possessions. Which writs heretofore were very frequent ; but now men’s possessions are more easily

easily recovered by ejectments. Yet, still the judges in their circuits have a commission of *assise*, directed to themselves and the clerk of assise, to take the assises, that is, to take the verdict of a peculiar species of jury called an assise, and summoned for the trial of landed disputes. Unto which commission of assise, four other are now superadded: 1. A commission of *general good delivery*, directed to the judges and clerk of assise associate; which gives them power to try every prisoner in the gaol, and none but prisoners in the gaol. 2. A commission of *oyer and terminer*, directed to the judges and many of the gentlemen of the county; by which they are empowered to *hear and determine* treasons, felonies, or other misdemeanors, by whomsoever committed, whether the persons to be tried be in gaol or not in gaol. 3. A commission or writ of *nisi prius* directed to the judges and clerk of assise, whereby civil causes brought to issue in the courts above, are tried in the vacation by a jury of twelve men of the county where the cause of action arises; and on return of the verdict of the jury to the court above, the judges there give judgment. 4. A commission of the *peace* in every county of their circuit.

At the said assises the sheriff is required to attend, and to give notice to all justices of the peace, mayors, coroners, escheators, high constables and bailiffs of liberties, that they also attend, with their rolls, records, indictments, and other remembrances; and if they make default in appearance, the judges may fine them for their neglect.

Of the ancient writs of assise there are four kinds: 1. Assise of *novel disseisin*, which is, where tenant in fee simple, fee tail, or for term of life, is put out and disseised of his lands or tenements, rents, common of pasture, common way, or of an office, toll, or the like. 2. Assise of *mort de ancestor*, which lies, where a man's ancestor, under whom he claims, dies seised of lands, tenements, rents, or the like, that were held in fee; and after such ancestor's death, a stranger abateth. 3. Assise of *darrein presentment*, which is, where a man and his ancestors have presented a clerk to a church, and afterwards, the church being void, a stranger presents his clerk to the same church, whereby the person having right is disturbed. 4. Assise *de utrum*, which lies for a parson against a layman, or a layman against a parson, for lands or tenements, doubtful whether they may be lay fee, or free alms, belonging to the church. *T. L.*

There is also *assise of the forest*, touching orders to be observed therein. The assise of *bread and beer*, for regulating the weight and quality thereof; and many other such like.

Assisors are those who set the assise, and sometimes the jury of assise are so denominated. *Assisus*, rented or farmed out for such

an assised or certain rent; and hence comes the word to *assess*, or rate, the proportion in taxes and payments by assessors.

Affisa cadere is to fail in one's suit, or to be nonsuited; as when there is such a plain and legal insufficiency in a suit that the complainant can proceed no farther in it.

ASSOCIATION, *associatio*, is a writ or patent sent by the king, either at his own motion, or at the suit of a party-plaintiff, to the justices appointed to take assizes, or of *oyer and terminer*, to have others *associated* unto them. And this is usual where a justice of assise dies; and a writ is issued to the justices alive to admit the persons associated: also where a justice is disabled, this is practised. *F. N. B.* 185. *Reg. Orig.* 201. 206. 223.

1. AN ASSUMPSIT is a voluntary promise made by word or supposed to be made by word, whereby a person, upon valuable consideration, *assumeth* or undertaketh to perform or pay something to another. *T. L.*

An *assumpsit* is either *express* or *implied*:

2. *Express*, is by direct agreement either by word, or (which is all one in law) by note in writing without seal; as where a person assumes or promises to make a good title of land sold; or to pay money upon a bargain and sale; or to deliver goods according to agreement: so if a builder assumes or promises that he will build an house within a limited time, and fails to do it; the person damnified hath an action of *assumpsit* against the builder for this breach of his promise, and shall recover a pecuniary satisfaction for the injury sustained by such delay. 3 *Black.* 157.

And herein it differs from an action of debt; for in an action of debt the plaintiff must recover the whole debt he claims, or nothing at all: for the debt is one single cause of action, fixed and determined. But in an action of *assumpsit*, which is not brought to compel a specific performance of the contract, but to recover damages for its non-performance, the implied promise, and consequently the damages for the breach of it, are in their nature indeterminate; and the jury will, according to the nature of the proof, allow either the whole damages laid in the declaration, or any inferior sum. 3 *Black.* 154.

So in the case of a debt by simple contract, if the debtor promises to pay it and doth not, this breach of promise intitles the creditor to his action of *assumpsit*, instead of being driven to an action of debt. *Id.* 157.

Thus likewise a promissory note, or note of hand not under seal, to pay money at a certain day, is an *express assumpsit*; and the person to whom it is payable may recover the value of the note in damages, if it remains unpaid. *Id.*

3. *Implied* :

3. *Implied* : As if I employ a person to transact any business for me, or perform any work, the law implies, that I undertook or assumed to pay him so much as he reasonably deserved. And if I neglect to make him amends, he hath a remedy for this injury, by bringing his action upon this implied *assumpsit* ; wherein he is at liberty to suggest, that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury ; who will assess such a sum in damages as they think he really merited. This is called an *assumpsit* on a *quantum meruit*. 3 *Black.* 161.

There is also an implied *assumpsit* on a *quantum valebat* ; being where one takes up goods or wares of a tradesman, without expressly agreeing for the price. In this case the law concludes, that both parties did intentionally agree, that the real value of the goods should be paid ; and an action of *assumpsit* may be brought accordingly, if the vendee refuses to pay that value. *Id.*

So also, where one has had and received money of another, without any valuable consideration given on the receiver's part ; as where money has been paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where undue advantage is taken of the plaintiff's situation : for the law construes this to be had and received for the use of the owner only, and implies that the person so receiving, promised and undertook to account for it to the true proprietor. *Id.* 162.

So an *assumpsit* will lie for money received by a bailiff or steward ; for money due on an account stated upon an *insumul computasset* ; or upon a bill of exchange ; for if a merchant to whom it is directed subscribes the bill, it is an *assumpsit* in law : in all these cases it is implied by the law, that the one agreed to pay to the other, though he made no express promise to do it. *Wood, b. 4. c. 4.*

4. But by the statute of frauds and perjuries, 29 C. 2. c. 3. no action shall be brought to charge the defendant upon any contract or sale of lands, or any interest concerning the same ; or upon any agreement that is not to be performed within a year after the making thereof ; unless the agreement or some memorandum or note thereof shall be in writing signed by the party to be charged therewith, or by some other person authorized by him : and no contract for the sale of any goods of ten pounds value shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or except
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some memorandum or note in writing be made, signed by the parties or their agents.

ATTACHMENT, from the French *attacher*, to tie or make fast, signifies the taking of a man's body by commandment of a writ or precept; and is properly grantable in cases of contempts, against which for the most part all courts of record generally, but more especially those of *Westminster-hall*, and above all the court of king's bench, may proceed in a summary manner according to their discretion. 2 *Haw.* 141.

Contempts that are thus punished are either *direct*, which openly insult or resist the powers of the court or the persons of the judges; or *consequential*, which tend to a disregard of their authority. The principal instances of either sort that have been usually punished by attachment, are chiefly of the following kinds: 1. Those committed by *inferior judges and magistrates*; by acting unjustly or oppressively in their offices, or by disobeying the king's writs issuing out of the superior courts, by proceeding in a cause after it is put a stop to or removed by writ of prohibition, certiorari, error, superseas, or the like. 2. Those committed by *sheriffs, bailiffs, gaolers*, and other officers of the court; by abusing the process of the law, or by acts of oppression, extortion, or neglect of duty. 3. Those committed by *attornies and solicitors*, by gross instances of fraud and corruption, injustice to their clients, or other dishonest practice. 4. Those committed by *jurymen*, in making default when summoned, refusing to be sworn or to give any verdict, eating or drinking without leave of the court, and especially at the cost of either party, but not in the mere exercise of their judicial capacity, as by giving a false or erroneous verdict. 5. Those committed by *witnesses*, in making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn. 6. Those committed by *parties to any proceedings* before the court; as by disobedience to any rule or order made in the progress of a cause, by non-payment of costs awarded by the court, or by non-observance of an award duly made by arbitrators after having entered into a rule for submitting to such award. 7. Those committed *in the face of the court*, as by rude and contumelious behaviour, by obstinacy or prevarication, by breach of the peace or other disturbance; or *out of the court*, as by disobeying the king's writ, or treating with disrespect the process of the court, or by perverting such process to the purposes of malice or injustice, or by speaking contemptuously of the court acting in their judicial capacity. 4 *Black.* 284.

If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any farther proof or examination. But in matters that arise elsewhere, if the judges upon
affidavit

affidavit see sufficient ground to suspect that a contempt hath been committed, they either make a rule on the suspected party to shew cause why an attachment should not issue against him ; or, in very flagrant instances of contempt, the attachment issues in the first instance ; as it also does, if no sufficient cause be shewn to discharge the original rule, and thereupon the court confirms and makes it absolute. *Id.* 286.

This process of attachment is merely intended to bring the party into court ; and when there, he must either stand committed, or put in bail, in order to answer upon oath to such interrogatories as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt. If he can clear himself upon oath, he is discharged ; but, if perjured, he may be prosecuted for the perjury. If he confesses the contempt, the court will proceed to correct him by fine, or imprisonment, or both, and sometimes by a corporal or infamous punishment. *Id.* •

There is also a *foreign attachment* ; which is an attachment of the goods of foreigners within a liberty or city, at the suit of any within the liberty, to whom the foreigner oweth money, or the like.

Court of attachments, is a forest court, to be holden once in every forty days, to inquire of all offenders against the king's deer or covert for the same ; who may be attached by their bodies, if found in the very act of transgression ; otherwise, by their goods. And in this court, the foresters are to bring in their attachments or presentments of vest and venison ; and the verderors are to receive the same, and to inroll them, and to certify them under their seals to the court of *justice-seat* or *swain-mote* : for this court can only inquire of, but not convict offenders. 3 *Black.* 71.

ATTAINDER, is where sentence is pronounced against a person convicted of treason or felony : he is then *attinctus*, tainted, or stained ; whereby his blood is so much corrupted, that by the common law his children or other kindred cannot inherit his estate, nor his wife claim her dower ; and the same cannot be restored or saved but by act of parliament ; and therefore in divers instances, there is a special provision by act of parliament, that such or such an attainder shall not work corruption of blood, loss of dower, or disherison of heirs.

ATTAINT is a writ that lies to inquire, whether a jury of twelve men gave a false verdict ; that so the judgment following thereupon may be reversed. In which case, twenty-four of the principal men of the county are to be jurors, who are to hear the same evidence which was given to the petty jury, and as much as can be brought in affirmance of the verdict, but no other against it. And if these twenty-four, who are called

called the grand jury, find it a false verdict, then followeth this terrible judgment at the common law upon the petty jury; that the party shall be infamous, so as never to be received to be a witness, or a juror; shall forfeit his goods and chattels; and his lands and tenements shall be taken into the king's hands; his wife and children cast out of doors; his houses prostrated; his trees rooted up; his meadows ploughed up; and his body imprisoned. And seeing all trials of real, personal, and mixed actions depend upon the oath of twelve men, prudent antiquity inflicted a strange and severe punishment upon them, if they were attainted of perjury. 1 *Inst.* 294.

But now, by the statute 23 *Hen.* 8. c. 3. the severity of this punishment is moderated, if the writ of attaind be grounded upon that statute, which inflicts the punishment of perpetual infamy, and a forfeiture of 20*l.* by each of the jurors, if the cause of action was above 40*l.*; if under that value, then of 5*l.* each. But nevertheless, the party grieved may, at his election, either bring his writ of attaind upon that statute, or at the common law. *Tr. per Pais*, 222.

But this proceeding is now entirely disused; and in the place of attaind, motions are usually made for new trials when a verdict is against evidence. 3 *Black.* 390.

ATTORNEY is he that is appointed by another to do any thing in the *turn* or stead of that other. 1 *Inst.* 51.

Attorney is either *public*, in the king's courts of record; or *private*, upon occasion of any particular business, who is commonly made by *letter of attorney*.

An attorney in the king's courts, commonly called an attorney at law, must be bound apprentice for not less time than five years; and during the whole time of service be actually employed in the proper business of an attorney. 2 *G.* 2. c. 23. 22 *G.* 2. c. 46.

No attorney or solicitor shall have more than two clerks at one time. 2 *G.* 2. c. 23.

And by the 25 *G.* 3. c. 80. every attorney shall take out a certificate annually of his admission, enrolment, or register, from the commissioners of the stamp duties, under the penalty of 50*l.*

If he shall willingly delay his client's suit, to work his own gain, the party shall recover costs and treble damages against him, and he shall be discharged from his office. 3 *Jac.* c. 7.

If he refuse a re-delivery of writings intrusted to his perusal, though some of them concern himself principally, the court, upon motion, will compel him to re-deliver them, on payment of all due to him in the cause for which they were delivered; for, if the writings were delivered for a special purpose, he shall not detain them for another demand. *Comyn. Dig.* Attorney.

He shall not be intitled to sue for the recovery of his fees, until

til after one month shall be expired from the time of his having delivered to his client his bill signed with his own hand. 2 G. 2. c. 23.

And the client, on submission to pay the whole sum that on taxation shall appear to be due, may have the bill taxed by the proper officer. If the bill taxed be less by a sixth part than the bill delivered, the attorney shall pay the costs of taxation: but if it shall not be less, the court may charge the attorney or client according to their discretion. *Id.*

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's inheritance or revenue.

The informations which he exhibits in matters criminal, are properly for such enormous misdemeanours as peculiarly tend to disturb his majesty's government, or to molest him in the regular discharge of his royal functions. For such heinous offenders the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal. 4 *Black.* 308.

In case of *misapplication of charities*, the attorney general at the relation of some informant (who is usually called the *relator*) files *ex-officio* an information in the court of chancery, to have the charity properly established. 3 *Black.* 427.

ATTORNMENT (*turning* from one to another) is the agreement of a tenant to the grant of a feigniory or a rent, or of the donee in tail or tenant for life or years, to the grant of a remainder or reversion. 1 *Inst.* 309.

Attornment may be either by words, or writing: by words as by saying, "I attorn to you by force of the said grant," or, "I acknowledge myself your tenant." By writing; which may be indorsed on the deed, or set down in any other writing, which is the safest way. And in both cases, the tenant may moreover deliver to the grantee a small sum of money by way of acknowledgment, that the witnesses may better remember it. The form of which said attornment in writing may be this: "I *A. B.* do hereby agree to attorn and become tenant to *C. D.* of *E.* of and for the messuage and tenement now in my possession, that is to say, lying and being in the parish of *F.* and county of *G.* and have given to the said *C. D.* sixpence in the name of attornment, and in part of rent. Witness my hand the — day of — in the year —."

The title of attornment was anciently a large and difficult title; but now attornments are not so much in use as formerly: for new expedients are found out by fines to uses, by bargain and sale, by lease and release, and by deeds indented and inrolled.

ed. And by the 4 *An. c.* 16. all grants or conveyances, by fine or otherwise, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual without any attornment of the tenants; provided that no such tenant shall be prejudiced by payment of rent to the grantor before notice given to him by the grantee.

And by the 11 *G. 2. c.* 29. attornment to strangers claiming title to the land shall be void; and the possession of the landlord shall not be altered thereby: provided, that this shall not effect any attornment made in pursuance of a judgment at law or decree in equity, or made with consent of the landlord, or to any mortgagee after the mortgage is become forfeited.

AUDIENCE COURT is a court of the archbishop of *Canterbury*, wherein at first were dispatched all such matters, whether of voluntary or contentious jurisdiction, as the archbishop thought fit to reserve for his own *hearing*. They who prepared evidence, and other materials to lay before the archbishop in order to his decision, were called *auditors*. Afterwards this court was removed from the archbishop's palace, and the jurisdiction of it was exercised by the master or official of the audience, who held his court in the consistory place at *St. Paul's*. But now the three great officers of official principal of the archbishop, dean or judge of the peculiars, and official of the audience, are and have been for a long time past united in one person, under the general name of dean of the arches, who keeps his court in Doctors Commons hall. The archbishop of *York* hath in like manner his court of audience.

AUDITA QUERELA is, where a defendant against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, which hath happened since the judgment: as if the plaintiff hath given him a release; or if the defendant hath paid the debt to the plaintiff, without entering satisfaction on the record. In these and the like cases, wherein the defendant hath good matter to plead, but hath no opportunity of pleading it, an *audita querela* lies in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is a writ directed to the court, stating that the complaint of the defendant hath been *heard (audita querela defendentis)*, and then setting out the matter of the complaint, enjoins the court to call the parties before them, and, having heard their allegations and proofs, to cause justice to be done between them. It also lies for *bail*, when judgment is obtained against them by *scire facias* to answer the debt of their principal, and it happens afterwards that the original judgment against their principal is reversed: for here the bail, after judgment had against them, have no opportunity to plead this special matter, and therefore they shall have redress

redress by *audita querela*; which is a writ of a most remedial nature, and seems to have been invented, lest in any case there should be an oppressive defect of justice, where the party hath a good defence, but by the ordinary forms of law had no opportunity to make it. But the indulgence now shewn by the courts in granting a summary relief upon motion in cases of such evident oppression, hath almost rendered useless the writ of *audita querela*, and driven it out of practice. 3 *Black.* 405.

AUDITOR is an officer of the king, or of some other great person, who examines the accounts of all inferior 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 the king's receivers, sheriffs, escheators, collectors, and customers, and audit and perfect them. *Auditors of the impress* take the account of the mint, and of money dispatched to any one for his majesty's service. *Auditor of the receipts* is an officer of the exchequer that files the tellers bills; and, having entered them, delivers to the commissioners a certificate of the money received the week before: he makes debentures to the tellers, before they pay any money: he also keeps the black book of receipts, and sees every teller's money locked up and secured. 4 *Inst.* 106.

AVENAGE (from the Latin *avena*, oats) was a certain quantity of oats, paid by a tenant to his lord as a rent, or in lieu of some other duties. So *avenor* is an officer belonging to the king's stables, that provides oats for his horses.

AVER, AVERIA, cattle. *Spelman* derives the word from the French *œuvre*, work; as principally denoting *working* cattle. Some deduce it from *avoir*, to have or possess, in a larger signification, extending to all cattle in general.—*Avera*, in *Domesday*, signifies a day's work of a ploughman, valued at 8*d.* (4 *Inst.* 269.)—*Aver land* seems to have been such lands as the tenants did plough and manure *cum averiis suis*, for the proper use of a monastery, or of the lord of the soil.—*Aver corn*. was a rent reserved in corn; and, according to *Somner*, it signifies corn drawn to the lord's granary by the *averia* or working cattle of the tenant. Or perhaps it may denote a particular species of corn; for, in the northern parts of *England*, the word *haver* is commonly used for *oats*, in which sense it may signify corn for the lord's horses.—*Aver-penny* was money paid to be excused from such service. So also *aver-silver*.

AVERAGE is commonly used for a contribution that merchants and others make towards their losses, who have their goods cast into the sea for the safeguard of the ship, or of the other goods and lives of those persons that are in the ship during a tempest. In which case it is lawful for the master (on consultation

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tion with the mariners) to throw over-board goods, wares, guns, or whatsoever else is on board, for the preservation of the ship; and it shall be made good by average. But if the master takes in more goods than he ought, without leave of the owners and freighters, and a storm arises at sea, and part of the freighters goods are thrown overboard, the remaining goods are not subject to average; but the master shall make good the loss out of his own estate: and if the ship's tackle be lost by storm, the same is not within the average. If goods are cast overboard before half the voyage is performed, they are to be estimated at the price they cost: but if they be cast out after, then at the price as the rest are sold at the port of arrival. *Leg. Oleron.*

AVERDUPOIS (Fr. *avoir-du-pois*, to have full weight) is a weight of 16 ounces to the pound, whereas the standard weight is but 12 ounces. This averdupois weight is allowed by custom, for all those sorts of goods wherein there is a refuse or waste, by way of allowance for the loss occasioned thereby.

AVERMENT, *verificatio*, is to avouch or verify the matter in hand. And it is twofold; *general* and *particular*. A *general* averment, which is the conclusion of every plea to the writ, or in bar of replications and other pleadings, containing matter affirmative, ought to be averred "and this he is ready to verify." *Particular* averments are, as when the life of tenant for life, or tenant in tail, are averred; and there, though this word *verify* be not used, but the matter avouched and affirmed, it is upon the matter an averment. 1 *Inst.* 362.

All pleas in the affirmative ought to be averred; but pleas in the negative ought not to be averred, because a negative cannot be proved. 1 *Inst.* 303.

Special pleas always advance or affirm some new fact not mentioned in the declaration, and then they must be averred to be true. But this is not necessary in pleas of the general issue; for those always containing a total denial of the facts before advanced by the other party, puts him directly upon the proof of them. 3 *Black.* 309.

Where one thing is to be the consideration of the other, though there be mutual promises, performance must be averred. As if the agreement be, that the one party shall pay so much money, on the other transferring so much stock; if either party would sue upon this agreement, the one for not paying, or the other for not transferring, the one must aver a transfer or a tender, and the other a payment or tender. 1 *Salk.* 112. But the want of this may be helped by a verdict; but not by a judgment by default. *Bur. Mansf.* 900.

In an action of debt by an administrator, the not averring that the deceased died intestate is cured by pleading over, though not by verdict. *L. Raym.* 635.

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The truth of the fact may, in some cases, be averred against the fiction of law : as where the true time of suing out a *littit* is material, it may be shewn notwithstanding the teste. *Bur. Mansf.* 966.

So, the time of signing a judgment may be shewed, in the case of *purchasers* ; because they are bound only from the signing. *Id.* 967.

Delivery of a writ or warrant need not be averred, but the contrary must come on the other side. *L. Raym.* 310.

Any matter out of a deed that alters the case cannot be averred. *1 Salk.* 197.

Nor is any averment to be received against the express words of the deed or will. *Id.* 227.

But in debt upon bond for the payment of a sum of money, an averment that the bond was made upon a corrupt agreement not appearing in the bond itself, is admissible and good in pleading. *2 Wilson,* 347.

By statute 4 *An. c.* 16. no exception or advantage shall be taken upon a demurrer, for want of averment, except the same be specially set down for cause of demurrer.

AUGMENTATION, the name of a court erected by king *Hen. 8.* for determining suits and controversies relating to monasteries and abbey lands. The intent of which 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 long since been dissolved.

AUGUSTINE CANONS were a religious society that followed the rule of *St. Austin*, and came into *England* in the reign of king *Henry* the first. They wore a long black cassock, with a white rochet over it, and over that a black cloak and hood ; from whence they were called *Black canons regular of St. Austin*. Of these, before the dissolution, there were about 175 houses in *England* and *Wales*.

AULA REGIS was a court established by *William* the Conqueror in his own hall. It was composed of the king's great officers of state resident in his palace, who usually attended on his person, and followed him in all his progresses and expeditions. Which being found inconvenient and burthensome, it was enacted by the great charter, *c. 11.* that common pleas shall no longer follow the king's court, but shall be holden in some certain place, which certain place was established in *Westminster-hall*, the place where the *aula regis* originally sat when the king resided in that city ; and there it hath ever since continued

continued. 3 *Black.* 37. *Aula ecclesie* was the nave or body of the church, where the temporal courts were frequently holden of ancient time.

AULNEGER (from *ulna*, an ell in length) was an ancient officer appointed by the king, with a salary, whose business it was to measure all cloth made for sale, that the king might not be defrauded of his customs and duties. This office was abolished by the statute 11 & 12 *W. c.* 20.

AUNCCEL WEIGHT (quasi *hand-sale* weight, or from *ansa*, the handle of a balance) was an ancient manner of weighing, by hanging of scales or hooks at each end of a beam or staff, which by lifting up in the middle with one's finger or hand, discovered the equality or difference between the weight at one end, and the thing weighed at the other. This weighing being subject to great deceit, was prohibited by several statutes, and the even balance enjoined in its stead. But notwithstanding, it is still used in some parts of *England*, and what we now call the *stilliards* (a sort of hand weight 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*.

AVOIDANCE of an ecclesiastical benefice, as opposed to *plenarty*, is, where there is a want of a lawful incumbent. And this happens several ways :

1. The most usual and known means, by which any spiritual promotion doth become void is, by the *act of God*, namely, by the *death* of the incumbent thereof. Of this the patron is obliged to take notice at his peril in order to prevent a lapse, and not to expect an intimation from the ordinary. *Watf. c.* 1.

2. By *resignation*, which is the *act of the incumbent*. And this being necessary made into the hands of the ordinary, and not valid but as admitted by him; the avoidance consequent upon it is to be notified by the ordinary to the patron. *Gibf.* 792.

3. By *cession*, or the acceptance of a benefice incompatible, which also is the *act of the incumbent*. In which case, the benefice, if of 8l. a year or upwards in the king's books, is void by act of parliament; and no notice is needful. *Watf.* 6. 2.

4. By *deprivation*, which is the *act of the ordinary*: which avoidance being created by sentence in the ecclesiastical court, must be notified to the patron. *Gibf.* 792.

5. By *act of the law*: As, in case of simony; not subscribing the articles or declaration; or not reading the articles or the common prayer: all which being avoidances by act of parliament, are to be understood (with regard to the times of commencement of such avoidance, and the notice of them) according to the directions of the respective acts. *Id.*

ADVOWRY

AVOWRY is, where one takes a distress, and the person distrained sues a replevin, then he that took the distress must *avow* and justify in his plea for what cause he took it, if he took it in his own right; and this is called an *avowry*: if he took it in the right of another, then, when he hath shewed the cause, he must make *consuance* of the taking, as bailiff or servant to him, in whose right he took it. *T. L.*

AURUM REGINÆ, the queen's gold; an ancient perquisite belonging to every queen consort during her marriage with the king, and due from every person who hath made a voluntary offering or fine to the king, amounting to ten marks or upwards, for and in consideration of any privilege, grant, licence, pardon, or other matter of royal favour, conferred upon him by the king; and it is due in the proportion of one-tenth part more, over and above the intire sum paid to the king. As if 100 marks in silver be given to the king to have a fair, market, park, chase, or free warren, there, the queen is entitled to ten marks in silver, or (what was formerly an equivalent denomination) to one mark in gold, by the name of queen-gold, or *aurum reginae*. *1 Black. 219.*

AUSTURCUS, a goshawk; anciently reserved in many manners as a rent to the lord.

AUTER DROIT, another's right: where persons sue or are sued, or claim not in their own right, but in the right of another; as executors and administrators.

AUTERFOITS *acquit*, a former acquittal, is a special plea in bar of an indictment, when a person hath been formerly indicted of the same offence, and acquitted; for no man shall be brought into jeopardy of his life more than once for the same offence. Of the like sort is the plea of *auterfoits convict*, or a former conviction for the same identical crime, though no judgment was given thereupon, as being suspended by the benefit of clergy or other cause. *Auterfoits attain*, a former attainder, either for the same or any other felony, is another plea in bar; for the offender having by the attainder forfeited all that he had, it would be absurd to endeavour to attain him a second time. *4 Black. 335.*

AUTER VIE. See **PUR AUTER VIE.**

AWARD. See **ARBITRATION.**

AYLE (of the French *aieul*, *avus*, a grandfather) is a writ which lieth where a man's grandfather was seized of lands and tenements in fee simple the day that he died, and a stranger abateh and entereth upon the same, and dispossesses the heir of his inheritance. *1 Inst. 160.*

B A I

BACHELOR, *baccalaureus*, from the French *bachelier*, a learner. In the universities, there are bachelors of arts, and the like, being an inferior degree, before they attain to higher dignity. And those that are called bachelors of the company in *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 12 companies consists of a *master*, two *wardens*, the *livery* and the *bachelors*. There are also *knights bachelors*, who are the lowest order of knighthood, and are commonly termed knights singly, whereas others have an honorary addition, as knights of the bath, knights of the garter, and the like.

BACKBEREND is, where the thief is apprehended with the things stolen in his possession, *bearing* them in a fardel at his *back*; which was also called being taken with the *mainour*, as having the goods in his *hand*. 2 *Inst.* 188. It was one of the four circumstances wherein a forester might arrest the body of a trespasser in the forest; *viz.* *dog-draw*, that is, drawing after a deer that he has hurt; *stable-stand*, that is, at his standing, with a knife, gun, bow, or greyhound, ready to shoot or course; *back-berend*, that is, carrying away upon his back the deer which he had killed; *bloody-hand*, that is, when he hath shot or coursed, and is imbrued with blood. 4 *Inst.* 294.

BACKING a warrant of a justice of the peace is, where a warrant having been granted in one jurisdiction, is required to be executed in another; as where a felony hath been committed in one county, and the offender resides in another county: in which case, on proof of the hand writing of the justice who granted the warrant, a justice in such other county indorses or writes his name on the back of it, thereby giving authority to execute the warrant in such other county.

BAIL (from the French *bailler*, to deliver) signifies the freeing or setting at liberty a person arrested or imprisoned upon any action, or surety taken for his appearance, at a day and place certain.

Bail is either *common* or *special*. *Common* bail is a matter of course, being nothing but a mere form upon appearance: for after personal service of the writ upon the defendant, and notice in writing delivered to him to appear by his attorney in court to defend the action, if the defendant thinks proper to appear upon this notice, his appearance is recorded, and he puts in sureties for his future attendance, which sureties are called *common bail*, being only

only two imaginary persons, as *John Doe* and *Richard Roe*. Or, if the defendant doth not appear on the return of the writ, or within four (or in some cases eight) days after, the plaintiff may enter an appearance for him, as if he had really appeared; and may file common bail in the defendant's name, and proceed thereupon as if the defendant had done it himself.—3 *Black.* 287.

But if the plaintiff will make affidavit, or assert upon oath, that the cause of action amounts to 10*l.* or upwards, then in order to arrest the defendant, and make him put in substantial sureties for his appearance, called *special bail*, it is required that the true cause of action be expressed in the body of the writ or process: and the precise sum sworn to is marked upon the back of the writ, and the sheriff or his bailiff is then obliged actually to arrest or take into custody the body of the defendant, and to certify the same with the return of the writ. 3 *Black.* 287, 8.

And in this case, the intention of the arrest being only to compel an appearance in court at the return of the writ, that purpose is equally answered, whether the sheriff detains his person, or takes sufficient security for his appearance: the manner whereof is, that the defendant enters into a bond or obligation to the sheriff, with one or more sureties, not fictitious persons (as in the case of common bail) but real and substantial bondsmen, to insure the defendant's appearance at the return of the writ; which obligation is called the *bail bond*. The sheriff, if he pleases, may let the defendant go without any sureties, but then it is at his own peril, for, after once taking him, the sheriff is bound to keep him safely so as to be forthcoming in court, otherwise an action lies against him for an escape. *Id.* 290.

The sheriff shall take bail for no other sum than such as is sworn to by the plaintiff, and indorsed on the back of the writ. *Id.*

The affidavit must be positive, and not that the defendant was indebted to the plaintiff in such a sum, as appears by agreement bearing date such a day, or the like: for the act of parliament, 12 *G. c.* 29. requires positive oath of the debt: whereas such affidavits cannot be said to be positive oaths of it, being only expressed in words of reference to somewhat else, and not in terms of absolute assertion. *Bur. Mansf.* 1447.

But in the case of an assignee under a commission of bankruptcy, where the assignee swore that the defendant was indebted to him in such a sum, as appears by the bankrupt's books, and as the plaintiff verily believes, this was held to be sufficient, being as certain as the nature of the thing will admit of: so, in like manner, when the plaintiff is executor or administrator. *Id.* 2283.

And where the original demand doth not require special bail,

the addition of costs will not alter the case; *Str.* 975. that is, according to the practice of the court of king's bench.

Thus in the case of *Palmer and Needham, E. 3 G. 3. B. R.* the original demand was only 3*l.* 13*s.* 6*d.* The plaintiff brought an action for it, and obtained judgment, with costs. The debt and costs amounted to above 10*l.* The plaintiff then brought an action upon this judgment, and held the defendant to special bail. But the court ordered the special bail to be discharged, and common bail to be accepted; the intention of the law being only, that special bail should be required where the original debt amounted to 10*l.* or upwards. *Bur. Mansf.* 1389.

And in the case of *Belither and Gibbs, T. 7 G. 3. B. R.* where the original debt was 3*l.* 9*s.* 6*d.* and by the addition of costs it was swelled up to 14*l.* the court accepted of common bail, and this was said to be the constant practice in the court of king's bench, but that the court of common pleas required special bail. But in order that there should be a uniformity between the two courts, lord *Mansfield* said, that he had laid this matter before all the judges, and that they all thought the practice of the king's bench to be the more reasonable, and more agreeable to the act of parliament; and that he believed the court of common pleas would alter their practice. *Id.* 2118.

Notwithstanding which determination, afterwards in the case of *Nightingale and Nightingdale, E. 19 G. 3.* in the common pleas on a judgment of nonsuit, the costs recovered by the defendant amounting to more than 10*l.* he brought an action on the judgment, and held the plaintiff in the original action to bail. On motion to discharge the *now* defendant on a common appearance, the cases of *Palmer and Needham*, and *Belither and Gibbs*, were cited, and relied on; particularly the latter, and the conference which lord *Mansfield* is reported to have said he had had with all the judges. And it was agreed, that if the defendant was not to be held to bail where part of the 10*l.* arose from costs, *a fortiori* he ought not, where (as in the present case) the whole demand arose from costs alone.—But by the whole court, no instance has been shewn where *this* court has refused to hold to special bail, where the whole or part of the demand (upon which the action upon judgment is brought) arises from the recovery of costs; but a multitude of cases the other way: and we see no reason to depart from the practice of the court.—Costs recovered for a groundless prosecution are as fair a debt as for any other consideration. And, by *Gould, J.*, the reporter in *Belither and Gibbs* must have mistaken lord *Mansfield*, for I was then a judge in this court, and remember no such conference. *Black. Rep.* 1274.

Upon the return of the writ, or within four days after, the defendant must appear according as the writ requires. This appearance

pearance is effected by putting in and justifying bail to the action, which is commonly called putting in bail *above*. This must be done either in open court, or before one of the judges thereof; or else, in the country, before a commissioner appointed for that purpose (not being an attorney or solicitor) by the statute of 4 *W. c. 4.* which must be transmitted to the court. These bail must enter into recognizance in court, or before the judge or commissioner, whereby they jointly and severally undertake, that if the defendant be condemned in the action, he shall pay the costs and condemnation, or render himself a prisoner, or that they will pay it for him: which recognizance is transmitted to the court, in a slip of parchment intitled a *bail-piece*. And, if required, the bail must, before the court, or commissioner as aforesaid, swear themselves housekeepers, and each of them to be worth double the sum for which they are bail, after payment of all their debts. 3 *Black. 290, 1.*

These bail must be *two* in number: for by the court of C. B. in *Allen and Keyt, M. 17 G. 3.* notice given to justify *three* bail is irregular. You may as well give notice of threecore, and send the plaintiff to inquire after them all over *London. Blackstone's Rep. 1122.*

And to prevent oppressions by sheriffs' officers, the courts will not accept of *them* as bail. 2 *Salk. 890.*

Form of a Bail-Bond to the Sheriff.

• KNOW all men by these presents, that we *A. B.* of —, in the county of —, gentleman; *C. D.* of —, in the said county, yeoman; and *E. F.* of —, in the said county, carpenter; are held and firmly bound to *G. H.* esquire, sheriff of the county of —, in — pounds (the sum sworn to) of lawful money of Great Britain, to be paid to the said sheriff, or to his certain attorney, his executors, administrators, or assigns: For which payment well and truly to be made, we bind ourselves and each of us by himself, for the whole, our and every of our heirs, executors, and administrators, firmly by these presents, sealed with our seals. Dated the — day of —, in the — year of the reign of our sovereign lord George the third, by the grace of God, king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord —

• The condition of this obligation is such, that if the above-bound *E. F.* do appear before [* *the justices of*] our sovereign lord the king at Westminster, on the morrow of the Holy Trinity, to answer *J. K.* gentleman, of a plea of debt of — pounds (the sum expressed in the body of the writ);

• If in the king's bench, these words must be omitted.

‘ then’ this obligation shall be void, or else shall be and remain
 ‘ in full force and virtue.’

Recognizance of Bail before a Commissioner.

‘ YOU *A. B.* do acknowledge to owe unto the plaintiff —
 ‘ pounds, and you *C. D.* and *E. F.* do severally acknowledge
 ‘ to owe unto the same person the sum of — pounds a-piece,
 ‘ to be levied upon your several goods and chattels, lands, and
 ‘ tenements; upon condition, that if the defendant be condemn-
 ‘ ed in this action, he shall pay the condemnation, or render
 ‘ himself a prisoner in the Fleet for the same; and if he fail
 ‘ so to do, you *C. D.* and *E. F.* do undertake to do it for
 ‘ him.’

The Bail-Piece.

‘ Trinity Term, 16 Geo. 3.
 ‘ Berks, } ON a *testatum capias* against *A. B.* late of —,
 ‘ (to wit.) } in the county of —, gentleman, returnable on
 ‘ the morrow of the Holy Trinity, at the suit of *J. K.* of a plea
 ‘ of debt of — pounds:
 ‘ The bail are *C. D.* of —, in the county of —, yeo-
 ‘ man, and *E. F.* of —, in the said county, carpenter.
 ‘ *R. P.* attorney }
 ‘ for the defendant. }

‘ The party himself in 400l.

‘ Each of the bail in 200l.

‘ Taken and acknowledged the — day of —, in the year
 ‘ of our Lord —, *de bene esse*, before me,

‘ *R. G.* one of the commissioners.’

3 *Black. Append.*

The above may give a general idea of the nature of bail; but as the forms differ not only in the different courts, but according to the species or cause of action in the same court, the books of practice must be consulted.

In criminal cases.—To refuse or delay to bail any personailable, is an offence against the liberty of the subject, in any magistrate, by the common law, as well as by the statute 3 *Ed. 1. c. 15.* and the *habeas corpus* act, 31 *C. 2. c. 2.* And lest the intention of the law should be frustrated by requiring bail to a greater amount than the nature of the case demands, it is declared by statute 1 *W. 3. c. 1.* that excessive bail ought not to be required. On the other hand, if the magistrate takes insufficient bail, he is liable to be fined if the criminal doth not appear. 4 *Black. 297.*

Bail may be taken either in court, or in some particular cases by

by the sheriff, coroner, or other magistrate, but most usually by justices of the peace.

By the ancient common law, all felonies were bailable, till murder was excepted by statute; so that persons might be admitted to bail before conviction almost in every case. But the statute 3 Ed. 1. c. 15. aforesaid, takes away the power of bailing in treason, and in divers instances of felony. The statutes 23 Hen. 6. c. 9. and 1 & 2 P. & M. c. 13. gave farther regulations in this matter. And, upon the whole, we may collect, that no justices of the peace can bail, 1. Upon an accusation of treason. Nor, 2. Of murder. Nor, 3. In case of manslaughter, if the prisoner be clearly the slayer, and not barely suspected to be so; or if an indictment be found against him. Nor, 4. Such as being committed for felony have broken prison. 5. Persons outlawed. 6. Such as have abjured the realm. 7. Approvers; namely, such as having confessed the felony undertake to prove another guilty of the same crime; and persons by them accused. 8. Persons taken with the mainour, or in the fact of felony. 9. Persons charged with house-burning. 10. Persons taken by writ of *excommunicato capiendo*.—Others are of a dubious nature, being in the discretion of the justices whether bailable or not: As, 1. Thieves openly defamed and known. 2. Persons charged with other felonies, or manifest enormous offences, not being of good fame. 3. Accessaries to felony, that labour under the same want of reputation.—A third class are those that are clearly bailable, upon offering sufficient surety; viz. 1. Persons of good fame, charged with a bare suspicion of manslaughter or other inferior homicide. 2. Persons charged with petit larceny or any felony not before specified. 3. Accessaries to felony not being of evil fame, nor under strong presumptions of guilt.

BAILMENT is properly a delivery of goods in trust, upon a contract express or implied, that the trust shall be faithfully executed on the part of the bailee. As if cloth be delivered to a taylor to make a suit of cloaths, he has it upon an implied contract to render it again when made, and that in a workmanlike manner. If goods be delivered to a common carrier, he is under a contract to carry the goods to the place appointed. If a horse be delivered to an innkeeper or his servants, he is bound to keep him safely, and restore him when his guest leaves the house. So if a friend delivers any thing to his friend to keep for him, the receiver is bound to restore it on demand: and it was formerly held, that in the mean time he was answerable for any damage or loss it might sustain, whether by accident or otherwise, unless he expressly undertook to keep it only with the same care as his own goods, and then he shall not be answerable for theft or other accident; but now it is settled, that he shall not be answerable

answerable for any loss, except what happens by gross neglect.
2 *Black.* 452.

But the case of a carrier, innkeeper, or the like, is different; for they have their hire, and thereby impliedly undertake the safe delivering of the goods intrusted with them; and therefore they shall answer the value, if the goods are stolen from them.
Wood. b. 4. c. 4.

BAILIFF is an old *Saxon* word, and signifies a safe keeper or protector; as *bail* is safe keeping or protection. And thereupon we say, when a man upon surety is delivered out of prison, he is delivered into bail, that is, into their safe keeping or protection from prison; and the sheriff, that hath the custody of the county, is called *ballivus*, and the county *balliva sua*. 1 *Inst.* 61.

But this word is most commonly applied to the sheriff's officers, who are either *bailiffs of hundreds*, or *special bailiffs*. *Bailiffs of hundreds* are officers appointed by the sheriff over those respective districts; to collect fines therein, to summon juries, to attend the judges and justices at the assizes and quarter sessions, and also to execute writs and process in the several hundreds. *Special bailiffs* are usually joined with the others upon special occasions; as for arresting persons in cases of difficulty or danger, or to execute some particular writ, and for that time only. 1 *Black.* 345.

Bound bailiffs are also sheriffs' officers, and are usually bound in a bond to the sheriff for the due execution of their office, and thence are called *bound-bailiffs*, which the common people have corrupted into a much more homely appellation. 1 *Black.* 345.

BAILIWICK, in the language of the king's writs, signifies the same as *county*: as where the sheriff is commanded not to omit, by reason of any liberty within his bailiwick, to enter and execute such a writ: sometimes the word *bailiwick* is used to denote such liberty or franchise itself, which is generally exempted from the sheriff's jurisdiction, where the lord of the franchise exercises like authority as the sheriff within his county.

BAN is a *Saxon* word, and signifies proclamation or public notice. It is most especially used in the publication of intended marriages; which must be done on three several Sundays previous to the marriage, to the end, that if any can shew just cause against such marriage, they may have opportunity to make their objections. But the spiritual judge by a licence may dispense with the formality of publication. But if any persons shall be married without either publication of bans or licence, the marriage shall be void, and the minister officiating shall be transported. 26 *G.* 2. c. 33.

BANISHMENT. By the common law, every *Englishman* may claim a right to abide in his own country so long as he pleases, and

and not to be banished or driven from it but by sentence of the law. The king, by his royal prerogative, may issue out his writ *ne exeat regnum*, and prohibit any of his subjects from going into foreign parts without licence; but no power less than the authority of parliament can send any subject out of the land against his will, no not even a criminal; for wherever banishment or transportation is inflicted, it is either by the choice of the criminal himself, to escape a capital punishment, or by the express direction of an act of parliament. By the great charter, c. 29. it is declared, that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. And by the *habeas corpus* act, 31 C. 2. c. 2., no subject of this realm, who is an inhabitant of *England, Wales, or Berwick*, shall be sent prisoner into *Scotland, Ireland, Jersey, Guernsey*, or place beyond the seas, where they cannot have the benefit and protection of the common law, but all such imprisonment shall be illegal. And the law in this respect is so liberally construed for the benefit of the subject, that, though *within* the realm, the king may command the attendance and service of all his liegemen, yet he cannot send any man out of the realm, even upon the public service, except sailors and soldiers, the nature of whose employment necessarily implies an exception: he cannot even constitute a man lord deputy, or lieutenant of *Ireland* against his will, nor make him a foreign ambassador; for this might, in reality, be no more than an honourable exile. 1 *Black.* 137.

BANK (*bancus*, Lat. *banque* Fr.), is sometimes used to denote the bench or seat of judgment, as *bank le roy*, the king's bench; *bank le common pleas*, the bench of common pleas, or the common bench; called also in Latin *bancus regis*, and *bancus communium placitorum*.—There is another sort of *bank*, which signifies a place, where a great sum of money is let out to use, returned by exchange, or otherwise disposed of to profit: and the *bank of England*, emphatically so called, established by act of parliament, under the management of a governor and directors, with funds for maintenance thereof, appropriated to such persons as are intitled to a share of the subscription money. There are also *private bankers*, in whose hands money is lodged and deposited for safety; to be drawn out again as the owners shall call for it.

BANKS DESTROYING. By the 9 G. c. 22. if any person shall unlawfully and maliciously break down the head or mound of any fish pond, whereby the fish shall be lost or destroyed; or break down or cut down the bank of any river, or any sea bank, whereby any lands shall be overflowed or damaged; he shall be guilty of felony without benefit of clergy.

BANKRUPT: by several acts of parliament, every person using the trade of merchandize, by way of bargaining, exchange, bartery, chevifance, or otherwise, in gross, or by retail, or seeking

ing his trade of living by buying and selling, or that shall use the trade or profession of a scrivener, receiving other men's monies or estates into his trust or custody, who shall (1) depart the realm; or (2) begin to keep his house, or otherwise to absent himself; or (3) take sanctuary; or (4) suffer himself willingly to be arrested for any debt or other thing not grown or due for money delivered, wares sold, or any other just or lawful cause or good consideration or purposes; or (5) shall suffer himself to be outlawed; or (6) yield himself to prison; or (7) willingly or fraudulently shall procure himself to be arrested, or his goods to be attached or sequestered; or (8) depart from his dwelling house; or (9) make any fraudulent grant or conveyance of his lands or goods, to the intent or whereby his creditors shall and may be defeated or delayed for the recovery of their just debts; or (10) shall obtain any protection, other than such person as shall be lawfully protected by privilege of parliament; or (11) shall prefer to any court any petition or bill against any of his 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 contract; or (12) being arrested for debt, shall lie in prison two months; or (13) being arrested for 100l. or more, shall escape out of prison—shall be adjudged a bankrupt (and in the said cases of arrest, or lying in prison, from the time of his first arrest).

But no commission of bankruptcy shall be issued on the petition of one or more creditors, unless the single debt of such creditor, or of two or more being partners, amount to 100l.; or of two such creditors petitioning amount to 150l.; or of three or more to 200l.

On such petition the Lord Chancellor may by commission under the great seal appoint such persons as he thinks fit to be commissioners; which commissioners shall cause notice to be given in the Gazette of the commission being issued, and notice thereof also to be given to the bankrupt.

In which notice they shall appoint a time and place of meeting of the commissioners; which shall be at three several times within forty-two days, the last of which, shall be on the forty-second-day: within which time the bankrupt shall surrender himself and discover his effects.—But the Lord Chancellor, if he see cause, may enlarge the time of surrender from the end of the said forty-two days for any further time not exceeding fifty days.

At the said first meeting, the creditors shall be admitted before the commissioners to prove their debts; and the major part in value of the creditors (each of whose debt amounts to 10l. or upwards) shall choose assignees of the bankrupt's estate and effects.

And

And the bankrupt shall deliver to the assignees, upon oath, an account of his effects; and for that purpose they shall have liberty to inspect his books and papers: and if he shall refuse to answer, or not answer fully all lawful questions of the commissioners, they may by their warrant commit him to prison till he shall submit to them and full answer make.

And in case he shall not surrender within the time limited, and also submit to be examined, and in all things conform and fully discover all his estate, and how disposed of, except what hath been *bona fide* disposed of in the way of his trade and dealing, or in the ordinary expence of his family, and also deliver up all his effects (except the necessary wearing apparel of himself and wife and children); he shall be guilty of felony without benefit of clergy.

And the commissioners shall have power by sale to dispose of all his lands, as well copy or customary hold as freehold; and all his goods, chattles, wares, merchandize, and other personal effects: and also his estate tail which he might cut off by common recovery. And they may break open doors, trunks, and chests, where any of the goods are reputed to be. And they may state accounts between the bankrupt and his debtors or creditors, and the balance only shall be paid on either side. And, with consent of the major part in value of the creditors, they may submit disputes to arbitration, and compound for debts owing unto him.

A landlord may distrain for his rent upon the bankrupt's goods, either before or after the assignment; but if he neglects to do it, and suffers them to be removed, he can only come in upon an average with the rest of the creditors. But if the goods remain on the premises, he may distrain them, even after sale by the assignees. And he is not restricted to one year only as in the case of executions, but may distrain for his whole arrear. (*1 Ark. 102.*)

The assignees shall, after four months, and within twelve months after issuing the commission, cause twenty-one days notice to be given in the Gazette of a dividend to be made. And in eighteen months they shall in like manner make a second dividend.

And the bankrupt, if he has conformed in due manner, shall be allowed *5l. per cent.* if his estate will pay *10s.* in the pound; so as the said *5l. per cent.* amount not to above *200l.* And if his estate will pay *12s. 6d.* in the pound, he shall be allowed *7l. 10s. per cent.* so as it amount not to above *250l.* And if his estate will pay *15s.* in the pound, he shall be allowed *10l. per cent.* so as it amount not to above *300l.* If his estate will not pay *10s.* in the pound, he shall be allowed so much as the commissioners and assignees shall think fit, not exceeding *3l. per cent.*

But he shall not be entitled to this allowance, unless the commissioners

missioners shall certify to the Lord Chancellor that he hath duly conformed; and unless four parts in five in number and value of the creditors, who shall be creditors for not less than 20l. each, shall sign the said certificate, and testify their consent to the said allowance.

And moreover he shall not be intitled to the said allowance, if he hath upon marriage of any child given above 100l., unless he prove by his books or upon his oath that he had remaining at the time sufficient to pay his debts; or if he hath lost in one day the value of 5l. or in the whole the value of 100l. in twelve months next before his becoming bankrupt at any sort of gaming, or 100l. in stock jobbing.

Finally, if the bankrupt's estate will pay 15s. in the pound, he shall be discharged from all the debts by him owing at the time he became a bankrupt: otherwise, if it will not pay 15s. in the pound, his body only shall be free from arrest, but his future estate shall be liable, except the tools of his trade, necessary household goods and furniture, and wearing apparel of himself and family.

BANNERET is a knight created by the king in person in the field, under the royal banner, in time of open war: and, being so created, he ranks next after the degree of nobility.

BANNITUS, an outlaw, or *banished* man. So, *bannitus fortis* was a stout desperado, called in our ancient vagrant acts a *valiant beggar*, the same as is stigmatized by our present vagrant act with the appellation of *incorrigible rogue*.

BAR, in a legal sense, is a plea or peremptory exception of a defendant, sufficient to destroy the plaintiff's action.

In *real* actions, a general release, or a fine, may be pleaded to bar the plaintiff's title. In *personal* actions, an accord, arbitration, conditions performed, non-age of the defendant, may be pleaded in bar. So the statute of limitation may be pleaded in bar, or the time limited by law, beyond which no plaintiff can lay his cause of action. 3 *Black.* 306.

In *criminal* cases, there are especially four pleas in bar, which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alledged. And these are, 1. A former *acquittal*, grounded on this universal maxim of the common law, that no man shall be brought into jeopardy of his life more than once for the same offence. 2. A former *conviction*; though no judgment was given, nor perhaps will be given; and this depends on the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime. 3. A former *attainder*; for being dead in law by such first attainder, he hath forfeited all he had, and it would be superfluous to attain him a second time. 4. A *pardon*; which at once destroys the end and purpose of the indictment,

diction, by remitting that punishment, which the prosecution is calculated to inflict. 4 *Black.* 329.

BARGAIN AND SALE of *lands* is a kind of real contract, whereby the feller, for some pecuniary consideration, bargains and sells, that is, contracts to convey, the land to the purchaser, and becomes by such bargain a trustee for, or seised to the use of the purchaser; that is to say, the bargain first vests the use, and then the statute of uses vests the possession. But as conveyances, thus made, want all those benefits of notoriety, which the old common law assurances were calculated to give, therefore to prevent clandestine conveyances of freehold, it is enacted by the 27 *H. 8. c. 16.* that such bargains and sales shall not enure to pass a freehold, unless the same be made by indenture, and inrolled within six months in one of the courts at *Westminster*, or with the *custos rotulorum*, or two justices of the peace, and the clerk of the peace of the county where the lands lie. 2 *Black.* 338.

But now the most common species of conveyance is by lease and release; wherein the lease, without any inrollment, makes the feller stand seised to the use of the purchaser, and vests in the purchaser the use of the term, and then the statute of uses immediately annexes the possession, and thereby renders him capable of receiving a release. And this is held to supply the place of livery of seisin; and so a conveyance by lease and release is said to amount to a feoffment. *Id.*

BARGAIN AND SALE of *goods*. See **CONTRACT**.

BARON is of the lowest order of nobility, but in point of antiquity the highest. Barons originally seem to have been the same as our present lords of manors; to which the name of *court baron* (which is the lord's court, and incident to every manor) gives some countenance. It may be collected from king *John's magna charta*, that originally all lords of manors, or barons, that held of the king *in capite*, had seats in the great council or parliament; till about the reign of that prince the conflux of them became so large and inconvenient, that the king was obliged to divide them, and summon only the greater barons in person; leaving the small ones to be summoned by the sheriff, and (as it is said) to sit by representation in another house; which gave rise to the separation of the two houses of parliament. By degrees the title came to be confined to the greater barons, or lords of parliament only; and there were no other barons among the peerage but such as were summoned by writ, in respect of the tenure of their lands or baronies, till *Richard* the Second first made it a mere title of honour, by conferring it on divers persons by letters patent. 1 *Black.* 399.

BARON-COURT is a Court which every lord of a manor (anciently called a *baron*) hath within the precinct of that manor.

It

It is not a court of record: and therefore county-courts, hundred-courts, and the like, are not of record, because they are but courts-baron. A court-baron is an inseparable incident to a real manor; not to a nominal manor, where the real manor hath been once destroyed by granting away the demesnes or services. A court-leet is not incident to a manor; but he that hath such a manor may also have a court-leet, to be holden within his manor, by prescription or grant from the king.

A court-baron must be holden on some part of the manor. For if it is holden out of the manor, it is void; unless there is a custom to hold courts at one manor for all, where the lord hath several manors.

This court is of two natures: 1. By *common law*, which is the freeholders court, or the court-baron that is incident to every manor, of which the freeholders being suitors are the judges, and the steward only register. It cannot be a court-baron without two suitors at least. This court may be kept from three weeks to three weeks. 2. By *custom*, which is called the customary-court, though it is kept but very seldom. This concerns customary tenants and copyholders, whereof the lord or his steward is judge.

The *freeholders* court consists in hearing plaints of copyhold tenants for debt under 40s. The process is the same as in the county-court, by distress infinite. Causes may be removed by the plaintiff out of this court by *tolt* to the county-court, and from thence by *pone* into the common pleas: or they may be removed by the defendant by *recordare* into the king's bench or common pleas. Executions are only by distress and impounding till the party is satisfied. There is no power to sell, or to deliver the distress to the party; neither is the body to be taken in execution.—A common recovery may be had in this court.

The *copyholders* or *customary*-court is for grants and admittances upon surrenders and descents, on the presentment of the homage or jury. The homage may inquire of all persons that owe suit to this court and make default, and present their names. It may inquire of the death of tenants after the last court, and who is next heir; of fraudulent alienations of land to defeat the lord of his profits; of incroachments on any of the lands of the lord without licence; of cutting down trees by the copyholder without custom or licence; of the copyholder's suffering his houses to decay and not repairing them; of suit not performed at the lord's will by reason of tenure; of surcharge of common with commonable beasts, or putting beasts upon the common that are not commonable; of trespass in the common or waste of the lord by digging, building, or inclosure; of rescous and pound breach; of removing mere stones or land-marks; of by-laws or orders not observed. The method of punishment is by amercement; and

and after the amerciament hath been affeered or moderated by three sworn affeerors, the lord may have an action of debt in his court-baron for the amerciament affeered. *Wood, b. 4. c. 1.*

BARON AND FEME, in our law French, are used for husband and wife. And forasmuch as the wife is under the protection and influence of her *baron*, lord, or husband, she is therefore stiled a *feme-covert*, and her state of marriage is called her *coverture*. See **HUSBAND and WIFE**.

BARONET is a dignity or degree of honour, next after barons, having precedency of all knights, except knights bannerets created by the king under the royal standard. Baronets were first instituted by king *James* the first, in order to raise a competent sum for the reduction of the province of *Ulster* in *Ireland*: for which reason all baronets have the arms of *Ulster* superadded to their family coat. They are created by letters patent, and the dignity usually descends to the issue male.

BARONY, *baronia*, is that honor and territory which gives title to a baron; comprehending not only the fees and lands of *temporal* barons, but of *bishops* also, who have two estates, one as they are spiritual persons, by reason of their spiritual revenues and promotions, the other grew from the bounty of our kings, whereby they have baronies and lands added to their spiritual livings and preferments. *Bracton* says, a barony is a right indivisible; and therefore, if an inheritance be to be divided among coparceners, though some capital messuages may be divided, yet if a capital messuage be the head of a barony, it may not be parcelled.

BARRATRY is a word which we have received from the Danes, or Normans, or both; for *baratta* in the Danish, and *baret* in the Norman, do equally signify a quarrel or contention. And a barrator, in legal acceptation, signifies a common mover, exciter, or maintainer of suits or quarrels between his majesty's subjects, either at law or otherwise.

An indictment of barratry is good, without alledging the offence at any certain place; because, from the nature of the thing, consisting in the repetition of several acts, it must be intended to have happened in several places. *1 How. 244.*

The punishment for this offence, in a common person, is fine and imprisonment: but if the offender belongs to the profession of the law, he ought to be disabled from practising for the future. And by the statute 12 G. c. 29. if any man, who hath been convicted of common barratry, shall practise as an attorney or solicitor in any suit, the court, upon complaint, shall examine it in a summary way; and, if proved, shall direct the offender to be transported for seven years.

BAR-

BARRISTER is a counsellor learned in the law, admitted to plead at the *bar*. In our old law books, barristers are stiled *apprentices*, *apprentitii ad legem*, being looked upon as learners, and not qualified until after a considerable tending in the inns of court to be called to the degree of serjeant.

BARROW, from the Saxon *borg*, an hill, an heap of earth, is a large hillock or mount, raised or cast up in many parts of *England*, called by the Romans *tumulus*, being the repository of the remains or ashes of the dead.

BARTON lands are in some places used to denote the demesne lands of a manor.

BAS, low, or inferior. So *bas chevalier* is an inferior knight, as distinguished from bannerets or knights superior. *Bas court*, an inferior court, such as is not of record, as the court baron of a manor. So *base tenure* was a holding by villenage, or other customary service, opposed to *alta tenura*, the higher tenure *in capite* or by military service. So the *bas tenants* were such as had no relation to the wars, but such only as were employed in inferior occupations, as in ploughing the lord's land, making his hedges, carrying his dung, and the like. 2 *Black.* 61.

BASILLARD, a short sword or dagger.

BASSINET, *basnetum*, an helmet or other defensive covering for the head.

● **BASTARD** :

1. Bastard, generally, is one that is born out of lawful matrimony. But, in some circumstances, children born in wedlock may be bastards : As if the husband be out of the kingdom, so that no access to his wife can be presumed, her issue during that period shall be bastards. 1 *Black.* 457.

So also, if there is an apparent impossibility of procreation on the part of the husband, as if he be only eight years old, or the like, there the issue of the wife shall be bastard. But if the issue be born within a month, or a day, after marriage, between parties of full lawful age, the child is legitimate. 1 *Inst.* 244.

So where a wife is separated from her husband by a divorce *a mensa et thoro*, the children she has during the separation are bastards ; for a due obedience to the sentence shall be intended, unless the contrary be shewed : but if a husband and wife, without sentence, do part and live separate, the children shall be taken to be legitimate, and so deemed till the contrary be proved ; for access shall be intended. — 1 *Salk.* 123.

Likewise, in case of divorce in the spiritual court *a vinculo matrimonii*, all the issue born during the coverture are bastards ; because such divorce is always upon some cause that rendered

rendered the marriage unlawful and null from the beginning.

1. *Inst.* 235.

2. The law hath appointed no exact certain time for the birth of a legitimate child by the widow after the death of her husband. For as a child may be born before the usual time of delivery, so also may the birth of the child, by infirmity of the mother, or other accident, be delayed as long after the usual time. And this gives occasion to a proceeding at common law, where a widow is suspected to feign herself with child, in order to produce a suppositious heir to the estate; in which case, the presumptive heir may have a writ *de ventre inspiciendo*, to examine whether or no she be with child; and, if she be, to keep her under proper restraint till she be delivered: but if, upon due examination, she be found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again, on the birth of a child within 40 weeks from the death of her husband. 1 *Black.* 456.

3. 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, chuse which of the fathers he pleases. *Id.*

4. Bastardy is either *general* or *special*: *General*, where the question is, whether the father and mother were ever married: *Special*, where the question is, whether the child was born before or after the marriage of the father and mother; for by the ancient law of the church, if the child was born before marriage, yet if they married afterwards the child should be legitimate. And therefore the temporal courts would not allow the ordinary to try *special* bastardy, but this shall be determined by a jury. But *general* bastardy shall be tried in the ecclesiastical court, on the king's writ issued to the ordinary for that purpose.

5. The two next justices, shall take order for the maintenance of a bastard child, by charging the mother or reputed father with payment of money weekly, or other sustentation. 18 *Eliz. c.* 3.

6. And if any single woman shall be delivered of a bastard child, or shall declare herself to be with child, a justice, on application by the parish officers, may take order for apprehending the reputed father, and may compel him to give security to indemnify the parish, or else bind him to appear at the next sessions, and also to abide such order as shall be made by the statute of the 18 *Eliz.* for the maintenance of such child.—But no woman shall be compelled to go before a justice

a justice before the birth of the child, nor till one month after. 6 G. 2. c. 31.

7. If the putative father or mother run away, the parish officers may, under direction of the justices, seize the goods and chattels, and the rents of the lands of such person, towards the discharge of the parish. 13 & 14 C. 2. c. 1.

8. The justices shall also take order for the punishment of the mother and reputed father of a bastard who shall be chargeable; and may commit the mother to the house of correction for a year. 18 El. c. 3 7 Ja. c. 4.

9. Generally, the lawful settlement of a bastard is the place of its birth, unless there be some fraud or collusion. Also this rule doth not hold, where a bastard is born whilst a legal order is under execution for removal of the mother to her proper settlement; nor where the child is born in a state of vagrancy, provided the parish officers take care to have the mother apprehended and punished; nor where the child is born in prison, or in a licensed lying-in hospital.

10. A bastard can have no name of reputation as soon as he is born; but after he is born, and hath gained by time a name of reputation, he may purchase by his reputed name, to him and his heirs; though he can have no heirs but of his body. 6 Co. 65.

11. If the issue of a man who is a bastard purchase land, and die without issue, though the land cannot descend to any heir on the part of the father, yet to the heir on the part of the mother (being no bastard) it may; for the heir on the part of the mother makes not any conveyance by the bastard. *Noy.* 159.

12. If a bastard dies intestate, without wife or issue, the king is intitled to the personalty; and the ordinary of course grants administration to the patentee or grantee of the crown. 3 P. Will. 33. 2 Black. 505.

13. If any woman be delivered of a child, which if born alive should by law be a bastard, and endeavours privately to conceal its birth, by burying the child, or the like, she shall suffer death as in case of murder, unless she can prove by one witness at least that the child was born dead. 21 Ja. c. 27.

But of late years it hath been usual, upon trials for this offence, to require some sort of presumptive evidence that the child was born alive. 4 Black. 198.

Bastard eigné is a son born *before* marriage, whose parents afterwards intermarry, and by the civil law he is *mulier*, or lawful issue; but not by the common law. 2 Inst. 99. and the son born *after* the marriage, (who is distinguished by the addition of *mulier puiffné*,) shall be heir to his father.

Alt

All the bishops intreated the lords that they would consent that all such as were born afore matrimony, should be legitimate, as well as they that be born within matrimony, as to the succession of inheritance, for so much as the church accepteth them for legitimate. And all the earls and barons with one voice answered, that they would not change the laws of the realm which hitherto have been used and approved. *St.*

23 *H. 3. c. 9.*

BASTON (Fr.) a staff or club.

BATH, knights of, are an order of knights instituted by king *Hen. 4.* and revived by king *Geo. 1.* They were so called from the ceremony of *bathing*, the night before their creation.

BATTEL (from the Saxon *batte*, a club; or *beatan*, to beat) signifies a trial by combat, where the defendant in an appeal of murder or felony may fight with the appellant, and make proof thereby whether he be guilty or innocent of the crime. Which species of trial is of great antiquity in our laws, but now disused; there having been no instance of it since the year 1638; though still in force, if the parties chuse to abide by it.

When an appellee chuses to wage battel, the manner is this: He pleads not guilty, and that he is ready to defend the same by his body, and then flings down his glove; and if the appellant will join battel, he replies, that he is ready to make good his appeal by his body upon the body of the appellee, and takes up the glove: And then the appellee lays his right hand on the book, and with his left hand takes the appellant by the right, and swears thus: *Hear this, thou who callest thyself John by the name of baptism, whom I hold by the hand, that falsely upon me thou hast lied; and for this thou liest, that I who call myself Thomas by the name of baptism, did not feloniously murder thy father W. by name: So help me God.* And then he kisses the book, and says, *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 thus: *Hear this, thou who callest thyself Thomas by the name of baptism, that thou didst feloniously murder my father W. by name: So help me God.* And then he kisses the book, and says, *And this I will prove against thee by my body, as this court shall award.*

On the day appointed, both parties shall be brought into the field before the justices of the court where the appeal is depending, at the rising of the sun, bareheaded and barelegged from the knee downward, and with bare arms to the elbows, armed only with batons or staves, of an ell long, and a four-cornered leathern target; and before they engage, they take the following oath: *Hear this, ye justices, that I have this*

day neither eat, drank, nor have upon me, neither bone, stone, nor grafs; nor any enchantment, sorcery, or witchcraft, whereby the law of God may be abased, or the law of the devil exalted: So help me God and his saints.

Then, after proclamation for silence, 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 kills the appellant, or can maintain the fight till the stars appear, he shall have judgment to be quit of the appeal: And if the appellant becomes recreant or a crying coward, the appellee shall recover his damages, and may plead his acquittal in bar of a subsequent indictment or appeal; and the appellant for his perjury shall lose his *liberam legem*, and become infamous.

This trial by battel is at the defendant's choice, but if the plaintiff be under an apparent disability of fighting, as being an infant, or of the age of sixty, or lame, or blind, he may counterplead the wager of battel, and compel the defendant to put himself upon his country.

Also peers of the realm bringing an appeal shall not be challenged to wage battel, on account of the dignity of their persons. So likewise if the crime be notorious; as if the thief be taken with the mainour, or the murderer in the room with a bloody knife, the appellant may refuse the tender of battel from the appellee; for it is unreasonable that an innocent man should stake his life against one who is already half convicted.

This mode of trial was used not only in criminal cases on appeals of murder or felony, but also in one civil case, namely, upon an issue joined in a writ of right. And herein the form of proceeding was not much different from that on appeals of murder or felony. Only the parties did not fight in person, but by their champions: and the reason was, that if either of the parties should be killed, the suit would abate, and no judgment could be given. But as the writ of right itself is now disused, this course of trial is only matter of speculation; although, in the case of a writ of right, the defendant hath it at this day in his election to demand it. 3 *Black.* 337. 4 *Black.* 346.

BATTERY (from the Saxon *batte*, a club: or *beatan*, to beat; from whence cometh also the word *battle*) is, when any injury whatsoever, be it never so small, is actually done to the person of a man, in an angry, or revengeful, or rude, or insolent manner; as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, and the like. 1 *Haw.* 134.

But battery is, in some cases, justifiable or lawful; as where one, who hath authority, a parent or master, gives moderate correction to his child, his scholar, or his apprentice. So also
on

on the principle of self-defence; for if one strikes me first, or even only assaults me, I may strike in my own defence. So likewise in defence of my goods or possessions, if a man endeavours to deprive me of them, I may justify laying hands upon him to prevent him; and, in case he persists with violence, I may proceed to beat him away. Thus also in the exercise of an office, as that of churchwarden, a man may gently lay hands on another to turn him out of the church, thereby to prevent his disturbing the congregation. 3 *Black.* 120.

BAWDY-HOUSE is a house of ill-fame, kept for the resort and commerce of lewd people of both sexes. The keeping of a bawdy-house comes under the cognizance of the temporal law, as a common nuisance, not only in respect of its endangering the public peace, by drawing together dissolute and debauched persons, and promoting quarrels, but also in respect of its tendency to corrupt the manners of the people. 1 *Haw.* 196.

Those who keep bawdy-houses are punishable by fine and imprisonment, and also such infamous punishment as to the court in discretion shall seem proper. *Id.*

It seems always to have been the better opinion, that a man may be bound to his good behaviour, for haunting bawdy-houses with women of bad fame, as also for keeping bad women in his own house. 1 *Haw.* 132.

And a wife may be indicted together with her husband, and condemned to the pillory with him, for keeping a bawdy-house; for this is an offence as to the government of the house, in which the wife hath a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of her sex. 1 *Haw.* 2.

But if a person is indicted for frequenting a bawdy-house, it must appear that he knew it to be such a house; and it must be expressly alleged that it is a bawdy-house, and not that it is suspected to be so. *Wood, b. 3. c. 3.*

It is said, a woman cannot be indicted for being a bawd generally, for that the bare solicitation of chastity is not indictable. 1 *Haw.* 196.

BEACON is derived of the Saxon word *becn*, a signal, and *becn an*, to give notice or intelligence; as we use the word *beckon* in a like signification to this day. It was a signal erected as a sea mark for the use of mariners, or to give warning of the approach of an enemy. Before the reign of *Edward* the third, there were only stacks of wood set upon high places, which were fired when the coming of enemies was descried; but in his reign pitch-boxes were set up instead of those stacks of wood. There was an ancient payment, and yet is in some places called *beaconage*, for the maintenance of beacons and lighthouses. In the borders between *England* and *Scotland*, attending at the beacon

was a personal service, to which the inhabitants in their turns were liable ; who, on their descrying the approach of the enemy, were immediately to set fire to their combustibles, whereby they could communicate intelligence in a few minutes to other beacons, and those to others again to a very great distance.

BEAD, or *beade* (Sax.), a prayer. So *beadefman* is one who says prayers for his patron, or other. So *beadroll* was a list of those who used to be prayed for in the church, and from thence transferred to signify any long tedious list, or confused reckoning up of many things together.

BEES are animals *feræ nature* ; but when hived and reclaimed, a man may have a qualified property in them. It is the seizing, hiving, or inclosing them, which gives the property. For though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds that make their nests therein ; and therefore if another hives them, he shall be their proprietor : but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight, and have power to pursue them ; and in these circumstances, no one else is intitled to take them.—But it hath been also said, that the only ownership in bees is *ratione soli* ; and the *charta de foresta*, which allows every freeman to be intitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found. 2 *Black.* 392.

BEHAVIOUR. See GOOD BEHAVIOUR.

BENEFICE is generally taken for all ecclesiastical preferments and dignities ; but, in a more restrained sense, it is applied only to rectories and vicarages. We have received the word from the old Romans, who being wont to distribute part of the lands they had conquered on the frontiers of the empire to their soldiers, those who enjoyed such rewards were called *beneficiarii*, and the lands themselves *beneficia*. Hence, doubtless, came the word *benefice* to be applied to church livings ; for besides that the ecclesiastics held for life, like the soldiers, the riches of the church arose from the benefice of princes. And these *beneficia* were not given by the Romans merely as a recompence for what was past, but also as an encouragement for future service.

BENEFIT OF CLERGY. See CLERGY.

BENERETH, an ancient service which the tenant rendered to his lord with his plough and cart. *Co. Lit.* 86.

BENEVOLENCE was an aid given by the subjects to the king, as a voluntary gratuity ; but, in truth and reality, it was an extortion and imposition : and therefore this hath been carefully guarded and provided against by several statutes. By 25 *Ed.* 1. c. 5, 6. it is enacted, that the king shall not take any aids or tasks, but by the common assent of the realm. And what that common

common assent is, is more fully explained by 34 *Ed.* 1. *ft.* 4. *c.* 1. which enacts, that no talliage or aid shall be taken without the assent of the archbishops, bishops, earls, barons, knights, burgessees, and other freemen of the land. And again, by 14 *Ed.* 3. *ft.* 2. *c.* 1. none shall be charged to make any aid, but by the common assent of the great men and commons in parliament. And as this fundamental law was shamefully evaded under many succeeding princes, by compulsive loans and benevolences, extorted without a real and voluntary consent; it was made an article in the petition of right, 3 *Charles*, that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, it without common consent by act of parliament. And, lastly, by the declaration of rights, 1 *W.* *ft.* 2. *c.* 2. it is insisted, that levying money for or to the use of the crown, by pretence of prerogative without grant of parliament, or for longer time, or in other manner than the same is or shall be granted, is illegal.

BENT, or *Star*, is a rush or shrub growing on the north-west coast of the kingdom; and by the 15 *G.* 2. *c.* 33. several provisions are made for the preservation thereof.

BERCARIA, *bercary*, in Domesday *Berquarium*, (*Fr. Bergerie*,) a sheep-fold, or other inclosure for keeping of sheep. It is said to be abbreviated from *berbicaria*, a sheep-heath, or ground whereon to feed sheep. So *berbiage* seems to have been a rent paid for the depasturing of sheep. And the whole perhaps from the Latin *vervex*, a wether sheep. Hence have been framed *berbicus*, a ram; *berbica*, an ewe; *cara berbicina*, mutton; *bercarius*, a shepherd. 2 *Inst.* 476. *Cowel*.

BERRA, *beria*, *berry*, a plain open field or heath. Such cities and towns in *England* which end with that word, are built in plain and open places, and derive their names from thence.

BERWICK was originally part of *Scotland*, and, as such, was for a time reduced by king *Edward* the first into the possession of the crown of *England*; and, during such its subjection, it received from that prince a charter, which (after its subsequent cession by *Edward Baliol* to be for ever united to the crown and realm of *England*) was confirmed by king *Edward* the third, 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* the first. Its constitution was afterwards new modelled, and put upon an *English* footing by a charter of king *James* the first; and all its liberties, franchises, and customs were confirmed in parliament by the statute 2 *J.* *c.* 28. Though therefore it hath some local peculiarities, derived from the ancient laws of *Scotland*, yet it is part of the realm of *England*, being represented by burgessees
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in the house of commons, and bound by all acts of the British parliament, whether specially named or not. And by way of corroboration, it is enacted by 20 G. 2. c. 42. that where *England* only is mentioned in any act of parliament, the same shall be deemed to comprehend the dominion of *Wales* and town of *Berwick upon Tweed*. 1 *Black.* 98.

BESAYLE is a writ directed to the sheriff, in case of an abatement or disseisin, to summon a jury to view the land in question, and to recognize whether the great grandfather (*befayle*) of the demandant died seized of the premises, and whether the demandant be his next heir. If the abatement was in the time of the grandfather, then the writ was a writ of *ayle* (*de avo*); if in the time of a nearer ancestor, then the remedy was by a writ of *mort d'ancestor*. 3 *Black.* 185.

BIDALE, the *bidding* or inviting of friends to drink at the house of some poor man, in order to raise a charitable contribution for his relief.

BIDDING OF THE BEADS, from the Saxon *biddan*, to desire, and *beide*, a prayer, was anciently a charge or warning given by the parish minister 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, the giving notice on the *Sunday* before of an holiday to be observed in that week is called *bidding* the holiday.

BIGAMY is commonly applied to persons that have two husbands or two wives at one and the same time; and herein it is confounded with *polygamy*: whereas *bigamy*, in its proper acceptation, signifies the having two husbands or two wives successively.

BILL OF EXCEPTIONS. If the counsel of either party, in the hearing and determining of a cause, apprehend that the judge, either in his directions or decisions, mistates the law, they may require him to seal a *bill of exceptions*, stating the point wherein he is supposed to err.—3 *Black.* 372. 2 *Inst.* 426.

Which 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 *Binc.* 372.

The exception should be insisted on at the trial, and the party shall not resort back to it after a verdict against him, when perhaps, if he stood upon the exception, the opposite party had other evidence, and needed not to have put the cause upon this point. The exception should be reduced to writing when taken and disallowed, like a special verdict, or a demurrer to evidence; not that it need be drawn up in form,

form, but the substance must be reduced to writing whilst the thing is transacting, because it is to become a record. 1 *Salk.* 288.

This bill of exceptions is given by the statute of 13 *Ed.* 1. c. 31. which statute extends to civil cases only, and not to criminal: otherwise there would be no trials of that nature ever dispatched in any reasonable time, if every frivolous exception which a prisoner would make should be drawn up into a bill of exceptions: besides, the court is always so far of counsel with the prisoner, as to see that he hath right; and if they find any thing doubtful, they of themselves will take time to advise. *Kelyng.* 15.

Also a bill of exceptions will not lie to summary proceedings before justices of the peace; for it would introduce into them much delay and expence, which are the two evils meant to be avoided by the institution of summary proceedings. *Bur. Settlem. Caf.* 77.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Of bills of exchange and promissory notes in general.*
2. *Statutes concerning bills of exchange and promissory notes.*
3. *Indorsement thereof.*
4. *Demand.*
5. *Acceptance.*
6. *Protest on non-acceptance.*
7. *Protest on non-payment after acceptance.*
8. *Remedy over against the drawer or indorser.*
9. *Case of bills lost or forged.*

1. *Of Bills of Exchange and Promissory Notes in general.*

A BILL OF EXCHANGE is a security, originally invented among merchants in different countries, for the more easy remittance of money from the one to the other which hath since spread itself into almost all pecuniary transactions. 2 *Black.* 466.

It is an open letter of request from one man to another, desiring him to pay a sum named therein, to a third person on his account; by which means, a man, at the most distant part of the world, may have money remitted to him from any trading country. *Ibid.*

In common speech such a bill is called a *draught*, but a *bill of exchange* is the more legal as well as mercantile expression. *Ibid.*

The person however who writes the letter is called in law the *drawer*; and he to whom it is written, the *drawee*; and the third person, or negotiator, to whom it is payable, (whether

ther specially named, or the *bearer* generally,) is called the *payee*.
Ibid.

It is commonly drawn either payable at sight, or in so many days, weeks, or months, or at one or two *ufances*: and the space of one month from the date of the bill is called *ufance*, and two or three months double or treble *ufance*.

These bills are either *foreign* or *inland*: *foreign*, when drawn by a merchant residing abroad upon his correspondent in *England*, or *vice versa*; and *inland*, when both the drawer and the drawee reside within the kingdom. 2 *Black. ibid.*

Formerly, foreign bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now by two statutes, the one 9 & 10 *W. c.* 17. the other 3 & 4 *An. c.* 9. (hereafter following) inland bills of exchange are put upon the same footing as foreign ones; what was the law and custom of merchants with regard to the one, and taken notice of merely as such, being by those statutes expressly enacted with regard to the other. So that there is now in law no manner of difference between them. *Ibid.*

PROMISSORY NOTES, or notes of hand, are a plain and direct engagement in writing, to pay a sum specified, at the time therein limited, to a person therein named, or sometimes to his *order*, or often to the *bearer* at large. These also, by the statute of the 3 & 4 *An. c.* 9. are made assignable and indorsible, in like manner as bills of exchange. But by 15 *G. 3. c.* 51. all promissory notes negotiable being for any sum less than 20s. shall be void. And by 17 *G. 3. c.* 30. all such notes for 20s. or above, and under 5l. shall be also void, unless they specify the names and places of abode of the persons to whom made payable, and bear date at the time of drawing, and payable in twenty-one days after, and the indorsements thereon be made before the expiration of the said term.

2. Statutes concerning Bills of Exchange and Promissory Notes.

By the 9 & 10 *W. c.* 17. “Whereas great damages and
“other inconveniencies do frequently happen in the course
“of trade and commerce, by reason of delays of payment
“and other neglects on *inland bills of exchange* in this king-
“dom, it is enacted, that every bill of exchange drawn in
“or dated at and from any trading city or town, or any
“other place within this kingdom, upon any person in Lon-
“don, or any other trading city, town, or place (in which
“said bill shall be acknowledged and expressed the said
“value

“ value to be received), and drawn payable at a certain number of days, weeks, or months after date thereof, that from and after presentation and *acceptance* of the said bill (which *acceptance* shall be by the under-writing the same under the party's hand so accepting), and after the expiration of three days after the said bill shall become due, the party to whom the bill is made payable, his servant, agent, or assigns, may cause the said bill to be protested by a notary public, and in default of such notary public, by any other substantial person of the city, town, or place, in the presence of two witnesses, refusal or neglect being first made of due payment of the same. S. 1.

“ Which protest shall be made and written under a fair written copy of the bill, in the words or form following :
 “ *Know all men, that I A. B. on the _____ day of _____, at the usual place of abode of the said _____, have demanded payment of the bill of which the above is the copy, which the said _____ did not pay; wherefore I the said _____ do hereby protest the said bill. Dated at _____, this _____ day of _____.* S. 1.

“ Which protest, so made, shall within fourteen days be sent, or otherwise due notice given thereof, to the party from whom the said bill was received; who is, on producing such protest, to repay the bill, together with all interest and charges from the day the bill was protested; for which protest shall be paid a sum not exceeding 6d. S. 2.

“ And in default or neglect of such protest made and sent, or due notice given, within the days before limited, the person so failing or neglecting shall be liable to all costs, damages, and interest, which shall accrue thereby. S. 2.”

And by the 3 & 4 An. c. 9. “ Whereas, by there being no provision made in the foregoing act for protesting such bills in case the party on whom they are drawn refuse to *accept* the same, by underwriting the same under his hand, all merchants and others refuse to underwrite such bills or make any other than a promissory acceptance, whereby the good intent of the said act is wholly evaded; it is therefore enacted, that in case, upon presenting any such bill of exchange, the party on whom the same shall be drawn shall refuse to accept the same by underwriting it as aforesaid, the party to whom it is made payable, his servant, agent, or assigns, may cause the bill to be protested for *non acceptance*, as in case of foreign bills of exchange: for which protest shall be paid 2s. and no more. S. 4.

“ Provided, that no acceptance of any such inland bill of exchange shall be sufficient to charge any person, unless
 “ the

“ the same be underwritten or indorsed ; nor shall the
 “ drawer be liable to any costs, damages, or interest, unless
 “ such protest be made for non-acceptance thereof, and
 “ within fourteen days after be sent, or otherwise notice
 “ thereof be given, to the party from whom such bill was
 “ received, or left in writing at his usual place of abode :
 “ And if such bill be accepted, and not paid before the ex-
 “ piration of three days after the same shall become due ;
 “ then no drawer of such bill shall be liable to any costs, da-
 “ mages, or interest, unless a protest be made and sent, or
 “ notice given thereof as aforesaid. S. 5.

“ Provided, that no protest shall be necessary for non-
 “ payment of any inland bill of exchange, unless the *value*
 “ be acknowledged in the bill to be received, and unless such
 “ bill be drawn for *twenty pounds* or upwards. S. 6.

“ And if any person accept any such bill of exchange in
 “ satisfaction of any former debt or money due unto him,
 “ it shall be deemed a full payment, if the person accepting
 “ do not take his due course to obtain payment, by endea-
 “ vouring to get the same accepted and paid, and make his
 “ protest either for non-acceptance or non-payment. S. 7.

“ Provided, that nothing herein shall extend to discharge
 “ any remedy that any person may have against the drawer,
 “ acceptor, or indorser. S. 8.”

And by the same act of 3 & 4 An. c. 9. “ PROMISSORY NOTES
 “ may be assigned or indorsed, and action maintained thereon, in
 “ every respect, as on inland bills of exchange. S. 1.”

Note—By several acts of parliament, stamp duties are im-
 posed upon bills of exchange and promissory notes, and upon
protests and other *notarial acts* ; for which and the exemptions, see
Burn's Justice, title STAMPS.

3. *Indorsement thereof.*

THE person to whom either a bill of exchange or promissory
 note is made payable, hath clearly a property vested in him
 (not indeed in possession, but in action), by the *express* contract
 of the drawer in the case of a promissory note, and by his
implied contract in the case of a bill of exchange, namely, that
 provided the person on whom the bill is drawn do not pay it,
 the drawer will : for which reason it is usual, in bills of exchange,
 to express that the *value* thereof hath been *received* by the
 drawer ; in order to shew the consideration, upon which the
 implied contract of repayment arises. And this property, so
 vested, may be transferred and assigned from the payee to any
 other man ; contrary to the general rule of the common law,
 that no *chose in action* is assignable : which assignment is the life of
 paper credit. 2 *Black.* 468.

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The payee therefore, or person to whom or to whose order such bill of exchange or promissory note is payable, may, by indorsement or writing his name *in dorso*, or on the back of it, assign over his whole property to the *bearer*, or else to another person *by name*, either of whom is then called the *indorsee*; and and he may assign the same to another, and so on *in infinitum*. And a promissory note, payable to one or *bearer*, is negotiable without any indorsement, and payment thereof may be demanded by any bearer of it. *Ibid.*

4. Demand.

THE person to whom the bill is made payable, or to whom it is indorsed, (whether it be a general or particular indorsement,) is to go to the person on whom it is drawn, and offer his bill for acceptance. 2 *Black. ibid.*

For if, after the bill is payable, he makes no demand, so that he might have been paid if he had been diligent enough; then, if the party on whom the bill is drawn shall fail, it is at the peril of him who keeps the bill. *Mod. Caf. 147.*

5. Acceptance.

THE acceptance, so as to charge the drawer with costs, must be in writing, under, or on the back, of the bill, as is required by the aforesaid statutes.

But a parol acceptance is sufficient to charge the acceptor for the *principal* sum, as it was before at common law. And there is a proviso in the act, that the same shall not extend to discharge any (other) remedy, that any person might have against the acceptor. *Str. 1000.*

Therefore after the drawee hath accepted the bill, either verbally or in writing, he thereby renders himself liable to pay it: for it is now a contract on his side, grounded on an acknowledgment that the drawer hath effects in his hands, or at least credit sufficient to warrant the payment. 2 *Black. ibid.*

6. Protest or Non-Acceptance.

If the drawee refuses to accept the bill, and it be of the value of 20*l.* or upwards, and expressed to be for *value received*, according to the statute aforesaid, the payee or indorsee may protest it for non-acceptance; which protest must be made in writing, under a copy of such bill, by some notary public, as aforesaid; or, if no such notary be resident in the place, then by any other substantial inhabitant, in the presence of two witnesses; and notice of such protest must, within fourteen days after, be given to the drawer. 2 *Black. ibid.*

And

And the drawer, on producing such protest, is bound to make good to the payee or indorsee, not only the amount of the said bill (which he is bound to do, within a reasonable time after non-payment, without any protest, by the rules of the common law); but also interest and all charges, to be computed from the time of making such protest: But if no protest be made or notified to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill. *Ibid.*

7. *Protest for Non-Payment after Acceptance.*

If the bill be accepted by the person on whom it is drawn, and after the acceptance he fails or refuses to pay it within three days after it becomes due (which three days are called *days of grace*), the payee or indorsee is then to get it protested for non-payment, in the same manner, and by the same persons, who are to protest it in case of non-acceptance: and such protest must also be notified, within fourteen days after, to the drawer. And the drawer, on producing such protest, is bound to make good the same, in like manner as when the bill is protested for non-acceptance. 2 *Black. ibid.*

And in the said days of grace, no allowance is made for Sundays and holidays. 1 *Salk.* 128.

If the person, upon whom a bill is drawn, absconds before the day of payment, he to whom it is payable may protest it, in order to have better security for the payment, and to give notice to the drawer of the absconding: and after the time of payment is incurred, then it ought to be protested for non-payment, the same day of payment or after it. But no protest for non-payment can be before the day that it is payable. *L. Raym.* 743.

8. *Remedy over against the Drawer or Indorser.*

If the bill be an indorsed bill, and the indorsee cannot get the person upon whom it is drawn to discharge it; he may call upon either the drawer or indorser, or if the bill hath been negotiated through many hands, upon any of the indorsors: for each indorser is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the indorser, as of the drawer. And if such indorser, so called upon, has the names of one or more indorsors prior to his own, to each of whom he is properly an indorsee; he also is at liberty to call upon any of them to make him satisfaction; and so upwards. But the first indorser hath nobody to resort to, but the drawer only. 2 *Black. ibid.*

And

And what hath been said of bills of exchange, is applicable also to promissory notes that are indorsed over, and negotiated from one hand to another: only that, in this case, as there is no drawee, there can be no protest for non-acceptance; or rather, the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the drawer, the several indorseees of a promissory note have the same remedy, as upon bills of exchange, against the prior indorsors. *Ibid.*

To intitle an indorsee of an inland bill of exchange to bring an action against the indorsor, on failure of payment by the person upon whom the bill is drawn; it is not necessary to make any demand of, or inquiry after, the first drawer. And the case is exactly the same upon promissory notes, when the resemblance between them is rightly understood. While a promissory note continues in its original shape of a promise from one man to pay to another, it bears no similitude to a bill of exchange. When it is indorsed, the resemblance begins. For then, it is an order by the indorsor, upon the maker of the note, (his debtor, by the note,) to pay to the indorsee. The indorsor is the drawer; the maker of the note is the acceptor; and the indorsee is the person to whom it is made payable. The indorsor only undertakes, in case the maker of the note doth not pay. The indorsee is bound to apply to the maker of the note. He takes it upon that condition, and therefore must, in all cases, know who he is, and where he lives; and, if after the note becomes payable, he is guilty of a neglect, and the maker becomes insolvent, he loses the money, and cannot come upon the indorsor.—*Bur. Mansf.* 676.

Therefore, before the indorsee of a promissory note brings an action against the indorsor, he must shew a demand or due diligence to get the money from the maker of the note; just as the person, to whom a bill of exchange is made payable, must shew a demand or due diligence to get the money from the acceptor, before he brings an action against the drawer; that is, in both cases, application must be made to the person from whom the money is supposed to be due. *Ibid.*

And therefore, in all cases, in actions upon inland bills of exchange, by an indorsee against an indorsor, the plaintiff must prove a demand of, or due diligence to get the money from the drawee or acceptor, but need not prove any demand on the drawer. And in actions upon promissory notes, by an indorsee against the indorsor, the plaintiff must prove a demand of, or due diligence to get the money from the maker of the note. *Bur. Mansf.* 678.

When a bill of exchange is indorsed by the person to whom it was made payable, as between the indorsor and indorsee, it is

is a new bill of exchange, and the indorfor stands in the place of the drawer. The indorsee doth not trust to the credit of the original drawer, he perhaps may not know whether such a person exists, or where he lives, or whether his name may have been forged. The indorfor is his drawer, and the person in whom he trusted if the drawee should not pay the money. And there is no difference, in this respect, between *foreign* and *inland* bills of exchange. *Id.* 674.

9. *Cases of Bills lost or forged.*

IN the aforefaid act of 9 & 10 W. c. 17. there is a proviso, that if any inland bill of exchange shall be *lost* or *mis-*carried, within the time limited for payment thereof, the drawer shall be obliged to give another bill of the same tenor: the person to whom it shall have been delivered, giving security (if demanded) to the drawer, to indemnify him against all persons whatsoever, in case the said bill so alleged to be lost or miscarried shall be found again.

If a *bank bill* be lost, an action of trover may be brought against the finder, because he hath no title; though payment to him would indemnify the bank: but if the finder transfers it over for a valuable consideration, an action shall not be brought against him to whom it is transferred, by reason of the course of trade, which creates a property in the assignee or bearer. 1 *Salk.* 126.

If the mail be *robbed* of a bank note, and afterwards the note is received in payment; the true owner is not intitled to recover it, against the person who came lawfully by it, for a valuable consideration, or in the common course of trade. *Burr. Mansf.* 452.

If a bill is accepted by the person upon whom it is drawn, and the money paid by him to an indorsee, and the bill afterwards appears to have been *forged*; the indorsee shall not pay back the money to the acceptor: for he should have inquired and satisfied himself whether the bill was genuine or not; or supposing no neglect to be in him, yet there is no reason to throw off the loss from one innocent man upon another innocent man. *Burr. Mansf.* 1357.

BILL OF SALE is a solemn contract under seal, whereby a man passes the right or interest that he hath in goods and chattels. For if a man promises to give any chattels without valuable consideration, or without delivering possession, this doth not alter the property, because it is *nudum pactum*, whereon arises no action. 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 delivering of possession, because a man is estopped to deny his own deed, or affirm any thing contrary to
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the manifest solemnity of contracting.—But by statute 13 *Eliz. c. 5.* all conveyances of lands, goods and chattles, to avoid the debt or duty of another, shall, as against the party whose debt or duty is so endeavoured to be avoided, be utterly void; except grants made *bona fide*, and on good (which is construed a *valuable*) consideration.

If a man makes a bill of sale of all his goods, in consideration of blood and *natural affection* to his son or one of his relations, it is a void conveyance in respect of creditors; for the consideration of blood and natural affection, which are made the motives to this gift, are esteemed in their nature inferior to valuable considerations, which are necessarily required in such sales.

If a man, being indebted to two persons, makes a secret conveyance to one of them of all his goods and chattles, in satisfaction of his debt; but notwithstanding continues in possession of them, and sells some of them, and sets his mark (as of sheep) on others of them, this is fraudulent, and shall not prevent the other creditor of his execution for his just debt. For though such sale, hath one of the qualifications required for a good conveyance, being made to a creditor for a real debt, and consequently on a valuable consideration, yet it wants another essential consideration, for the owner's continuing in possession is a fixed and undoubted character of a fraudulent conveyance, because the possession is the only *indicium* of the property of a chattel, and therefore this sale was not made *bona fide*.

And as the owner's continuing in possession is an undoubted badge of a fraudulent conveyance, so there are other marks and characters of fraud; as a general conveyance of them all without any exception: for it is hardly to be presumed, that a man will strip himself intirely of all his personal property, not excepting his bedding and wearing apparel, unless there was some secret agreement for a private occupancy of all or some part of the goods for his support: as also a secret manner of transacting such bill of sale and unusual clauses in it, as that it is made honestly, truly, and *bona fide*, are marks of fraud and collusion; for such an artful and forced dress and appearance give a suspicion and jealousy of some defect varnished over with it. 3 *Co.* 80.

BIRTHS. By the 23 *G. 3. c. 67.* a stamp-duty is imposed upon the registering of every birth or christening. And by the 25 *G. 3. c. 75.* the same shall extend to all Protestant Dissenters.

BISANTIUM, *tesant*, a coin first coined by the westren emperors at *Bizantium* or *Constantinople*. It was of two sorts, gold and silver; both of which were current in *England*.

BISHOP, from the Saxon *biscop* (*episcopus*), signifies an overseer or superintendant; the bishop being so called, from that watchfulness,

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watchfulness,

watchfulness, care, charge, and faithfulness, which by his place and dignity he hath and oweth to the church.

Bishops in this kingdom at first were elective by the clergy and people ; but these popular elections being found to be inconvenient, they were afterwards appointed by the king, by delivery of a ring and pastoral staff, the *ring* as a token that the bishop was wedded to the church, and the *pastoral staff* as signifying that he was now become a shepherd of *Christ's* flock.

But the pope, who in process of time got himself advanced to be head of the church, disliked that the bishops should have any dependence upon princes, and therefore brought it about that the canons in cathedral churches should have the election of their bishops ; which elections were usually confirmed at *Rome*.

Afterwards, in the reign of king *Hen. 8.* they were made elective by the deans and chapters (without the pope) by the king's nomination. Which having in effect only the appearance of an election, in the reign of king *Ed. 6.* they were made donative by the king's letters patent without election : but afterwards, in the reign of queen *Mary*, this was again altered, and reduced to the standard of king *Hen. 8.* by election of the dean and chapter ; which method still continues. In order whereunto, when a bishop dies or is translated, the dean and chapter certify the king thereof in chancery ; upon which the king issues a licence to them to proceed to an election ; which licence is called a *conge d'eslire*, which in *French* signifies *leave to elect*. And with the licence he sends a *letter missive*, containing the name of the person whom they shall elect ; which if they shall refuse to do, they incur the penalty of a *præmunire*.

BISSEXTILE, leap year, so called because the *sixth* day before the calends of *March* (*viz. Feb. 24.*) is *twice* reckoned ; so that the bissextile year hath one day more than the others, and happens every fourth year. This intercalation of a day was first contrived by *Julius Caesar*, to make the year agree better with the course of the sun.

BLACK ACT is an act of parliament made in the 9 *G. 2.* occasioned by the outrages committed by persons with their faces blacked or otherwise disguised, who appeared in *Epping* forest near *Waltham* in *Essex*, and destroyed the deer there, and committed divers other enormities ; by which it is enacted, that if any persons armed with swords, fire arms, or other offensive weapons, and having their faces blacked or otherwise disguised, shall appear in any forest, chase, park, paddock, or ground inclosed where deer have been usually kept ; or in any warren or place where hares or conies have been usually kept, or in any high road, open heath, common, or down ; or shall hunt, wound, or kill any red or fallow deer ; or rob any warren or place where hares or conies are usually kept ; or shall steal any fish out of any river or pond ; they shall be guilty of felony without benefit of clergy.

BLACK

BLACK GAME. See MOOR GAME.

BLACK LEAD: Forcibly entering into any mine or wad hole of black cawke or lead, or stealing any ore from thence, is by statute 25 G. 2. c. 10. made felony and transportation.

BLACKMAIL. *Maile*, in French, is a small piece of money, and in 9 Hen. 5. silver halfpence here were termed *mailes*. In a large acceptation, the word *maile* signifies a rent in general paid either in money, corn, cattle or other goods, as geese maile, cow maile, and the like; and in *Scotland*, maile is still the common word for rent. White maile, white rents, vulgarly called quit rents, were rents paid in silver, and thereby distinguished from work day rents, cummin rents, corn rents and the like. Blackmaile, or black rents, seem properly to have been rents paid in cattle, otherwise called neat-geld; but more largely taken, it signifies all rents not paid in silver, by way of distinction from the *redditus albi*, blanck farms or white rents.—Extorting blackmaile in the northern counties, under pretence of protection against robbers and spoil takers, is by the 43 Eliz. c. 13. made felony without benefit of clergy.

BLANCK FARM was anciently a rent paid in silver, other wise called *white rent*; in contradistinction from rent paid in cattle, corn, or the like. 2 *Inst.* 19.

BLANK BAR is the same with what is called a common bar, and is the name of a plea in bar, which in an action of trespass is put in to oblige the plaintiff to assign the certain place where the trespass was committed. *Cro. Ja.* 594.

BLASPHEMY. See PROPHEANENESS.

BLOOD CORRUPTED. See CORRUPTION OF BLOOD.

BLOODWITE, an amercement for bloodshed: a grant from bloodwite in ancient charters is an exemption from ameracements of that kind.

BLOODY HAND, is one of the four kinds of circumstances by which an offender is supposed to have killed deer in the king's forest. And it is where a trespasser is apprehended in the forest, with his *hands* or other parts bloody, though he be not found chasing or hunting the deer. *Manw.*

BOIS, *Fr.* wood; *Subbois*, underwood.

BONA FIDE, is that which is done with good *faith*, honestly, without any fraud or deceit.

BONA NOTABILIA. Where a person dies, having at the time of his death goods in any other diocese, besides his goods in the diocese where he dieth, amounting to the value of 5*l.* in the whole, he is said to have *bona notabilia*; in which case proof of his will, or granting administration, belongs to the archbishop of the province. 1 *Roll's Abr.* 908.

But where by composition or custom in any county, *bona notabilia* are rated at a greater sum, the same is to continue un-

altered : as in the dioceſe of *London* it is 10*l.* by compoſition.
4 *Inſt.* 335.

If a perſon happens to die, in another dioceſe than that where-
in he lives on a journey ; what he has about him ſhall not be
bona notabilia. *Swin.* 438.

Debts owing to the deceaſed are *bona notabilia*, as well as goods
in poſſeſſion ; and they ſhall be *bona notabilia* in that dioceſe where
the bonds or other ſpecialties are, and not where the debtor
inhabits. But bills of exchange, or other debts by ſimple contract
ſhall be *bona notabilia* in that place where the debtor is. 1 *Roll's*
Abr. 909.

Where a man dies poſſeſſed of *bona notabilia*, both in the pro-
vince of *Canterbury*, and in the province of *York*, the will muſt
be proved either before both metropolitans, if within each of
their jurisdictions there be *bona notabilia* in divers dioceſes ; or elſe,
if there be not ſo in any of the places, then before the particular
biſhops in thoſe ſeveral dioceſes where the goods are. *Wentw.*
46.

1. A BOND, or obligation, is a deed whereby one doth bind
himſelf, his heirs, executors, and adminiſtrators, to pay a certain
ſum of money, or do ſome other act ; and there is generally a
condition added, that if he doth perform ſuch act, the obligation
ſhall be void, or elſe remain in full force ; as performance of co-
venants, ſtanding to an award, payment of rent, or re-payment
of a principal ſum of money, with intereſt, which principal ſum
is uſually half of the penal ſum ſpecified in the bond. 2 *Black.*
340.

He that enters into the obligation or bond is the *obligor*, he to
whom it is made is the *obligee*.

2. If the condition of a bond be impoſſible at the time of making
it, or be to do a thing contrary to ſome rule of law that is merely
poſitive, or be uncertain, or unintelligible, the condition alone is
void, and the bond ſhall ſtand ſingle and unconditional ; for it is
the folly of the obligor to enter into ſuch an obligation, from
which he can never be releaſed. 2 *Black.* 340.

3. If it be to do a thing that is *malum in ſe*, as to invade a man's
private property, the obligation itſelf is void ; for the whole is an
unlawful contract, and the obligee ſhall take no advantage from
ſuch a tranſaction. *Ibid.*

So a bond to a woman, as the price of her prostitution, is void ;
and ſhe ſhall recover nothing. *Burr. Manſf.* 1568.

4. If the condition, in its own nature, is impoſſible, as if a man
is bound in an obligation, with condition that if the obligor do
go from *London* to *Rome* in three hours, that then the obligation
ſhall be void ; this condition is void and impoſſible, but the obli-
gation ſtandeth good. 1 *Inſt.* 206.

5. But if the condition be poſſible at the time of making it, and
afterward

afterward 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. As if a man be bound with condition that he shall appear the next term in such a court, and before the day the obligor dieth, the obligation is saved. 1 *Inst.* 206.

6. But it is commonly holden, that if the condition of a bond be against law, the bond itself is void. But herein the law distinguisheth between a condition against law for the doing of any act that is *malum in se*, and a condition against law that concerns not any thing that is *malum in se*; but therefore is against law because it is either repugnant to the tenor or against some maxim or rule of the law; and therefore in this case the condition is void, but the bond is absolute. 1 *Inst.* 206.

So if a man be bound, with a condition to make a deed of feoffment to his wife; the condition is void, because it is against a maxim in law: but the bond is good. 1 *Inst.* 206.

7. A voluntary bond, without consideration, if there be no fraud in obtaining it, is obligatory, and shall operate as a gift; but it shall 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 *Cha. Ca.* 157. 1 *Atk.* 294.

8. If a bond has no date, or a false date, if it be sealed and delivered it is good; and shall bear date from the time of the delivery. 5 *Mod.* 282.

A bond dated on the same day on which a release is made of all things *until the day of the date*, is not thereby discharged: but otherwise it is, if *until the date*. 2 *Roll's Rep.* 255.

If the condition for payment of money be made impossible, as to make payment on the 30th of *February*; it shall be paid presently. *Wood, b. 2. c. 3.*

9. If the words in a bond, at the end of the condition, *then this obligation to be void*, are omitted, the condition will be void, but not the obligation: but if the words *or else shall stand in force* be left out, it has no effect to hurt either the condition or obligation.

10. If a man bind himself, his executors or administrators are bound though they be not named; but so it is not of the heir. 1 *Inst.* 209.

For an heir is not bound, unless he be named expressly in the bond. *Dyer, 14.* 271.

If a man binds (as is usual) himself, his heirs, executors, and administrators, after the death of the obligor, the obligation descends upon his heir, who (on defect of personal assets) is bound to discharge it, provided he hath real assets by descent as a recompence. - 2 *Black.* 340.

In equity indeed, in favour of the heir at law, the personal estate is often directed to be applied first in discharge of the bond; but at law there is no such distinction, but the creditor may proceed against the heir if he pleases, and he hath no remedy in a court of law. 2 *Atk.* 426.

11. If the condition is not performed, the bond becomes forfeited or absolute at law; but in such cases the courts of equity have relieved: and by the 4 *An. c.* 16. *f.* 13. in an action at law, on the defendant's bringing into court the principal, interest, and costs, he shall be discharged.

12. Where a bond is conditioned for payment of money, and no time is limited, in this case the money is to be paid presently, that is, in convenient time. 1 *Inst.* 208.

And yet there is a diversity between the condition of a bond, which concerns the doing of a transitory act without limitation of any time, as payment of money, delivery of writings, or the like, for there the condition is to be performed presently, that is, in convenient time; and when by the condition of the obligation the act that is to be done to the obligee is of its own nature local, for there the obligor (no time being limited) hath time during his life to perform it, as to make a feoffment, or the like, if the obligee doth not hasten the same by request. 1 *Inst.* 208.

In case where the condition of the obligation is local, there is also a diversity, when the concurrence of the obligor and the obligee is requisite (as in the said case of a feoffment), and when the obligor may perform it in the absence of the obligee, as to acknowledge satisfaction in the court of king's bench, although the acknowledgment of satisfaction is local, yet because he may do it in the absence of the obligee, he must do it in convenient time, and hath not time during his life. *Id.*

But where the concurrence of both parties is requisite, and no place is mentioned for performance of the condition, the obligor is bound 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. 1 *Inst.* 210. "

13. If several days are mentioned for payment of money upon a bond, the obligation is not forfeited, nor can be sued, until all the days are past. 1 *Inst.* 292.

14. In a bond where several are bound severally, the obligee is not 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 only once; for if it be of one only, that shall discharge the rest. *Dyer*, 19. 310.

But he shall not sue several of them jointly, omitting the rest. As if three bind themselves jointly and severally, any one of them may

may be sued alone ; but two of them cannot be sued, but either all or one. 1 *Roll's Abr.* 148.

A release to one obligor is a release to all, both in law and equity. 1 *Att.* 294.

15. If a bond of 100*l.* be made with condition for the payment of 50*l.* at a day, and at the day the obligor tender the money, and the obligee refuses the same ; yet in an action of debt upon the obligation, if the defendant plead the tender and refusal, he must also plead that he is yet ready to pay the money, and tender the same in court. 1 *Inst.* 207.

16. After assignment of a bond, the money in equity is the assignee's ; and payment to the obligor, after notice of the assignment, is not good. 2 *Vern.* 540.

17. It is said, that if a bond be of 20 years standing, and no demand be proved thereon, or good cause of so long forbearance shewed to the court, it shall be intended paid. 2 *Att.* 144.

But in the case of *K. v. Stephens*, *M.* 31 *G.* 2. Lord *Mansfield* said, that there is no direct and express limitation of time when a bond shall be supposed to have been satisfied : the general time indeed is commonly taken to be about 20 years, but he had known lord *Raymond* leave it to a jury upon 18 years. *Burrow. Mansf.* 434.

The indorsement of interest being paid within 20 years, may be given in evidence, though under the hand of the obligee, the obligee being dead, and no circumstances appearing that the indorsement was fraudulently made to take away the presumption from length of time. *Str.* 826.

BOOK-LAND was so called because it was held by *deed* or *writing* under certain rents and services, and in effect differed in nothing from free socage land : and from hence have arisen all the freehold tenants which hold of particular manors, and owe suit and service to the same. It was so denominated in contradistinction to *folk-land*, which was held by no assurance in writing, but distributed among the common *folk* or people at the pleasure of the lord, and resumed at his discretion ; and was no other than villenage. 2 *Black.* 90.

BOOKS. No person shall import for sale, or shall sell or expose to sale, any book first printed in this kingdom, and reprinted elsewhere ; on pain of forfeiting the same, and also 5*l.* and double the value of every such book. 12 *G.* 2. *c.* 36.

In the case of *Millar and Taylor*, in the king's bench, *E.* 9 *G.* 3. it was determined, that an exclusive copyright in authors subsisted by the common law. But afterwards, in the case of *Donaldson and Becket*, before the house of lords, 22d *February* 1774, it was determined by the lords, that no copyright subsists in authors, after the expiration of the several terms created by

by the statute 8 *An. c.* 19. which enacts, that the author of any book, and his assigns, shall have the sole liberty of printing and re-printing the same for fourteen years, to commence from the day of the first publication thereof, and no longer; except that if the author be living at the expiration of the said term, the sole copyright shall return to him for other fourteen years: and if any other person shall print or import, or shall sell or expose to sale any such book without the consent of the proprietor, he shall forfeit the same, and also one penny for every sheet thereof which shall be found in his possession.—But this shall not expose any person to the said forfeitures, unless the title thereof before publication be entered in the register book of the Company of Stationers.

And nine copies of each book, on the best paper, shall before publication, be delivered to the warehouse-keeper of the Company of Stationers, for the use of the Royal Library, the libraries of the two Universities in *England*, the four universities in *Scotland*, the library of *Sion* college, and of the faculty of advocates at *Edinburgh*; on pain of forfeiting the value thereof, and also 5*l.*

BORD-HALFPENNY, a small toll, by custom paid to the lord of the town for setting up *boards*, tables, or booths, in a fair or market.

BORGH-BRECHE, a breach of the peace within the borgh or pledge, for the preservation of which peace the members of the decennary or frank pledge were sureties for each other. Upon breach of the peace, their bond or assurance was forfeited: from which forfeiture several ancient charters granted, to particular persons or bodies corporate, an immunity to be free from *borgh-breche*.

BOROUGH (*burg*, Saxon) signified originally a walled town or other fortified place, perhaps from the Greek word *πυργος*. But now it is used to denote any town corporate which is not a city.

BOROUGH ENGLISH; so named in contradistinction as it were to the *Norman* customs, is a custom in divers ancient boroughs, of the youngest son succeeding to the burgage tenement on the death of his father. 2 *Black.* 83.

BOROUGH-HOLDERS. See **BORSHOLDER**.

BORROWING, or *hiring*, are contracts, the same in law whereby the possession and a transient property is transferred for a particular time or use, and to be returned as soon as the time is expired, or the use performed. If a thing lent for use, be used to any other end or purpose than that for which it was borrowed, the party may bring his action for it, though it be no worse: and if what is borrowed be lost, although not by any negligence of the borrower, as if he be robbed of it, or where
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the thing is impaired or destroyed by his neglect, admitting it to be put to no more service than that for which borrowed, he must make it good; so where I borrow a horse and put him in an old rotten house likely to fall, and it does fall and kills him, I must answer for the horse; but if the goods borrowed perish by the act of God in the right use of them; as where I put the horse in a strong house, and it fall and kill him, or he dies by disease, or by default of the owner, I shall not be chargeable. *Co. Lit. 89. 2 Black. 453.*

BORSHOLDER contains within it the meaning of tithing-man, borrowhead, headborrow, third-borrow, and chief pledge; and is made up of the Saxon *borge*, *borrou*, or *borhoe*, a pledge, and *ealder*, the elder, chief, or head; and *borsholder* in one word is the chief or head of the sureties or pledges. For after the kingdom was divided into hundreds, and those hundreds again into tithings, consisting each of ten men with their families, each of whom was to be surety or pledge for the other, those ten men chose one of their number to speak and to do in the name of them all, he was therefore in some places called the tithing-man, in other places the *boroës elder* (whom we now call *borsholder*), in other places the borohead or headborrow, and in other places the chief pledge. *Lamb. Const.*

BOSCAGE is that food which wood and trees yield to cattle, as of leaves and croppings; and herein differs from *pannage*, which consists of the fruit of such trees, as acorns, crabs, or mast. It seems also to have signified a duty paid for the privilege of dead or windfall wood in the forest; and a grant to be quit of *boscage* is, to be discharged from the payment of such duty.

BOSARIA, wood houses, sheds (or shades) for cattle.

BOTE, *Sax.* signifies a recompence, satisfaction, or amends, or from *baten*, *Dutch*, profit or advantage. Hence came the old word *manbote*, denoting a compensation for a man slain. There are also *house-bote*, *cart-bote*, *hedge-bote*, *plough-bote*, signifying privileges of tenants in cutting wood for those uses: and these the tenant or lessee may take from off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary. *2 Black. 35.*

BOTELESS, or *bootless*, without recompence, reward, or satisfaction made, or useless, unprofitable, or without success.

BOTTOMRY is in the nature of a mortgage of a ship; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or *bottom* of the ship as a security for repayment. In which case it is understood, that if the ship be lost, the lender loses also his whole money; but if it returns in safety,

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then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender. And in this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent.—But if the loan is not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage: then only the borrower, personally, is bound to answer the contract; who, therefore, in this case is said to take up money at *respondentia* (for which himself only is responsible). 2 *Black.* 458.

BOVATA TERRÆ, an oxgang, being as much land as one yoke of oxen can plough in a year.

BOUCHE OF COURT (from *bouche*, a mouth) was a certain allowance of provision from the king, to his knights and servants that attended him in any military expedition.

BOWBEARER, an under officer of the forest, whose office it is to oversee and make inquiry of all trespasses done either to the vert or venison.

BRACETUS, *Fr.* *brachet*, a hound, chiefly of the larger kind; as *bracelet* was of a smaller kind, a *beagle*. So *bracenarius* was the huntsman or master of the hounds.

BRASIUM, *malt*. So *braciator* (from the *Fr.* *brasseur*) is a maltster or malt-maker. But in some of the ancient statutes, *braciator* is taken for a brewer; and *braciatrix* was the woman who sold ale, against whom, if she offended against the assise of ale, the punishment of the tumbrel was ordained by the statute 51 *H.* 3. c. 6. In some manors the tenants were bound by their tenure to dry the lord's malt at his kiln, on his finding them wood for that purpose.

BREACH signifies where a person commits any breach of the condition of a bond, or of his covenant entered into; in which case, upon an action brought, the plaintiff must assign the breach, otherwise he will have no cause of action. 1 *Scund.* 102. And when a breach is assigned, it must not be general, but must be particular; as in an action of covenant for not repairing of houses, the breach ought to be assigned particularly, what is the want of reparation. But on mutual promise, for one to do an act, and in consideration thereof another to do some act, as to sell goods for so much money, a general breach that the defendant hath not performed his part is well assigned. 3 *Lev.* 319.

In case of a bond for performance of an award, if the defendant pleads any matter by which he admits a non-performance, and excuses it; the plaintiff in his replication must shew
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the award, and assign the breach, that the court may see an award was made, and judge whether it was good or not; for if it should be of a void part thereof, it need not be performed. 1 *Salk.* 138.

Where a thing is to be done by a person or his assigns, the breach must be alleged that it was done neither by the one nor the other. 5 *Mod.* 133.

If several breaches are assigned, and the defendant demurs upon the whole declaration; the plaintiff shall have judgment for all that are well assigned, for they are as several actions. *Cro. Ja.* 557.

In actions on bonds, or any penal sum for non-performance of covenants, the plaintiff may assign as many breaches as he shall think fit, and the jury may assess damages for such of the breaches as the plaintiff upon the trial shall prove to have been broken. 8 & 9 *W. c.* 11.

BREDWITE, a fine or penalty imposed for defaults in the assise of bread.

BREHON law, in *Ireland*, was so called from the *Irish* name of judges, who were denominated *brehons*. At the time of the conquest of *Ireland* by king *Henry* the Second the *Irish* were governed by this law. But by several kings of *England*, successively, this law was enjoined to be abolished, and the laws of *England* to be received in the place of it. But many of the *Irish* still adhered to their *brehon* law; and so late as the reign of queen *Elizabeth*, the wild natives still kept and preserved this their ancient law, which is described to have been "a rule of right unwritten, but delivered by tradition from one to another, in which oftentimes there appeared great shew of equity in determining the right between party and party, but in many things repugnant both to God's law and man's law." *Spencer's State of Ireland*, 1513. 1 *Black.* 100.

BREVE is any writ by which a person is summoned or attached to answer an action, or whereby any thing is commanded to be done in the king's courts. It is called *breve*, for the brevity of it; and is directed to the sheriff or other officer.

BRIBERY, in a strict sense, is taken for a great misprision of one in a judicial place, taking any thing whatsoever, except meat and drink of small value, of any one who hath to do before him any way, for doing his office, or by colour of his office, but of the king only; and is punishable at the common law, by fine and imprisonment. 1 *How.* 158.

BRICKS and TILES. By 7 *G.* 3. c. 42. 24 *G.* 3. c. 24. & 25. *G.* 3. c. 66. several regulations are made concerning the true making of bricks and tiles. And by the 27 *G.* 3. c. 13.

c. 13. a duty is laid upon all bricks and tiles made in *Great-Britain*, which are to be under the management of the officers of excise.

BRIDGES. Every parish, by the ancient common law, was bound to the repair of the public bridges therein. From this burden no man was exempt, whatever other immunities he might enjoy, this being part of the *trinoda necessitas*, to which every man's estate was subject, viz. castles, bridges, and expeditions. 1 *Black.* 357.

But now the statute of 22 *Hen.* 8. c. 5. hath laid this charge upon the county.

None can be compelled to make new bridges, where never any were before, but by act of parliament. 2 *Inst.* 701. But if a man builds a bridge, which afterwards becomes of public use, the county is obliged to repair it. *Bur. Mansf.* 2594.

Any inhabitant may be made defendant to an indictment for not repairing a bridge, and be liable to pay the whole fine for default of repairs, and shall be put to his remedy for a contribution; for bridges being of absolute necessity, are not to lie unrepaired till suits shall be determined. 1 *Haw.* 221.

BRIEF, *brevis*, an abridgment of the client's case made use of for instruction of counsel on trial at law, wherein the case of the party is to be briefly but fully stated.

BRIEF for collecting charity.—The undertaker of the briefs shall cause all the copies thereof to be marked with the name of one trustee (or more) written with his own hand, with the time of signing; and shall also cause them to be stamped with a stamp kept for that purpose by the register of the court of chancery. Then he shall deliver them to the churchwardens, chapelwardens, teachers and preachers of every separate congregation, who shall indorse the time of receipt, and set their names. And they again shall deliver them to the ministers, who also shall indorse and sign the same in like manner. And the briefs shall be publicly read within two months after receipt; and the sum collected shall be indorsed in words at length, and signed by the minister and churchwardens, or by the teacher and two elders. Which sums they shall, within six months after the time of the delivery of the briefs, pay over to the undertaker, taking his receipt for the same in a book to be kept for that purpose. And any person making default in the premises shall forfeit 20*l.* And a register shall be kept by the minister of all monies collected, when, and on what occasion. And the undertaker, in two months, shall account before a master in chancery.—If any person shall purchase or farm charity money on briefs, he shall forfeit 50*l.* to the use of the sufferers. 4 *An. c.* 14.

BRIGANDINE, a coat of mail or ancient armour, consisting of

of many jointed and scale-like plates, very pliant and easy for the body.

BRIGBOTE, a fine or amercement for not repairing of bridges. A grant of freedom from *brigbote*, is to be free from the payment of such fine.

BROCAGE, the wage or hire of a *broker*.

BROCHA (Fr. *broche*) a *broach* or spindle not yet out of use. The tapering spire of a steeple is in some places called a *broach*. A *spit*, in some parts of *England*, is called a *broach*. And hence comes the expression of piercing or *broaching* a barrel.

BROKERS (*broccatores, broccarii*) are those that contrive, make, and conclude bargains and contracts between merchants and tradesmen, in matters of money and merchandize, for which they have a fee or reward.

The statute 1 *Ja. c. 21.* recites, that, of ancient standing, there have been brokers within the city of *London*, being freemen of the said city, appointed by the lord mayor and aldermen, and sworn by them to demean themselves uprightly between merchants and tradesmen, in making bargains and contracts. And by 8 & 9 *W. c. 20.* they are to carry about them a silver medal, having the king's arms and the arms of the city, and pay 40s. yearly to the chamber of the city. By 7 *G. 2. c. 8.* contracts for transferring stock, whereof the party contracting to transfer the same shall not be then in actual possession, shall be void; and the person offending herein shall forfeit 100l.; and if any broker shall negotiate such contract, he also shall forfeit 100l.

There are, besides these, certain persons called *pawn-brokers*, who commonly keep shops, and let out money to poor necessitous people upon pawns: but these are not of that antiquity or credit as the former; nor do the statutes allow them to be brokers, though now commonly so called. Several late statutes have made divers regulations in their trade, and subjected them to annual licences and divers penalties on trading without such licences, as contrary to the directions of the statutes; for which see 30 *G. 2. c. 24.* 25 *G. 3. c. 48.* and 29 *G. 3. c. 57.* or *Burn's 7.* title **PAWNING**.

BROTHEL HOUSES are lewd places, being the common habitations of prostitutes. They were formerly allowed in certain places, and especially on the Bank Side in *Southwark*, where they had signs before their doors in like manner as inns and ale-houses. By the statute 14 *Ric. 2.* it was enacted, that no estews or brothel houses should be kept in *Southwark*, but in the common places therefore appointed. Of these, before the reign of king *Henry the seventh*, there were eighteen allowed; but that king for a long time forbad them. Afterwards twelve, and no more, were permitted. But finally, king *Henry the eighth*, by proclamation, in the 37th year of his reign, suppressed them all.

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And so odious were they become, that men in making leases of their houses did add an exprefs condition, that the leffees fhould not fuffer, harbour, or keep any lewd women within the faid houfes. 3 *Inf.* 205, 6.

BRUERE, *brueria* (Sax. *brær*, briar), heath ground, or uncultivated, over-run with brambles or brush-wood.

BUCKSTALL, a *ftation* to watch the deer in hunting; the attending whereof was a fervice performed by the tenants to the lord within the foreft.

BUGGERY (from the Italian *bugarone*, this vice being faid to have been brought into *England* out of *Italy* by the *Lombards*) is a deteftable and abominable fin, among chriftians not to be named, committed by carnal knowledge againft the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beaft, or by womankind with brute beaft. 3 *Inf.* 58.

By ftatute 25 *H. 8. c. 6.* this offence is made felony without benefit of clergy.

If the party buggered be within the age of difcretion (which is generally reckoned the age of fourteen) it is no felony in him, but in the agent only. But if buggery be committed upon a man of the age of difcretion, it is felony in them both. 3 *Inf.* 59.

BUILDING erected fo near a man's houfe, that it ftops up his lights, is not a nufance for which an action will lie, unlefs the houfe is an ancient houfe, and the lights ancient lights. 2 *Salk.* 459.

But if the houfe new built exceeds the ancient foundation, and thereby is the caufe of hindering the lights of another houfe, an action lies againft him who caufed it to be erected. *Hob.* 131.

BULL, *bullæ*, was a brief or mandate of the pope or bifhop of *Rome*, fo called from the feal of lead, or fometimes of gold, affixed to it. To procure, publifh, or put in ufe any of thefe, is by act of parliament made high treason.

BULL AND BOAR: By custom, in fome parifhes, the parfon is obliged to keep a bull and boar, for the common ufe of the parifhioners, for the increafe of calves and pigs; in which cafe, every inhabitant prejudiced by his not keeping the fame may have an action on the cafe againft him. *Cro. Eliz.* 469.

BULTEL is the coarfer part of flour when drefsed by the baker. The word is mentioned in the ftatute of the affize of bread and beer, 51 *Hen.* 3. Hence comes *bulted* or *boulted* bread.

BURG, perhaps from the Greek *πυργος*, a tower, fignified in ancient times a walled town, or other fortified place.

BURGAGE, a dwelling-houfe within a borough town.

BURGAGE TENURE is, where houfes, or lands which were formerly the fite of houfes, in an ancient borough, are held

held of the king or some other lord in common socage, by a certain established rent. 2 *Black.* 82.

Many of such boroughs have divers customs and usages, which are not had in other places. For some boroughs have a custom, that if a man hath issue many sons, and dieth, the youngest son shall inherit all the tenements which were his father's within the same borough, as heir to his father, by force of the custom; which custom is called *Borough English*. Also in some boroughs, by custom, the wife shall have for her dower all the tenements which were her husband's. *Litt.* 165, 6.

These ancient boroughs seem to have withstood the shock of the Norman incroachments, principally on account of their insignificance, which made it not worth while to compel them to an alteration of tenure, as an hundred of them put together would scarce have amounted to a knight's fee. Besides, the owners of them, being chiefly artificers and persons engaged in trade, could not with any tolerable propriety be put on such a military establishment as the tenure in chivalry was. 2 *Black.* 82.

BURG-BOTE, a compensation, boot, or contribution, for the building and repairing of castles or walls of a borough or city: from which service divers persons or bodies politic had exemptions by grant from our ancient kings, that they should be free from *burg-bote*.

BURG-BRECHE, a fine imposed on the community of a town, for breach of the peace. See **BORG BRECHE**.

BURGESSES, *burgenses*, in general, are the inhabitants of a borough town. Sometimes the word is restricted to the magistrates or other principal inhabitants. And sometimes to the representatives of such borough in parliament.

BURGLARY (from the Saxon *burg*, a house, and *larron*, a thief, probably from the Latin, *latro, latronis*) is a felony at common law, in breaking and entering the mansion-house of another, in the night, with intent to commit some felony within the same, whether the felonious intention be executed or not. *Hale's Pl. C.* 79.

The mansion-house includes not only the dwelling-house, but also the outhouses that are parcel thereof; as a barn, stable, cow-house, dairy-house, if they are parcel of the messuage, though they be not under the same roof, or joining contiguous to it: but if it be remote from the dwelling-house, as if it stand a bow-shot off from the house, and not within or near the curtilage of the chief house, then the breaking is not burglary. 1 *H. H.* 558.

If a person shall enter without breaking the house, with intent to commit felony, or being in the house, shall commit any felony, and shall in the night-time break the house to get out, he shall be guilty of burglary. 12 *An. c.* 7.

If a window of the house be open, and the thief with a hook or engine

engine draweth out some of the goods of the owner, this is no burglary, because there is not an actual breaking. But if the thief breaketh the glass of the window, and with a hook or other engine draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house. 3 *Inst.* 64.

And as there must be a breaking, so there must be an actual entry; but it is sufficient if the thief breaks the house, and his body, or any part thereof, as his foot, or his arm, is within any part of the house, or if he put a gun into the window which he hath broken with intent to murder or kill: but if he doth barely break the house without any such entry at all, this is no burglary. *Id.*

If divers come in the night to commit a burglary, and one of them breaks and enters, the rest of them standing to watch at a distance, this is burglary in them all. *Id.*

Every person, who shall apprehend and prosecute to conviction any person guilty of burglary, shall have a certificate from the judge, which shall exempt him from all parish and ward offices within the parish and ward where the felony was committed; which certificate may be assigned once over. 10 & 11 *W. c.* 23. And moreover such person, as a further reward, shall be entitled to the sum of 40*l.* And if any person, being out of prison, shall commit any burglary, and afterwards discover two or more accomplices, so as they be convicted; he shall have a pardon, and the like sum of 40*l.* 5 *An. c.* 31.

BURGH-MOTE, a borough court.

BURIAL: By the custom of *England*, any person may be buried in the churchyard of the parish where he dies without paying any thing for breaking the soil. *Degge. P.* 1. *c.* 12.

For the encouragement of the woollen manufacture, no corpse of any person shall be buried in any shroud or other thing, but what is made of sheep's wool only. 30 *C.* 2. *st.* 1. *c.* 3.

Necessary funeral expences are allowed, previous to all other debts and charges. But if an executor or administrator be extravagant, it is a devastation or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased. 2 *Black.* 508.

A person who voluntarily kills himself is denied christian burial; and to shew the abhorrence in which this crime is holden in the eye of the law, he shall be buried ignominiously in the highway with a stake driven through his body. 4 *Black.* 190. And by the 23 *G.* 3. *c.* 67. a stamp duty is imposed upon all burials.

BURNING the house of another wilfully and maliciously, by night or by day, is felony at the common law. And by particular statutes divers kinds of burning are made felony, and others have other penalties annexed to them. By 37 *H.* 8. *c.* 6. burning any

any wain or cart, laden with coals or other goods, or any heap of wood prepared for making coals or billets, is subject to treble damages, and a fine of 10*l.* By 43 *El. c.* 13. for preventing rapine on the northern borders, to burn any barn or stack of corn or grain, is felony without benefit of clergy. By 22 & 23 *C. 2. c.* 7. burning in the night-time any ricks or stacks of corn, hay, or grain, barns, houses, buildings, or kilns, is felony; but the offender may make his election to be transported for seven years. By 5 *W. c.* 23. to burn on any waste, between *Candlemas* and *Michaelmas*, any grig, ling, heath, gofs, or fern, is punishable with whipping and confinement in the house of correction. By 1 *An. st. 2. c.* 9. captains and mariners belonging to ships, burning or destroying the same, are guilty of felony without benefit of clergy. By 6 *An. c.* 31. servants negligently firing houses shall forfeit 100*l.*; and if not able to pay, shall be imprisoned in the house of correction eighteen months. By 1 *G. st. 2. c.* 48. & 6 *G. c.* 16. setting on fire any wood, springs of wood, or coppice, is felony (but within clergy). By 9 *G. c.* 22. setting fire to any house, barn, or outhouse, or to an hovel, coek, mow, or stack of corn, straw, hay, or wood, is felony without benefit of clergy; and the hundred shall answer damages. By 10 *G. 2. c.* 32. the like penalty for setting fire to any mine, pit, or delph of coal or cannel coal. By 28 *G. 2. c.* 19. setting fire to any gofs, furze, or fern, in any forest or chafe, is subject to a penalty of 5*l.* By 9 *G. 3. c.* 29. burning or setting fire to any kind of mill, is felony without benefit of clergy: and burning or setting fire to any machine or engine belonging to any mine, is felony and transportation for seven years. By 12 *G. 3. c.* 24. burning or setting fire to any of his majesty's ships of war, or any arsenal, magazine, dock yard, rope yard, victualling office, or any military or naval stores or ammunition, is felony without benefit of clergy.

BUTLERAGE is an ancient hereditary duty belonging to the crown, much older than the customs; which was a right of taking two tons of wine from every ship importing into *England* twenty tons or more; which by king *Edward* the first was exchanged into a duty of 2*s.* for every ton imported by merchant strangers, and called *butlerage*, because paid to the king's butler. 1 *Black.* 314.

BUTTS, the place where archers meet with their bows and arrows to shoot at a mark, which is called shooting at the *butts*.

BUYING OF TITLES. At the common law, it is an high offence to buy or sell any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller is not able, or doth not think it worth his while to do, and on that consideration sells his pretensions at an under-rate; and it seems not to be material whether the title so sold be good

or bad, or whether the seller were in possession or not, unless his possession was lawful and uncontested. 1 *Haw.* 261. And by statute 32 *H.* 8. c. 9. none shall buy any pretended right in any land, unless the seller hath been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, for one year next before; on pain that the seller shall forfeit the land, and the buyer the value thereof.

BY-LAWS are orders made *by the bye*, in particular cases whereunto the public law doth not extend. In *Scotland*, these laws are called laws of *birlaw*, which are made by neighbours elected by common consent in the *birlaw* courts, wherein knowledge is taken of complaints betwixt neighbour and neighbour; which men so chosen are judges and arbitrators, and styled *irlaw-men*.

Every corporation lawfully erected hath power to make by-laws or private statutes for the better government of the corporation; which are binding upon themselves, unless contrary to the laws of the land, and then they are void. 1 *Black.* 475.

The inhabitants of a town may make by-laws for the reparation of the church, highway, or any thing which is for the general good of the public, without alleging a custom; for they are for such like purposes incorporated as it were by the common law: and the greater part of the inhabitants shall bind the rest. But if the by-law is for their own private profit, as for the well ordering of the common, or the like; there without custom, they cannot make by-laws. 5 *Co.* 63.

So the freeholders in a leet may make by-laws relating to the public good, for matters within the leet; and they shall bind every one if they are for the public good: otherwise, if they are for a private interest, they bind those only that agree to them. *Wood*, b. 4. c. 1.

Also a court baron may make by-laws by custom and add a penalty upon the breach thereof, which cannot be assented, for a penalty differs from an amercement. *Id.*

A corporation by charter cannot make by-laws inconsistent with the intention of their charter. *Bur. Mansf.* 2207.

A by-law in restraint of trade is not good, without setting forth a particular custom to support it. *Id.* 17.

A forfeiture imposed by the by-laws and private ordinances of a corporation, upon any that belong to the body, creates a debt in the eye of the law; and if unpaid may be recovered by action of debt. 3 *Black.* 159.

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CALLING the plaintiff is, where, upon the trial, the plaintiff perceives that he has not given evidence sufficient to maintain his issue, he thereupon withdraws himself, or becomes voluntarily nonsuited. Whereupon the crier is ordered to call the plaintiff, and if he appears not, the action is at an end, and the defendant shall recover his costs. And the reason of this practice is, that a nonsuit is more eligible for the plaintiff, than a verdict against him: for after a nonsuit he may commence the same suit again for the same cause of action; but after a verdict and judgment thereupon, he is for ever barred from attacking the defendant upon the same ground of complaint. 3 *Black.* 376.

CANDLES. By the 24 G. 3. c. 41. every maker of candles for sale, and also every person trading in, or selling candles, shall take out a licence annually from the officers of excise. But no person licensed as a maker of candles, need be licensed as a seller also.

But by the 25 G. 3. c. 74. no person residing within the limits of the head office in *London*, shall be permitted to make candles, unless he occupy a tenement of 10*l.* a year, for which he shall be assessed, in his own name; and shall also pay to the parish rates elsewhere, unless he be assessed, and pay to church and poor.

And by the 27 G. 3. c. 13. a duty is imposed on all candles made in *Great Britain*, and drawbacks allowed on the exportation thereof, as specified in a schedule annexed to the act.

And by the above statutes, and also by several others, regulations are made for the making of candles, which are to be under the inspection of the officers of excise.

CANONS, from *κανων*, *regula*, were originally an order of religious persons that lived under certain *rules* which they prescribed to themselves and were divided into two sorts, *secular* and *regular*. The *secular* were so called, because they conversed *in seculo*, abroad in the world, and performed spiritual offices to the laity, in the same manner as the canons and prebendaries in cathedral and collegiate churches at this day. *Regular* canons were such as lived together under one roof, and were obliged to observe the rules of their order.

CANON LAW is a body of *Roman* ecclesiastical constitutions made from time to time for the regulation of matters relating to the church; and compiled chiefly from the writings of the holy fathers, the decrees of general councils, and the decretal epistles and bulles of the pope. More particularly, of the canon law, there are two principal parts, the *Decrees*, and the *Decretals*.

The *Decrees* are ecclesiastical constitutions, made by the pope and cardinals, at no man's suit. These were first collected by

Ivo, in the year 1114; and afterwards polished and perfected by *Gratian*, a monk of *Bononia*, in the year 1149.

The *Decretals* are canonical epistles written by the popes alone, or by the popes and cardinals, at the instance or suit of some one or more, for the ordering and determining of some matter in controversy. Of these there are three volumes: The first, collected by order of *Gregory* the ninth, about the year 1231. The second, by *Boniface* the eighth about the year 1298. The third, made by pope *Clement* the fifth, and from him called the *Clementines*, and published by him about the year 1308.

To these may be added the *Extravagants* of pope *John* the twenty-second, and of some of his successors.

And besides this foreign canon law, we have in this kingdom our *legatine* and *provincial* constitutions.

The *legatine* constitutions were enacted in *national* synods held under the cardinals *Otho* and *Othobon*, legates from pope *Gregory* the ninth and pope *Clement* the fourth, in the reign of king *Henry* the third, about the year 1220 and 1268.

The *provincial* constitutions are principally the decrees of provincial synods held under divers archbishops of *Canterbury*, from *Stephen Langton*, in the reign of king *Hen.* 3. to *Henry Chicheley*, in the reign of king *Hen.* 5. and adopted also by the province of *York*, in the reign of *Hen.* 6.

At the dawn of the reformation, in the reign of *Hen.* 8. it was enacted in parliament, that a review should be made of the canon law; and till such review should be had, the said canon law, being then already made, and not repugnant to the law of the land or the king's prerogative, should be still used and executed. And as no such review hath yet been perfected, upon this statute depends the authority of the canon law in *England*.

The canons made by the clergy in 1603, in the reign of *James* the first, not having been confirmed in parliament, are not allowed to be in force so as to bind the laity, further than they are declaratory of the ancient canon law.

CAPE is a writ judicial touching plea of lands or tenements; so termed as most writs are, of that word in it, which carries the chief intention or end thereof. And this writ is divided into *Cape Magnum* and *Cape Parvum*, both of which take hold of things immoveable. *Cape Magnum*, or the *Grand Cape*, is a writ that lies before appearance, to summon the tenant to answer the default, and also to answer over to the demandant: and this is, where a man hath brought a *Præcipe quod reddat* of a thing touching plea of land, and the tenant makes default at the day to him given in the original writ, then this writ shall go for the king, to take the land into his hands; and if the tenant come not at the day given him thereby, he loseth his land. *Cape Parvum*, or *Petit Cape*, is, where the tenant is summoned in plea of land, and comes on the

the summons, and his appearance is recorded; if at the day given him he prays the view, and having it granted makes default, then shall issue this writ for the king. The difference between the *Grand Cape* and *Petit Cape* is, that the *Grand Cape* is awarded upon the tenant's not appearing or demanding the view in such real actions, where the original writ doth not mention the particular demand: and the *Petit Cape* is after appearance or view granted. And whereas the *Grand Cape* summons the tenant to answer for the default, and likewise over to the demandant; *Petit Cape* summons the tenant to answer the default only. *Registers*, 1, 2.

CAPIAS AD AUDIENDUM. In case of a misdemeanor, after the defendant hath appeared and is found guilty, and is not present in court upon his conviction, a *Capias* is awarded *ad audiendum judicium*, that is, to bring him in to receive judgment; and if he absconds, he may be prosecuted even to outlawry. 4 *Black.* 268.

A CAPIAS PRO FINE is where one who is fined to the king for some offence committed against a statute, doth not discharge the fine according to the judgment; whereupon his body is to be taken by this writ, and committed to prison until he pay the fine.

It is also used in some civil actions; but by 5 *W. & M. c.* 12. *capiatur fines* are taken away in several cases.

A CAPIAS AD RESPONDENDUM is a writ commanding the sheriff to take the body of the defendant, and him safely to keep, so that he may have him in court on the day of the return, to answer to the plaintiff of a plea of debt, or trespass, or the like, as the case may be. 3 *Black.* 282.

And if the sheriff returns that he cannot be found, then there issues another writ called an *Alias capias*; and, after that, another called a *Pluries capias*; and if upon none of these he can be found, then he may be proceeded against unto outlawry. *Id.*

But all this being only to compel an appearance, after the defendant hath appeared, the effect of these writs is taken off, and the defendant shall be put to answer; unless it is in cases where special bail is required, and there the defendant is actually to be taken into custody. *Id.*

CAPIAS AD SATISFACIENDUM is a writ directed to the sheriff, commanding him to take the body of the defendant, to make the plaintiff satisfaction for his demand; otherwise he is to remain in custody till he does. 3 *Black.* 415.

This is a writ of the highest nature, as it deprives a man of his liberty, till he makes the satisfaction awarded: and therefore, when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods. *Id.*

But if the defendant dies, whilst he is charged in execution upon

upon this writ, the plaintiff may, after his death, sue out new executions against his lands, goods, or chattles. 3 *Black.* 415

A **CAPIAS UTLAGATUM** is a writ that lies against a person that is outlawed in any action, whereby the sheriff is commanded to apprehend the party outlawed, and keep him in safe custody till the day of the return of the writ, and then have his body there to be ordered for his contempt. But this being only for want of appearance, if he shall afterwards appear, the outlawry most commonly is reversed. 3 *Black.* 284.

If a person is outlawed on a criminal prosecution, any one may take him, either by a writ of *Capias Utlagatum*, or without: if it is for treason or felony, the outlawry, in strictness, is a conviction of the offender; but in such cases the outlawry is frequently reversed, and the party admitted to plead and defend himself against the indictment. 4 *Black.* 315.

A **CAPIAS IN WITHERNAM** (from *wyther*, in Saxon *other*; and *naam*, a taking or distress;) is a writ directed to the sheriff, in case where a distress is carried out of the county or concealed by the distrainer, so that the sheriff cannot make deliverance of the goods upon a replevin; commanding him to take so many of the distrainer's own goods by way of reprisal, instead of the other that are so concealed. 2 *Inst.* 140, 1. *F. N. B.* 68, 69. 13 *Ed.* 1. c. 2.

CAPITE. Tenants *in capite*, or in chief, were those that held of the king as the *head* or fountain of tenure. And it might be either by knights service, or in socage. But now tenure *in capite* is abolished by the 12 C. 2. c. 24. and turned into free and common socage.

CAPTION (from *capio*, to take) signifies a *taking* in general. Caption of an indictment is the preamble to the indictment, setting forth when and before what court, the indictment was *taken*. So upon the execution of any commission, as of taking fines of lands, taking answers in chancery, or depositions of witnesses; the captors, or persons who executed the commission, specify, in their return, the time and place of the *taking* thereof.

CAPTIVE is a prisoner taken in war, in whom the taker has a sort of qualified property, at least until his ransom be paid. In the borders of *England* and *Scotland*, before the union, the skirmishing parties in both kingdoms made incursions upon each other, not with an intention of slaughter, but of taking prisoners, who were to continue with the taker till payment of the ransom agreed on. There is a writ in the Register for breaking the plaintiff's house, and setting at large one *B.* a Scotchman, whom the plaintiff had taken in war as his prisoner, and detained until he should pay to the plaintiff 100*l.* being the price agreed on for his redemption and saving of his life. 2 *Black.* 402.

CAPTURE

CAPTURE signifies properly the goods, and ships, or vessels, of an enemy taken at sea in time of war. These belonged originally to the captor. And anciently it was holden, that if an enemy take the goods of an Englishman, which are afterwards retaken by another subject of this kingdom, the former owner shall lose his property therein as soon as the goods have been the property of the captor for the space of twenty-four hours: but the more modern authorities require, that before the property can be changed, the goods must have been brought into port, and have continued one night (*intra præsidia*) in a place of safe custody, so that all hope of recovering them was lost. 2 *Black.* 401.

CARDS. By several acts of parliament a duty is imposed on every pack of playing-cards. See *Burn's* *J.* tit. **CARDS** and **DICE.**

CARRIER is one that carries goods for others for hire; under which denomination are included masters and owners of ships, lightermen, stage coachmen, and all others who undertake the carriage of goods for a reward.

2. By statute 3 *W. c.* 12. the justices of peace have power to rate the prices of all land carriage of goods to be brought *into* any place within their jurisdiction. And by 21 *G. 2. c.* 28. the same prices were to be paid for the carriage of goods *to London*, as the justices had fixed for the carriage *from London*. But this latter act is repealed by 7 *G. 3. c.* 40. & 13 *G. 3. c.* 84.

A carrier shall not evade the law, by refusing to carry goods at the prices limited. For if a common carrier, who is offered his hire, and who hath convenience, refuses to carry goods, he is liable to an action in the same manner as an innkeeper who refuses to entertain a guest, or a smith who refuses to shoe a horse. 1 *Bac. Abr.* 334.

3. A person, to whom goods are delivered to be kept, is only obliged to keep them as he would keep his own; but a common carrier, in respect of the reward, must make good the loss, although he himself may not be in fault. *Bur. Mansf.* 2298.

And the reward ought to bear proportion to the risque: therefore he ought to have more for carrying money or jewels than for common ordinary goods. *Id.*

4. For he may refuse to contract in extraordinary cases, without extraordinary terms. He may accept specially. He shall be answerable for no more than he is told of, and not for what is concealed from him, and whereby he is deceived. And therefore, if money or jewels are sent by him, and it be denied or concealed that it is money or jewels, he is not answerable for the loss of them. *Id.*

5. Where goods are delivered to a carrier, and he is robbed of them, yet he shall be charged and answer for them by reason
of

of the hire: and this was at the common law, before the hundred was answerable over to him; because such robbery might be, by consent and combination, carried on in such a manner that no proof could be had of it. And although it may be thought a hard case, that an innocent carrier who is robbed on the road, should be answerable for all the goods he takes, yet the inconvenience would be far more intolerable if he were not so: for it would be in his power to pretend a robbery or some other accident, without a possibility of remedy to the party; the law will not expose him to so great a temptation, but he must be honest at his peril. 1 *Salk.* 143. 12 *Mod.* 482.

6. And, generally, if a man delivers goods to a common carrier, to carry to a certain place, if he loses or damages them, an action upon the case lies against him: for by the custom of the realm, he ought to carry them safely. 1 *Bac. Abr.* 343.

And if a person who is not a common carrier, takes upon himself to carry my goods, though I promise him no reward, yet if my goods are lost or damaged by his default, I shall have an action against him: for the very taking of the goods is a general consideration, and renders him liable. *Id.*

7. A delivery to the carrier's servant is a delivery to the carrier; and if the goods are lost, an action will lie against the carrier.

CARTS. See **WAGGONS.**

CART-BOTE, an allowance to the tenant of wood sufficient for carts and other instruments of husbandry.

CARTHUSIAN monks were a branch of the benedictine order, and had their name from *Chartreux* (*Carthusia*) in France, where they were first instituted. They were brought into England by king Henry the second, and had their first house at Witham, in Somersetshire, and had, in the whole, nine houses in this kingdom. Their houses were called *Chartreux* houses, which by corruption have degenerated into *Charter* houses. Their rule was the most strict of any of the religious orders: for they were never to eat flesh; and were obliged to feed on bread, water, and salt, one day in every week. They wore a hair shirt next their skins; and were allowed to walk only once a week about their grounds.

CARUCATE (from *caruca*, a plough); as much land as can reasonably be tilled in a year by one plough.

CASE (action upon). *Action upon the case* is an universal remedy given for all personal wrongs and injuries with force; so called, because the plaintiff's whole *case* or cause of complaint is set forth at length in the original writ. For it is not brought (as in other actions) upon a writ formed in the Register; but the writ varies according to the variety of the case. 3 *Black.* 122.

For

For although in general there are methods prescribed and forms of action previously settled for redressing those wrongs which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, as battery, non-payment of debts, detaining one's goods, or the like; yet where any special consequential damage arises, which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed to bring a special action on his case, by a writ formed according to the peculiar circumstances of his own particular grievance. *Id.*

For wherever the law gives a right, or prohibits an injury, it also gives a remedy by action; and, therefore, wherever a new injury is done, a new method of remedy must be pursued. 3 *Black.* 123.

And it is a settled distinction, that where an act is done, which is in itself an *immediate* injury to another's person or property, there the remedy is usually by an action of trespass with force and arms; but where there is no act done, but only a culpable omission, or where the act is not immediately injurious, but only by consequence and collaterally, there no action of trespass with force and arms will lie, but an action on the special case, for the damages consequent on such omission or act. *Id.*

Generally, in all cases where a man hath a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaid in damages. As if the parishioners of such a parish have a right to pass a ferry toll free, and are hindered of that right by the owner of the ferry; every parishioner shall have an action upon the case against him, to assert that right. 1 *Comyns.* *Dig.* 140.

If a man, being intrusted in his profession, deceives him who intrusted him; as if a man retained of counsel, become afterwards of counsel with the other party in the same cause; or discover the evidence or secrets of his client; or, being retained to attend in court at such a day, doth not come, whereby the cause is lost; — this action lies. *Id.* 177.

So, if a man, by a false affirmation of a thing within his knowledge, deceive in the sale of goods; as if a taverner sell wine for sound and good, which he knows to be corrupt. *Id.* 178.

So, if he sell land, affirming the rent to be so much, when it is not, for the rent is certain, and lies within his own knowledge. *Id.* 179.

If a man lends an horse or other thing for hire, and the borrower misuseth it, an action upon the case lies against him. *Id.* 220.

If a man warrants an horse to be sound before sale, upon which another buys him, an action lies, for the warranting was the cause of

of buying ; or, if he so warrants him before payment of the money, for that completes the bargain. *Id.* 181.

If a servant or apprentice, upon a sale of goods for his master, warrants them, it is a void warranty, for it is the sale of the master ; and the warranty must be made by him that sells. *Id.* 180.

If a man bound by prescription to repair fences against another, doth not do it, whereby the cattle of the other are damnified, or whereby cattle enter and do damage ; — this action lies. *Id.* 225.

So, if a man be bound to the repair of a bridge, by the neglect whereof another hath a special damage ; or bound to repair a bank, doth it not, whereby the land of another is overflowed. *Id.*

So, if a man neglect to do that which he hath undertaken to do, an action upon the case lies : as if a man deliver goods to a carrier, to carry them to a certain place, and the carrier loses them, action of the case lies against him : for by the common custom of the realm, he ought to carry them safely. Or if any one, who is not a common carrier, undertakes to carry goods and to deliver them at such a place, if he doth not carry them, an action lies ; and this, although the plaintiff doth not agree for a price certain, but says he will content him. *Id.*

Also this action lies for words spoken to or concerning another whereby one is defamed and damnified. All scandalous words are actionable which may affect one's life or limb, his liberty, office or place of trust, trade, or preferment ; or which disparage his title to his estate, or where the words tend to one's disherison as by calling one bastard that is an heir to land ; or where they tend to one's particular damage, and he is actually damaged thereby. — 4 *Co.* 15.

So, it lies for a nuisance to the habitation or estate of another ; as if a man build an house hanging over the house of another, whereby the rain falls upon it : so if he stops the ancient lights of another house. 1 *Com. Dig.* 231.

But an action upon the case doth not lie for a common nuisance, for there the remedy can only be by indictment. Otherwise it is, where there is a special damage ; as if a man make a ditch in the highway, and my horse falls into it ; or if my servant falls in, and maims himself, whereby I lose his service ; so if he lay logs in the highway, whereby my horse falls with me : in all these and the like cases, an action will lie to be satisfied in damages. *Id.* 234.

CASTELLAIN, the governor of a *castle* or fortified place. *Castellarium* is the precinct or jurisdiction of such castle. And *castellorum operatio* is castle work, or service of the tenants for building and upholding of castles : which was one of the three necessary charges (the *trinoda necessitas*) to which all lands among our Saxon ancestors were charged. Immunities from this charge were

were sometimes granted by the lords, *ut sint quieti de castellorum operibus*. *Casleward* was the service of guarding or watching at such castle.

CASIGATORY (from *castigo*, to chastise) is the ducking stool provided for the punishment of scolding women, wherein they are plunged or soufed over head in the water.

CASUAL EJECTOR, anciently, in the trial of right to lands by ejection, was a person, supposed *casually* or by *accident* to come upon the land, and turn out the lawful possessor. For, originally, in order to the trying the right by ejection, several things were necessary to be made out before the court: First, a *title* to the land in question; upon which he was to make a formal entry: and, being so in possession, he executed a *lease* to some third person or lessee, leaving him in possession: then the prior tenant, or some other person (either by accident or by agreement beforehand), came upon the land and turned him out: and for this *ouster* or turning out, the action was brought. But now all these formalities are dispensed with, except the mere trial of the title. 3 *Black.* 202.

CASU CONSIMILI is a writ of entry, granted where tenant by the curtesy, or tenant for life aliens in fee, or in tail, or for another's life. And it is brought by him in reversion against the party to whom such tenant so aliens to his prejudice, and in the tenant's life-time. It takes its name from this; that the clerks of the chancery did, by their common assent, frame it to the *likeness* of the writ called *In casu proviso*, according to the authority given them by the statute of *Westminster* 2. c. 24. which statute, as often as there happens a new case in chancery something like the former, yet not specially fitted by any writ, authorises them to frame a new form answerable to the new case, and as like the former as may be. 7 *Co.* 4. *F. N. B.* 206.

CASU PROVISIO is a writ of entry given by the statute of *Gloucester*, c. 7. where a tenant in dower aliens in fee, or for life; and it lies for him in reversion against the alienee. This writ, and the writ of *casu consimili*, suppose the tenant to have aliened in fee, though it be for life only; and a *casu proviso* may be without making any title in it, where a lease is made by the demandant himself to the tenant that doth alien. But if an ancestor lease for life, and the tenant alien in fee, the heir in reversion must have this writ with the title included therein. *F. N. B.* 205, 6.

CATCHPOLE, one of the sheriff's bailiffs, so called because he *catches* by the *poll* or head the party arrested.

CATHEDRAL. After the establishment of Christianity, the emperors and other great men gave large demesnes and other possessions for the maintenance of the clergy, whereon were built the first places of publick worship, which were called *cathedrae*, *cathedrals*,

cathedrals, sees, or seats; from the clergy's residence thereon. And when churches were built in the country, the clergy were sent out from the cathedrals to officiate in those churches, the cathedral or head seat remaining to the bishop, with some of the chief of the clergy as his assistants.

CATHEDRATICUM. In honour of the *cathedral* church, and in token of subjection to it, every parochial minister within the diocese pays to the bishop an annual pension, called *cathedraticum*; but, from its being usually paid at the bishop's *synod* or visitation, it commonly goes under the name of *synodals*.

CATTLE, from *Ireland*, by several acts of parliament, are prohibited to be imported: but of late years these restrictions are taken off by temporary acts, and all sorts of cattle permitted to be imported from Ireland duty free.

By the articles of the Union, *Scotch* cattle in *England* shall be liable to no other duties than *English* cattle. 5 *An. c. 8*.

And by 5 *G. 3. c. 43*. cattle may be freely imported from the isle of *Man*.

By 3 & 4 *Ed. 6. c. 19*. no person shall *buy any cattle and sell the same again* in the same market or fair, on pain of forfeiting double. And this act continues in force, although the other acts against forestalling, ingrossing, and regrating, are repealed by 12 *G. 3. c. 71*.

Killing cattle in the *night-time* is felony and transportation; and wounding any cattle in the *night-time* incurs a forfeiture of treble damages. 22 & 23 *C. 2. c. 7*.

Stealing any cattle or sheep, or killing the same with intent to steal the whole carcase or any part thereof, is felony without benefit of clergy. And 10*l.* reward is given for convicting an offender. 14 *G. 2. c. 6*. 15 *G. 2. c. 34*.

By the *black act*, 9 *G. c. 22*. killing or wounding any cattle is made felony without benefit of clergy: and the hundred shall answer damages.

To prevent spreading of the *distemper* amongst the horned cattle, the king by his proclamation may prohibit the importation of hides or skins, or any other part of any cattle or beast, under such regulations as he shall think fit. 9 *G. 3. c. 39*.

CAVEAT is a caution entered in the spiritual court, to stop probates, administrations, licences, dispensations, faculties, institutions, and such like, from being granted without the knowledge of the party that enters it.

And a *caveat* is of such validity by the ecclesiastical law, that if an institution, administration, or the like, be granted pending such *caveat*, the same is void: but this the temporal courts pay no regard to. 3 *Black. 246*.

CERTIFICATE is a writing made in any court, to give notice to another court of any thing done therein, which is usually by

by way of transcript. And sometimes it is made by an officer of the same court, where matters are referred to him, or a rule of court is obtained for it, containing the tenor and effect of what is done.

Sometimes where a question of law arises in the court of chancery, the lord chancellor refers it to the judges of the court of king's bench or common pleas, upon a case stated for that purpose; who thereupon, having heard the counsel on both sides, *certify* their opinion to the chancellor. 3 *Black.* 453.

So there is a *certificate* of a judge upon trial of a cause at nisi prius: as where it is enacted by several statutes, that if the jury in an action of trespass give less damages than 40s. the plaintiff shall have no more costs than damages, unless the judge shall *certify* under his hand that the trespass was wilful and malicious. There is also a certificate of a judge certifying the conviction of a felon, to entitle the prosecutor to an exemption from parish offices, and to a pecuniary reward for such conviction. 3 *Black.* 214.

Sometimes a *certificate* from a proper officer is admitted, without finding the matter by verdict of a jury; as the custom of the city of *London* with respect to the distribution of the effects of freemen deceased, is certified by the mouth of the recorder. 3 *Black.* 334.

Certificate of assize of novel disseisin is a writ granted for the re-examining of a matter passed by assize before the king's justices, directed to the sheriff, commanding him to call the parties before the justices on such a day, that the matter may be further examined. *F. N. B.* 181.

Certificate de recognitione stapule is a writ commanding the mayor of the staple to certify to the lord chancellor a statute staple taken before him, where the party himself detains it, and refuses to bring in the same. *Reg. Orig.* 152. There is a like writ to certify a statute merchant, and in divers other cases. *Id.* 148. 151.

On certificate to the lord chancellor by four parts in five of a *bankrupt's* creditors, that the bankrupt hath made an honest discovery of his effects, and conformed to the directions of the law, the bankrupt shall be intitled to a ratable allowance out of his effects.

So there is a certificate of the settlement of a poor person, by the churchwardens and overseers, to entitle the party obtaining the certificate to reside in another parish without molestation, so long as he shall not become chargeable to such other parish.

CERTIORARI is an original writ, issuing out of the court of chancery or of the king's bench, directed in the king's name to the judges or officers of inferior courts, commanding them to *certify* or to return the records of a cause depending before them,

to the end the party may have the more sure and speedy justice, before the king or such justices as he shall assign to determine the cause. 1 *Bac. Abr.* Certiorari.

A certiorari lies in all judicial proceedings, in which a writ of error doth not lie; and it is a consequence of all inferior jurisdictions erected by act of parliament, to have their proceedings returnable in the king's bench. *L. Raym.* 469.

But it seems agreed, that a certiorari shall not be granted to remove an indictment after a conviction, unless for some special cause, as where the judge below is doubtful what judgment to give. 2 *Haw.* 288.

Also it seems a good objection against the granting it, that issue is joined in the court below, and a *venire* awarded for the trial of it. *Id.*

After a certiorari is allowed by the inferior court, it makes all the subsequent proceedings on the record removed by it erroneous. *Id.* 293.

But it has been adjudged, that if a certiorari for the removal of an indictment before justices of the peace be not delivered before the jury be sworn for the trial of it, the justices may proceed. 2 *Haw.* 294.

And the justices may set a fine to complete their judgment, after a certiorari delivered. *L. Raym.* 1515.

Every return of a certiorari ought to be under seal. And if the person, to whom it is directed, do not make a return, then an *alias*, that is, a second writ, then a *pluries*, that is, a third writ, shall be awarded, and then an attachment. *Crompt.* 116.

CESSAVIT is a writ that lieth in divers cases, upon this general ground, that he against whom it is brought hath for two years *ceased* or neglected to perform such service or to pay such a rent as he is bound to by his tenure, and hath not upon his lands or tenements sufficient goods or chattels to be distrained. And if a tenant for years of land at certain rent suffers the rent to be behind two years, and there is no such distress to be had upon the land; then the landlord shall recover the land: but if the tenant come into court before judgment given, and tender the arrearages and damages, and find security that he shall *cease* no more in payment of the rent, then the tenant shall not lose his land. *F. N. B.*

CESSION, *cessio*, signifies a *ceasing*, yielding up, or giving over; and is, when an ecclesiastical person having a benefice with cure of souls, takes another benefice incompatible.—For by the statute of 21 *H. 8. c.* 13. if any one having a benefice with cure of souls of 8*l.* a year or upwards in the king's books, accepts any other without a dispensation, the first shall be adjudged void, and the patron may present as if the incumbent had died or resigned.

And

And a vacancy thus made for want of a dispensation is called *cession*. 1 *Black.* 392.

But the avoidance of the former benefice doth not take place as to lapse, till induction to the second : for though the patron hath six months from the induction to present to save the incurring of a lapse, yet he may, if he pleases, present before the induction. *Bur. Mansf.* 1512.

Cession is not made by taking a deanry, archdeaconry, prebend, or rectory, where there is a vicarage endowed ; because the statute only extends to benefices *with cure of souls*.

But where an ecclesiastical person is made bishop, his former benefices become void by *cession*, and the king shall present to the benefices so vacated ; for the avoidance made by promotion to a bishoprick is only changing one life for another, and therefore is no prejudice to the patron ; for which reason, the law allows the king to present for that turn. But the king, if he pleases, may grant to the bishop a dispensation to retain his former preferment, which dispensation is called a *commendam retinere*.

CESTUY QUE TRUST is he who hath a trust in lands and tenements committed to him for the benefit of another. If the person intrusted doth not perform his trust, he is compellable thereto in a court of equity.

CESTUY QUE VIE is he for whose life land is holden by another person, which other person is therefore called tenant *pur autre vie*, or tenant for another's life.

CESTUY QUE USE is he to whose use land is granted to another person, which other person is called the *terretenant*, having in himself the legal property and possession, yet not to his own use, but to dispose thereof according to the intention of the *cestuy que use*, and to suffer him to take the profits.

CHAIRS. See **COACHES**.

CHAISES. See **COACHES**.

CHALLENGE, of jurors, is of two kinds ; either to the *array*, by which is meant the whole jury as it stands *arrayed* in the *panel* or little square *pane* of parchment on which the jurors names are written : or to the *polls* ; by which are meant the several particular persons or *heads* in the array. 1 *Inst.* 156. 158.

Challenge to the *array* is in respect of the partiality or default of the sheriff, coroner, or other officer that made the return : and it is two-fold : 1. *Principal* challenge to the array, which, if it is made good, is a sufficient cause of exception, without leaving any thing to the judgment of the triers. As if the sheriff is of kindred to either party ; or if any of the jurors be returned at the denomination of either of the parties. 2. Challenge to the array *for favour* ; which being no principal challenge, must be left to the discretion and conscience of the triers. This is, where either

of

of the parties suspects that the juror is inclined to favour the opposite party. *Id.*

Challenge to the *polls* is three-fold: 1. *Peremptory*, where a man challenges upon his own dislike of the juror, without shewing any cause. 2. *Principal* challenge to the polls; where cause is shewed, but which, if found true, stands sufficient of itself, without leaving any thing to the triers. 3. Challenge to the polls *for favour*; which is, when either party cannot take any principal challenge, but sheweth causes of favour, which must be left to the triers, upon hearing the evidence, to find the juror favourable or not favourable.—Causes of challenge to the polls are infinite. *Id.*

CHALLENGE TO FIGHT. See DUEL.

CHAMPETRY, *campi partitio*, is the unlawful maintenance of a suit, in consideration of some bargain to have part of the lands or thing in dispute, or part of the gains. By the statute 33 *Ed.* 1. *§.* 3. both the champertor, and he who consents thereunto, shall be imprisoned three years, and make fine at the king's pleasure. And by 1 *R.* 2. *c.* 9. feoffments of lands and gifts of goods for maintenance shall be void, and the person disseised shall recover the lands with double damages.

CHANCEL of a church, *cancellus*, is so called a *cancellis*, from the lattice-work partition between the quire and the body of the church, so framed as to separate the one from the other, but not to intercept the sight.

Generally, the rector or parson is bound to the repair of the chancel; but where the custom hath been for the parish, or for the vicar, or for the owner of a particular estate, to repair the chancel, that custom is good. *Gibf.* 199. And the repairing of the chancel is *prima facie* a discharge from contributing to the repairs of the church. *Id.*

It hath been said, that the parson, or rector impropriate, is intitled to the chief seat in the chancel; but by prescription another parishioner may have it. *Noy*, 153. But where there is no prescriptive right, it seems that the bishop hath the same power of disposing of the seats in the chancel, as he hath in the body of the church. *Gibf.* 200.

CHANCELLOR OF A DIOCESE is an ecclesiastical officer under the bishop, whose office includes in it the power both of an *official principal* and *vicar general*. The proper work of an *official* is, to hear causes between party and party, concerning wills, legacies, mortuaries, and other like temporal matters. The office of *vicar general* is, the exercise and administration of jurisdiction purely spiritual, as visitation, correction of manners, granting institutions, and the like, with a general inspection of men and things, in order to the preserving of discipline and good government in the church.

CHANCELLOR, Lord. See CHANCERY.

CHANCE-

CHANCEMEDLEY signifies a casual meddling or contention, and, in common speech, is applied to any manner of homicide by misadventure, whereas in strictness and propriety it is only applicable to such killing as happens in self defence upon a sudden encounter, when the slayer hath no other possible means of escaping from the assailant. As where the slayer, either having not begun to fight, or (having begun) endeavours to decline any farther struggle, and afterwards being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide by chance-medley. 4 *Black.* 184.

CHANCERY, in matters of civil property, is the highest and most important of the king's superior and original courts of justice. It hath its name of *chancery*, *cancellaria*, from the judge who presides therein, the lord *chancellor* or *cancellarius*; which name and office, under the Roman emperors, signified a chief scribe or secretary. And when the modern kingdoms of *Europe* were established upon the ruins of the empire, almost every state preserved its chancellor, who had the supervision of all charters, letters, and other public instruments of the crown, and *cancelled* or authenticated them as circumstances might require. 3 *Black.* 46.

And when seals came in use, he had always the custody of the king's great seal. So that the office of chancellor or lord keeper of the great seal (whose authority with us is one and the same) is created by the mere delivery of the king's great seal into his custody; whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior in point of precedence to every temporal lord. He is a privy counsellor by his office, and prolocutor of the House of Lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom; he is visitor, in right of the king, of all hospitals and colleges of the king's foundation; and patron of all the king's livings under the value of 20*l.* a-year in the king's books. He is general guardian of all infants, idiots, and lunatics; and has the general superintendance of all charitable uses in the kingdom. And all this, over and above the vast and extensive jurisdiction which he exerciseth in his judicial capacity in the court of chancery. 3 *Black.* 46.

In the chancery are two courts; one ordinary being a court of *common law*; the other extraordinary being a court of *equity*. The ordinary or *common law* court is a court of record. Its jurisdiction is to hold plea upon a *scire facias* to repeal and cancel the king's letters patent, when made against law, or upon untrue suggestions; and to hold plea on all personal actions, where any officer of this court is a party; and of executions on statutes, or of recognizances in nature of statutes; and by several acts of parliament, of divers other offences and causes; but this court cannot try a cause by a jury, but the record is to be delivered by the lord chancellor

into the king's bench to be tried there, and judgment given thereon. And when judgment is given in this common law part of chancery upon demurrer, or the like, a writ of error lies returnable into the king's bench; but this hath not been practised for many years. From this court also proceed all original writs, commissions of charitable uses, bankrupts, sewers, idiots, lunatics, and the like: and for these ends this court is always open. 3 *Black.* 47. *Wood,* b. 4. c. 1.

The extraordinary court is a court of *equity*, and proceeds by the rules of equity and good conscience. This equity consists in abating the rigour of the common law, and giving a remedy in cases where no provision, or not sufficient provision, hath been made by the ordinary course of law. The jurisdiction of this court is of vast extent. Almost all causes of weight and moment, first or last, have their determination here. In this court relief is given in the case of infants, married women, and others not capable of acting for themselves. All frauds, for which there is no remedy at law, are cognizable here; as also all breaches of trust, and unreasonable or unconscionable engagements. It will compel men to perform their agreements; will relieve mortgagors and obligors against penalties and forfeitures, on payment of principal, interest, and costs; will rectify mistakes in conveyances; will grant injunctions to stay waste; and restrain the proceedings of inferior courts, that they exceed not their authority and jurisdiction. *Id.*

The method of proceeding in equity is, first, to file the *bill* of complaint, setting forth the injury done, and praying relief. After the bill is filed, process of *subpœna* issues to compel the defendant to appear. On his appearance, if there is no cause of plea in bar, he puts in his *answer*. Then the plaintiff brings his *replication*, unless he files *exceptions* against the answer as insufficient. The several pleadings being settled, and the parties come to issue, *witnesses* are examined upon interrogatories, either in court, or by commission in the country. And when the plaintiff and defendant have examined their witnesses, *publication* is to be made of the depositions, and the cause set down for hearing. After which follows the *decree*; which decree being served on the party under the seal of the court, and not obeyed, all the processes of contempt will issue out against him for his *imprisonment* till he yields obedience to it; or there may be an *injunction* granted for the possession of land, where the decree is for land, and the party remains obstinate after his imprisonment. From this court an appeal lies to the House of Lords, the last resort of temporal jurisdiction in this kingdom.

CHAPELS, *capellee*, are of divers kinds:

1. *Private chapels*; such as noble men and other religious and worthy persons have, at their own private charge, built in or near their own houses, for them and their families wherein to perform religious

religious duties. These, and the ornaments belonging to the same, are maintained at those persons charge to whom they belong, and chaplains provided for them by themselves. *Degge. Part. 1. c. 12.*

2. *Free chapels*, so called from their freedom or exemption from all ordinary jurisdiction. All free chapels, together with the chantries, were given to the king in the first year of the reign of *Edward* the Sixth, except some few that are excepted in the acts of parliament by which the others were given; and except such as have been founded by the king, or by his licence, since the dissolution. And the king himself visits his free chapels, and not the ordinary; which office of visitation is executed for the king, by the lord high chancellor. *Godolph. 145.*

3. *Chapels of ease* under the mother church, built for the ease of the parishioners especially in larger parishes. Some of these chapels of ease have parochial rites granted to them by the ordinary, of baptism and sepulture: others have only the privilege of prayers and preaching. At the foundation of these chapels it is generally provided that they shall be no prejudice to the mother church, either in revenues or in exemption from subordination and dependence.

CHAPTER of a cathedral church consists of persons ecclesiastical, dean, and canons or prebendaries, whereof the dean is the head; all subordinate to the bishop, to whom they are as assistants in matters relating to the church, for the better ordering and disposing the things thereof, and the confirmation of such leases of the temporalities and offices relating to the bishoprick, as the bishop shall make from time to time. And they are termed *capitulum*, as a kind of head, instituted not only to assist the bishop in manner aforesaid, but also anciently to rule and govern the diocese in the time of vacation.

CHARITIES: the king has the general superintendence of all charities; which he exercises by the lord chancellor. And by the statute 43 *Eliz. c. 4.* authority is given to the lord chancellor to grant commissions to inquire into any abuses of charitable donations, and rectify the same by decree.

But by the 9 *G. 2. c. 36.* no lands, or money to be laid out in lands, shall be given to any charitable use, unless by deed indented, executed twelve months before the death of the donor, and enrolled in chancery within six months after execution, and unless made to take effect immediately, and be without power of revocation.

Concerning the collecting of charity money on *briefs*. See BRIEF.

CHARTER, *charta*, a written paper or parchment, is of divers kinds, and distinguished into charters of the *king*, and charters of *private* persons. Charters of the *king* are those whereby the king

passeth any grant to any person or body politic, as charters of exemption, of privilege, of pardon; the *great* charter of liberties is called by way of pre-eminence, *magna charta*. Charters of *private* persons are deeds and instruments for conveyance of lands.

CHARTER HOUSE is a corruption of *Chartreux* (*Carthusia*) the name of a town in *France*, where an order of monks was instituted, from thence called *Carthusians*.

CHARTER LAND was land held by writing, otherwise called *bookland*; as opposed to *falkland*, which was an inferior kind of tenure, without writing, held merely at the will of the lord.

CHARTER PARTY, *charta partita*, is a deed or writing *divided*, or pair of indentures, among merchants or seafaring men, containing the covenants and agreements made between them, touching their merchandize and maritime affairs.

A charter party of *affreightment* settles agreements, as to the cargo of ships, and binds the master to deliver the cargo in good condition, at the place of discharge, according to agreement: and sometimes the master obliges himself, ship, tackle, and furniture for performance.

CHASE is a privileged place for receipt of deer and beasts of the forest, and is of a middle nature between a forest and a park. It is commonly less than a forest, and not endowed with so many liberties, as officers, laws, courts; and yet is of a larger compass than a park, having more officers and game than a park. Every forest is a chase, but every chase is not a forest. It differs from a park in that it is not inclosed; yet it must have certain metes and bounds, but it may be in other men's grounds as well as in one's own. *Manw.* 49.

Beasts of chase are the buck, doe, fox, martern and roe. *Id.* 44.

A forest is governed by the forest law, but a chase is governed by the common law. *Id.* 52.

CHATTELS is a *French* word, and signifies *goods*, comprehending all goods, moveable and immoveable; except such as are in nature of freehold, or parcel of it. And chattels are either *personal* or *real*: *Personal* are such as belong immediately to the person of a man; and for which, if they be any way injuriously withheld from him, he hath no other remedy but by personal action: chattels *real* are such as either appertain not immediately to the person, but to some other thing by way of dependency, as a box with writings of land; or such as are issuing out of some immovable thing, as a lease, or rent for term of years; and they concern the realty, lands and tenements, interest in advowsons, in statutes merchant, and the like. 1 *Inst.* 118.

CHAUNTRIES, *cantaria*, in the times of popery, were endowments of land or other revenues, for maintenance of one or more priests, to celebrate daily mass for the souls of the founder and

and his kindred, and of their other benefactors; sometimes at a particular altar, and oftentimes in little chapels added to cathedral and parochial churches for that purpose.

CHEATS, punishable by fine and imprisonment, at the common law, may in general be described to be deceitful practices, in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty; as by playing with false dice; by causing an illiterate person to execute a deed to his prejudice; reading it over to him in words different from those in which it was written; and such like. 1 *Haw.* 188.

Also the person injured by such fraud may have an action upon the case for damages; as where a person sells one commodity for another, or sells by false weights and measures: in which, and the like cases, an action will lie upon the contract, because the law always implies that every transaction is fair and honest. In buying and selling, it is always understood, that the seller undertakes that the commodity he sells is his own; and if it proves otherwise, an action on the case lies against him, to exact damages for this deceit. In contracts for provisions, it is always implied that they are wholesome; and if they be not, the same remedy may be had. Also if he that sells any thing, doth upon the sale warrant it to be good, the law annexes a tacit contract to this warranty, that if it be not so, he shall make compensation to the buyer; otherwise it is an injury to good faith, for which an action on the case will lie to recover damages. 3 *Black.* 164.

As there are some frauds which may be relieved civilly, and not punished criminally, (with the complaints whereof the courts of equity commonly abound;) so there are other frauds which may not be helped civilly, and yet shall be punished criminally: thus, if a man goes about, and pretends to be of age and defrauds many persons by taking credit for considerable quantities of goods, and then insists on his non-age; the persons injured cannot recover the value of their goods, but they may indict and punish him for a common cheat.

And the distinction in all cases of the like kind is this: that, in such impositions or deceits where common prudence may guard persons against their suffering from them, the offence is not indictable, but the party is left to his civil remedy for the redress of the injury that has been done to him; but where false weights or measures are used, or false tokens produced, or such methods taken to cheat and deceive, as people cannot by any ordinary care or prudence be guarded against, there it is an offence indictable. *Bur. Mansf.* 1125.

By statute 33 *H. 8. c. 1.* if any person shall falsely and deceitfully obtain any money or other goods, by colour and means of any false privy token, or counterfeit letter made in another

man's name; he shall have such punishment by imprisonment, pillory, or other corporal pain (except death), as the court shall award.

By 30 G. 2, c. 24. all persons who by false pretences shall obtain any money, goods, or merchandize, with intent to defraud any person of the same, shall be fined and imprisoned, or put in the pillory, or publicly whipped, or transported for seven years, at the discretion of the court.

By 9 Ann. c. 14. if any person shall, by cheating in any kind of gaming, win any money or other thing, he shall forfeit five times the value, and suffer as in case of perjury.

CHEVISANCE (from the French, *achever* or *chevir*, to complete or come to the (*chief*) head, or end) signifies an agreement or composition made, and in our statutes is used for a bargain or contract in general; and not, as some have thought, as denoting particularly an unlawful or indirect agreement only; for, in the instances produced, it is used to signify the same as the words *bargain* or *contract*; and is still retained in all commissions of bankrupt, in which the bankrupt is stated to use and exercise the trade and merchandize, by way of bargaining, exchange, bartering, and *chevisance*.

CHIEF, tenure in, was the most honourable species of holding lands and tenements, and belonged only to those who held immediately of the king in right of his crown and dignity, who were called the king's tenants in *chief*, or *in capite*. But by the 12 C. 2. c. 24. all these kinds of tenure are abolished, and turned into free and common socage.

CHILD. See PARENTS AND CHILDREN.

CHIMINAGE (*Fr. chemin*, a way), a toll due by custom for having a way through a forest: if it was a footway only, it was called *pedage*.

CHIMNEY-SWEEPERS. By 28 G. 3. c. 48. several regulations are made respecting chimney-sweepers and their apprentices; and all differences and disputes between them are to be determined by one justice of the peace.

CHIPPING, when it is part of the name of a place, denotes such place to be a market town: as *Chippenham*, *Chipping Norton*, from the Saxon *cypan*, *ceapan*, to buy; whence *cheapen*. So *chipping-gavel*, a toll for buying and selling.

CHIROGRAPH (from *χειρ*, a hand; and *γραφειν*, to write) signifies a deed, or other public instrument in writing, which anciently were attested by the subscription and crosses of witnesses; afterwards, to prevent frauds and concealment, they made their deeds of mutual covenant in a *script* and *rescript*, or in a *part* or *counterpart*, and in the middle between the two copies they drew the capital letters of the alphabet, and then tallied or cut asunder, in an *indented* manner, the sheet or skin of parchment; which, being

being delivered to the two parties concerned, were proved authentic by matching with and answering to one another. Deeds thus made were denominated *syngrapha* by the canonists, and with us *chirographa*, or handwritings. 2 *Black.* 296.

Chirograph was also used for a fine; the manner of ingrossing whereof, and cutting the parchment in two pieces, is still observed in the *chirographer's* office. *Id.*

CHIVALRY, court of, was anciently held before the lord high constable and earl marshal of *England* jointly, and afterwards before the earl marshal only. This court hath cognizance of contracts and other matters touching deeds of arms and war, as well out of the realm as within it. It is now grown intirely out of use, on account of the feebleness of its jurisdiction, and want of power to inforce its judgments; as it can neither fine nor imprison, not being a court of record. 3 *Black.* 68.

CHIVALRY, tenure in. See KNIGHTS SERVICE.

CHOCOLATE. See COFFEE.

CHOSE is a French word, and signifies *thing*; and a *chose in action* is a thing of which a man hath not the possession or actual enjoyment, but hath a right to demand the same by action. For property in things personal is of two kinds, either in *possession*, where a man has not only the right to enjoy, but also the actual enjoyment of the thing; or else it is in *action*, where a man hath only a bare right, without any occupation or enjoyment. The possession whereof, however, may be recovered by a suit or action at law: from whence the thing so recoverable is called a thing or *chose in action*. 2 *Black.* 389. 397.

Thus money due on a bond is a *chose in action*; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law; *Id.* 397.

If a man promises or covenants with me to do any act, and fails in it, whereby I suffer damage, the recompence for this damage is a *chose in action*: for though a right to some recompence vests in me, at the time of the damage done, yet what and how large such recompence shall be, can only be ascertained by verdict; and the possession can only be given to me by legal judgment and execution. *Id.*

CHURCH:

1. The letters *ch* were anciently pronounced hard, as the letter *k*. In the northern parts of *England*, as also in *Scotland*, the ancient pronunciation is still retained in the word *kirk* or *kurk*; being as it were *κυριον οικος*, the Lord's house, or *κυριακος*, be longing to the Lord.

2. By the common law and general custom of the realm, it was lawful for earls, barons, and others of the laity, to build churches; but they could not erect a spiritual body politic to continue in succession,

lucceſſion, and capable of endowment, without the king's licence; and, before the law ſhall take knowledge of them as ſuch, they muſt alſo have the biſhop's leave and conſent, and be conſecrated or dedicated by him. 3 *Inſt.* 203.

3. And after a new church is erected, it may not be conſecrated without a competent endowment; which endowment was commonly made by an allotment of manſe and glebe by the lord of the manor, or other, who thereby became patron of the church. Other perſons alſo, at the time of dedication, often contributed ſmall portions of ground; which is the reaſon, why, in many pariſhes, the glebe is not only diſtant from the church, but lies in ſcattered divided parcels. *Ken. Par. Ant.* 222.

4. As to the form of conſecration:—In the year 1661, a form for this purpoſe was drawn up by the convocation, but was not authorized by authority; and now every biſhop as to this matter is left to his own judgment and diſcretion. But that form, as drawn up by the convocation, ſeems to be generally followed.

5. The anniversary feaſt on the day of dedication of the church continued a long time, and is ſtill kept up in many places; and this, drawing together a large reſort of people, was the original of fairs on that day. And from thence in ſuch places may probably be conjectured to what ſaint the church was dedicated. *Ken. Par. Ant.* 609.

6. Of common right, the *repair* of the church is in the pariſhioners, at leaſt of the body of the church; and ſometimes of the chancel, as particularly in *London*, in many churches there. But, generally, the parſon, or lay impropiator, is bound to repair the chancel: ſometimes the vicar is bound, but this muſt be by ſpecial cuſtom. An ile in a church, belonging to a particular family, is commonly repaired by thoſe to whom it belongs. If two churches be united, the repairs of the ſeveral churches ſhall be made as before their union. *Degge, Part 1. c.* 12.

7. Before the age of the reformation, no *ſeats* were allowed, nor any diſtinct apartment in a church aſſigned to diſtinct inhabitants, except for ſome very great perſons. The ſeats that were, were moveable, and the property of the incumbent, and ſo in all reſpects at his diſpoſal. And, generally, the ſeats in churches are to be built and repaired as the church is to be, at the general charge of the pariſhioners, unleſs any particular perſon be chargeable to do the ſame by preſcription. *Id.*

And although the freehold of the body of the church be in the incumbent thereof, and the ſeats therein be fixed to the freehold, yet the uſe of them is common to all the people that pay to the repair thereof. But the authority of appointing what perſons ſhall fit in each ſeat is in the ordinary. But, by cuſtom, the churchwardens may have the ordering of the ſeats, as in *London*;

dm ; which, by the like custom, may be in other places. *Watf.*
c. 39.

If a man prescribe, that he and his ancestors, and all they whose estate he hath in a certain messuage, have used to sit in a certain seat in the church time out of mind, in consideration that they have used time out of mind to repair the said seat, it is a good prescription : but if he prescribe to have a seat generally, without the said consideration of repairing the seat, the ordinary may displace him. 2 *Roll's Abr.* 288.

A seat may not be granted by the ordinary to a person and his heirs absolutely. For the seat doth not belong to the person, but to the inhabitant ; otherwise, if he and his heirs go away, and dwell in another parish, they might yet retain the seat, which would be unreasonable. *Gibf.* 197.

The title to a seat, on the foundation of prescription, is properly liable at common law. But for a disturbance in a seat, a man may sue in the spiritual court ; and the defendant, if he will, may admit the prescription to be tried there ; as a defendant doth a modus, or a pension, by prescription. 2 *Salk.* 551.

In an action for disturbing the plaintiff in his pew, the plaintiff need not prove that he repaired it against a stranger ; for this being a possessory action against a stranger, and a mere wrong doer, the plaintiff is not obliged to prove any repairs done by himself or others whose estate he hath ; for it is a rule in law, that one in possession need not shew any title or consideration for such possession against a wrong doer. But it is otherwise where one claims a pew or an ile in a church against the ordinary, who has *prima facie* the disposal of all the seats in the church ; and against him a title or consideration must be shewn in the declaration, and proved upon the trial. 1 *Wilf.* 326.

8. Rates for reparation of the church are to be made by the churchwardens together with the parishioners assembled upon public notice given in the church. And the major part of them that appear shall bind the parish ; or if none appear, the churchwardens alone may make the rate. 1 *Bac. Abr.* 373.

The rate is not chargeable upon the land, but upon the person in respect of the land. And houses, as well as lands, are chargeable ; and, in some places, houses only : as in cities, and large towns where there are only houses, and no lands to be charged. *Hell.* 130.

It hath been holden, that there ought to be two rates, one for the fabric, and another for the goods and ornaments, of the church : for that a rate for the reparation of the fabric is real, charging the land, and not the person, but a rate for ornaments is personal, upon the goods, and not upon the land. 2 *Roll's Abr.* 291. But by reason of the trouble and inconvenience attending such separate assessments, the practice hath now universally

verfally obtained to make one affeffment for all. *Degge, Part 1. c. 12.*

If any perfon find himfelf aggrieved at the inequality of any fuch affeffment, his appeal muft be to the ecclefiastical judge. *Id.*

9. If any perfon fhall, by words only, *brawl* in any church or church-yard, he fhall be fufpended from the entrance of the church: if he *fmite* or lays violent hands on another, he fhall be *ipfo facto* excommunicate: if he fhall therein ftrike with any *weapon*, or draw any weapon to ftrike, he fhall have one of his ears cut off, and if he have no ears, he fhall be burned in the cheek with the letter F, whereby he may be known to be a fray-maker and fighter. *5 & 6 Ed. 6. c. 4.*

13. The *way* to a church may be claimed and maintained by libel in the fpiritual court. *Gibf. 293.*

CHURCHWARDENS :

1. Perfons exempted from the office of churchwarden are, all peers of the realm, by reafon of their dignity; clergymen, by reafon of their order; members of parliament, by reafon of their privilege; attorneys, by reafon of their attendance in the king's courts; apothecaries, having ferved feven years apprenticeship; perfons having profecuted a felon to conviction; diffenting teachers; and other diffenters, provided they find a fufficient deputy. And by *26 G. 3. c. 107. c. 130.* all ferjeants, corporals, and drummers of the militia; and alfo all private men from the time of their enrolment, until they are difcharged; fhall not be liable to ferve as churchwardens.

2. By *Can. 118.* churchwardens fhall be chofen yearly in Eafter week, or fome week following, as the ordinary fhall direft.

3. And they fhall be chofen by the joint confent of the minifter and parifhioners, if it may be; if not, the minifter fhall chufe one, and the parifhioners another. *Can. 89.*

But this is to be underftood, where there is not a cuftom for the parifhioners to chufe both. *L. Rym. 137.*

In fome places, the lord of the manor prefcribes for the appointment of churchwardens; and this fhall not be tried in the ecclefiastical court, although it be a prefcription of what appertains to a fpiritual thing. *God. 153.*

4. A perfon elected churchwarden, and refufing to take the oath according to law, may be excommunicated for fuch refufal and no prohibition will lie. *Gibf. 216.*

5. If the party chofen offer himfelf, and the ecclefiastical judge refufe to tender the oath to him, a mandamus from the temporal court will be granted. For the ecclefiastical judge is not to determine concerning the fitnefs or unfitnefs: and a churchwarden is a temporal officer, and hath the property and cuftody of the goods of the parifh. And as it is at the peril of the parifhioners, fo they may chufe and truft whom they think fit; and the fpiritual judge hath no power to elect, or controul their election. *1 Salk. 166.*

6. The

6. The churchwardens are so far incorporated by law, as to sue for the goods of the church, and to bring an action of trespass for them; also to purchase goods for the use of the parish; but they are not a corporation in such sort as to purchase lands, or to take by grant, except in *London*, where they are a corporation for those purposes also. *Gibf.* 215.

Every churchwarden is an overseer of the poor, by the statute 43 *Eliz. c. 2.*

They have power to manage the revenues of the church during a vacancy. In which case, having first taken out a sequestration under the seal of the office, they are to take care that the glebe land be seasonably tilled and sown, to gather in tithes, thresh, and sell out corn, repair houses and fences, and what other things are necessary; and to provide for the supply of the cure. And when a successor is instituted and inducted, they are to account to him for the profits received by them, deducting their reasonable expences: and if they cannot agree, the same shall be settled by the ordinary. *Watf. c. 30.*

The release of one churchwarden is in no case a bar to the action of the other; for what they have is to the use of the parish. *Cro. Ja. 34.*

7. All churchwardens, at the end of their year, or within a month after, shall, before the minister and parishioners, give up a just account of such money as they have received, and also what particularly they have bestowed in reparations and otherwise for the use of the church. And they shall deliver up to the parishioners whatsoever money, or other things, of right belonging to the church or parish, which remain in their hands, that it may be delivered over by them to the next churchwardens *Canon 89.*

If the churchwardens have laid out the parish money imprudently, yet if it be truly and honestly laid out, they must be reimbursed; and the parishioners can have no remedy herein, unless some fraud be proved against them, because the parish have made them their trustees. *Gibf.* 196.

CHURL, *ceorl, carl*, was, in the Saxon times, a tenant at will, who held lands on condition of certain rents and servile duties. Hence many villages bear the name of *Carleton*, being the place where those earls inhabited. *Carl*, in *German*, is strong, and the word is still used in *Scotland*, to denote a rustic, countryman, or labourer.

CINQUE PORTS (*quinque ports*) are the five most important havens, as they formerly were esteemed, in the kingdom, lying towards *France*, viz. *Dover, Sandwich, Romney, Hastings, Hythe*; to which *Winchelsea* and *Rye* have since been added. They have a special governor or keeper of their own, called by his office lord warden of the cinque ports, who hath also jurisdiction

dition of admiralty, and is exempt from the admiralty of *England*. He is also constable of *Dover castle*. 4 *Inst.* 223.

They have had several privileges granted to them, and an exclusive jurisdiction, before the mayor and jurats of the ports, in which the king's ordinary writ doth not run. But a writ of error lies from the mayor and jurats of each port to the lord warden of the cinque ports in his court of *Shepway*; and from the court of *Shepway* to the king's bench. And all prerogative writs, as those of *habeas corpus*, *prohibition*, *certiorari*, and *mandamus*, may issue to all these exempt jurisdictions; because the privilege, that the king's writ runs not, must be intended between party and party, for there can be no such privilege against the king. 3 *Black.* 79.

CIRCUMSPECTE AGATIS, is the title of a statute made in the 13 *Ed.* 1. relating to prohibitions, prescribing certain cases wherein the king's prohibition doth not lie.

CIRCUMSTANTIAL EVIDENCE is, where the fact cannot be positively and demonstratively proved, and therefore *circumstances* are applied in order to strengthen the evidence; which circumstances, as they are more or less strong, induce either a *violent* presumption, which is equivalent to full proof; or *probable* presumption, which also hath its due weight; or *light* presumption, which hath little or no weight or validity.

CISTERTIAN monks were an order instituted at *Cisteaux* in *France*, who came into *England* about the year 1128, and had their first house at *Waverley* in *Surry*. Before the dissolution they had 85 houses in this kingdom, which were generally founded in solitary and uncultivated places: and all dedicated to the Blessed Virgin.

CITATION is a summons to appear, being a process particularly applied to the ecclesiastical courts. The party to whom it is directed shall diligently seek the person to be cited; and when he hath found him, he is to shew to the person cited, the citation under seal, and by virtue thereof cite him to appear at the time and place appointed. And it is usual also to leave a note with him, expressing the contents thereof. 1 *Ought.* 44, 45.

But if it be returned upon the citation that the defendant cannot be found, then the plaintiff's proctor petitions that the defendant may be cited personally (if he can), to appear and answer the contents of the former citation; and if not personally, then by any other ways and means, so as the party to be cited may come to the knowledge thereof, and this is that which is called a citation *viis et modis*, or a public citation, seeing it is executed either by public edict, a copy thereof being affixed to the doors of the house where the defendant dwells; or the doors of the parish church where he inhabits, for the space of half an hour in the time of divine service; or, as it hath been said,

said, by the tolling of a bell, or the sounding of a trumpet, or the erecting of a banner: this being done, a certificate must be made of the premises, and the citation brought into court; and if the party cited appear not, the plaintiff's proctor accuseth his contumacy (he being first three times called by the crier of the court), and in penakty of such his contumacy, requests that he may be excommunicated. 1 *Ought.* 49.

But the citation must be served at the door or outside of a man's house; for the house may not be entered in such case without his consent. *Lindw.* 87.

CITY, *civitas*, is a town incorporated, which is or hath been the see of a bishop: and though the bishoprick be dissolved, as at *Westminster*, yet still it remaineth a city. 1 *Inst.* 109.

But in ancient time, the word city is used promiscuously with burgh or town; as in the charter of *Leicester*, it is called both *civitas* and *burgus*; which shows, that though the word *city* generally signifies such a town corporate as hath a bishop and cathedral church, yet there are some exceptions.

CIVIL LAW is the law of the ancient *Romans*, collected in the books called the *Code*, the *Digest*, the *Institute*, and the *Novels*. It was heretofore much in use in this kingdom; and is still admitted in a considerable degree in the ecclesiastical courts, the courts of equity and of the admiralty, and in the courts of the two universities.

CLAIM is a challenge of interest in any thing that is in the possession of another; or at least out of a man's own possession; and may be either *verbal*, where one doth by words claim and challenge the thing that is so out of his possession, or by *action* brought. Where any thing is wrongfully detained from any person, this claim is to be made; and the party making it may thereby avoid descents of lands or disseisins, and preserve his title, which otherwise would be in danger of being lost. 1 *Inst.* 250.

See CONTINUAL CLAIM.

CLARENDON, constitutions of, were certain constitutions made in the reign of king *Henry* the Second, in a parliament holden at *Clarendon*; whereby the king checked the power of the pope and his clergy. 4 *Black.* 415.

CLARETUM, a liquor made of wine and honey, clarified or made clear by decoction, which the *Germans*, *French*, and *English* called *hippocras*: and it was from this, that the red wines of France were called *claret*. *Whart. Ang. Sax. Part* 2. p. 480.

CLAUSUM FREGIT signifies in law the same as an action of trespass, and is a writ so called because the defendant is summoned thereby to shew cause *quare clausum fregit*, that is, why he broke the close of the plaintiff. For every man's land is, in the eye of the law, inclosed and set apart from his neighbour's;

bour's ; and that, either by a visible and material fence, as one field is divided from another by a hedge ; or by an ideal boundary existing only in contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other ; for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, namely, the treading down and bruising his herbage. 3 *Black.* 209.

CLERGY are of two sorts, *regular* and *secular*. *Regular* are those that live under certain *rules*, being of some religious order, as abbots, priors, monks, or the like. The *secular* are those that live not under any certain rules of the religious orders, as bishops, deans, parsons, vicars.

The clergy being a body of men separate and set apart from the rest of the people, in order to attend to the divine offices, have thereupon had large privileges allowed them by our municipal laws ; several of which have been lost by disuse, others abolished by act of parliament, but some do yet remain. Particularly, a clergyman cannot be compelled to serve on a jury ; nor to appear at a court leet or frankpledge, which almost every other person is obliged to do. Neither can he be compelled to serve in any temporal office. During his attendance on divine service, he is privileged from arrests in civil causes. And in cases of felony, he may have the benefit of his clergy, without being burnt in the hand. But the clergy are not exempt from the temporal burthens of repairing the highways, paying to the poor rate, and the like ; and it seems to be now generally settled, that they are liable to all public charges imposed by act of parliament, where they are not specially excepted.

Benefit of clergy.—Anciently, princes and states, converted to christianity, in favour of the clergy, and for their encouragement in their offices and employment, and that they might not be so much intangled in suits, did grant to the clergy very bountiful privileges and exemptions ; and particularly, an exemption of their persons from criminal proceedings, in some capital cases before secular judges ; which was the true original of the benefit of clergy. Afterwards, the clergy increasing in wealth, power, honour, number, and interest, began to set up for themselves ; and that which they obtained by the favour of princes and states at first, they now claimed as their right, and a right of the highest nature, namely, by the law of God ; and by their canons and constitutions endeavoured, and in some places obtained, vast extensions of these exemptions, both with regard to the persons concerned, to wit, not only to persons in holy orders, but also to all that had any kind of subordinate ministrations relative to the church ; and likewise in respect of the causes, exempting as far as they could all

all causes of clergymen, as well civil as criminal, from the jurisdiction of the secular power, and wholly subordinating them immediately and only to the ecclesiastical jurisdiction, which they supposed to be lodged first in the pope by divine right and investiture from *Christ*, and from the pope shed abroad into all subordinate and ecclesiastical jurisdiction. And by this means they endeavoured, and in some kingdoms and for some ages obtained, that there was a double supreme power in every kingdom; the one ecclesiastical, absolute, and independent upon any but the pope, over ecclesiastical men and causes; and the other secular, of the king, or civil magistrate. But this claim of exemption, although it obtained much in this kingdom, yet grew so burthensome, that it was from time to time qualified and abridged by the civil power, sometimes by acts of parliament taking it away in some cases, sometimes by the interpretation and construction of the judges, and sometimes by the contrary usage of the kingdom; for ecclesiastical canons never bound in *England* farther than they were received, and so had not their authority from their own strength and obligation, but from the usages and customs of the kingdom that admitted them, and only so far forth as they were so admitted. And therefore if they were indicted in cases criminal, but not capital, nor wherein they were to lose life or limb, there the privilege of clergy was not allowed; and therefore not in indictments of trespass or petit larceny. Also it was not allowed them in high treason. But, at the common law, in all cases of felony or petit treason, clergy was allowable, excepting two, lying in wait, and burning of houses (which were looked upon as hostile acts, and the authors of them therefore not intitled to the common privileges of subjects). 2 *Hale's Hist.* 323. 330.

And by the statute 25 *Ed. 3. st. 3. c. 4.* all manner of clerks, who shall be convicted before the secular judges, for any treasons or felonies, touching other persons than the king himself, shall have the privilege of the holy church. By which statute, clergy is allowed in all treasons and felonies, except treason against the king; so that after this statute, the benefit of clergy might be pleaded and allowed in all other treasons and felonies. Consequently, wherever clergy is not allowable in any other cases, it is taken away by some subsequent act of parliament. Consequently, where a new felony is made by an act of parliament, clergy is to be allowed, unless expressly taken away by such statute. And if it maketh a new felony, and takes away clergy not generally, but in such or such cases, regularly in other cases clergy is allowable. But if the statute enacts generally, that it shall be felony without benefit of clergy, or that he shall suffer as in case of felony without benefit

benefit of clergy, this excludes it in all circumstances, and to all intents. *Id.*

By a favourable interpretation of the statutes relating to the benefit of clergy, not only those actually admitted into some inferior order of the clergy, but also those who were never qualified to be admitted into orders (which was formerly tried by putting them to read a verse) have been taken to have a right to this privilege, as much as persons in holy orders. 2 *Haw.* 338.

Persons admitted to the benefit of clergy to be burned in the brawn of the left thumb, and, as a farther punishment, may be continued in prison for a year. Or, instead of being burnt in the hand, they may be transported for seven years. 18 *El. c. 7.* 4 *G. c. 11.*

A person admitted to his clergy forfeits all his goods that he hath at the time of the conviction. But presently upon his burning in the hand, he ought to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof. Also, it restores him to his credit; and consequently enables him to be a good witness. And it is holden, that after a man is admitted to his clergy, it is actionable to call him felon; because his offence being pardoned by the statute, all the infamy and other consequences of it are discharged. 2 *H. H.* 388. 2. *Haw.* 364.

CLERK, in its spiritual sense, denotes a person in holy orders: in its temporal acceptation, it signifies one who practises with his pen in any court, or otherwise.

CLERK OF ASSISE is he that writes all things judicially done by the justices of assize in their circuits. *Crompt. Jurisd.* 227.

CLERK OF THE MARKET is an officer incident to every fair and market, to punish misdemeanors therein; as a court of *pie poudre* is to determine all disputes relating to private or civil property. The object of his jurisdiction is principally the cognisance of weights and measures, to try whether they be according to the true standard; and if they be not, besides the punishment of the party by fine, the weights and measures themselves are to be burnt or otherwise destroyed.

CLERK OF THE PEACE is an officer attending upon the justices of the peace in sessions, appointed by the *custos rotulorum*. In the sessions where he is clerk of the peace, he shall not act as attorney or solicitor. 22 *G. 2. c. 46.* He shall certify into the kings-bench the names of all persons outlawed, attainted, or convicted of felony. 34 & 35 *H. 8. c. 14.* He shall deliver to the sheriff, within twenty days after September 29, yearly, a schedule of all fines and other forfeitures in sessions; and on or before the second Monday after the morrow of All Souls shall deliver

deliver a duplicate thereof upon oath, into the court of exchequer. 22 & 23 C. 2. c. 22. 4 & 5 W. c. 24. If he misbehaves in his office, the justices in sessions may suspend or discharge him. 1 W. c. 21.

CLOSE, breaking of; words used in an action of trespass: for which see **CLAUSUM FREGIT**.

CLOSE ROLLS, or *close writs*; grants from the crown, to particular persons, and for particular purposes, and therefore not being intended for public inspection, are *closed* up and sealed on the outside, and thereupon called *writs close* in contradistinction from grants relating to the public in general, which are therefore left open and not sealed up, and are called *littera patentes*, or *letters patent*. 2 Black. 346.

CLOSH was an unlawful game forbidden by some ancient statutes. It is said to have been the same as the modern nine-pins. In the statute 33 H. 8. c. 9. it is called *closh-cayles*, which seems to intend throwing at the kittles or nine-pins; as to this day in some parts of *England*, the throwing at cocks on *Shrove Tuesday* is called *cailing* of the cocks; so the children throwing at eggs about *Easter* is called *cailing* of eggs.

CLOUGH, a valley or hollow place between two mountains; a word not yet intirely out of use.

CLUNIAN monks were a reformed order of *St. Benedict*, who had their name from *Cluni* in *France*, where they settled about the year 912. They were brought into *England* in the time of *William* the Conqueror, and had their first house at *Lewes* in *Suffex*; and, at the time of the dissolution, they had twenty-seven houses here belonging to their order.

COACHES AND COACHMAKERS. By the 25 G. 3. c. 47. and the 29 G. 3. c. 49. several duties are imposed on persons keeping coaches and such like carriages, which are to be under the management of the commissioners of the window duties. And by the 25 G. 3. c. 49. every *coachmaker* shall take out a licence annually from the commissioners of excise: and by 27 G. 3. c. 13. a duty is also imposed on all *new coaches* and such like carriages made in *Great Britain*; for which see the acts and *Burn's Just.* title *Coaches*.

COALS:

1. By the 30 C. 2. c. 8. commissioners shall be appointed for the measuring and marking boats, wains, and carts, in the port of *Newcastle*, and the members thereof; which shall be by the bowl-tub of *Newcastle*, containing twenty-two gallons and a pottle *Winchester* measure, and being of twenty-seven inches diameter upon the top, and allowing twenty-one bowls of coals by heap measure to each chaldar. And every wain shall be seven bowls, cart three bowls and a bushel heaped measure; and three wains or six carts shall be allowed for a chaldar; which said

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admeasurement, by the 6 & 7 *W. c.* 10. shall be by a dead weight of lead or iron (or otherwise), allowing fifty-three hundred weight to a chaldron. The weight of a wain load seventeen hundred weight and an half, cart load eight hundred weight and three quarters. And no keel or boat shall contain more than ten chaldrons.

2. By 16 & 17 *C. 2. c. 2.* sea-coal brought into the *Thames* shall be sold by the chaldron containing thirty-six bushels heaped up. All other coals, from *Scotland* or elsewhere, sold by weight, shall be sold after the proportion of 112 pounds to the hundred.

And the lord mayor and aldermen in *London* shall set the prices of coals to be sold by retail. And elsewhere, three justices shall set the rates of all sea-coal sold by retail in any part of *England*, allowing a competent profit to the retailers; and if the retailers refuse to sell accordingly, the justices may appoint persons to enter and sell the said coals at such rates as so set and ascertained. 32 *G. 2. c. 27.*

3. Any coal factor receiving, or coal owner giving, any gratuity, for buying or selling any particular sort of coals, or selling one sort of coals for and as a sort which they really are not, shall forfeit 50*l.* 3 *G. 2. c. 26.*

4. For the admeasurement of sea-coals in the port of *London*, the coal bushel shall be made round, with a plain and even bottom, and shall be nineteen inches and an half from outside to outside, and shall contain one *Winchester* bushel and one quar of water; and all sea-coals sold by the said *Winchester* measure, shall be sold by the chaldron containing thirty-six of such bushels heaped up. 12 *An. st. 2. c. 17.*

5. Coals within the bills shall be carried in linen sacks sealed by the proper officer, which shall be at least four feet and four inches in length, and twenty-six inches in breadth: and sellers of coals by the chaldron or lesser quantity shall put three bushels of coals in each sack. 3 *G. 2. c. 26.* 32 *G. 2. c. 27.*

6. Wilfully and maliciously setting on fire any mine, pit, or delph of coal or cannel coal, is felony without benefit of clergy. 10 *G. 2. c. 32.*

7. If any person shall convey water into any coal work, with design to destroy or damage the same, he shall forfeit treble damages with costs. 13 *G. 2. c. 21.*

8. Setting fire to, demolishing, or otherwise damaging, any engine for draining water from coal mines, or for drawing coals out of the same; or any bridge, waggon way, or trunk, erected for conveying coals from any coal mine, or staith for depositing the same, is felony and transportation for seven years. 9 *G. 3. c. 29.*

COATS

COATS of arms were not in use till about the reign of king *Richard* the First, who brought them from the croifade in the Holy Land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained. 2 *Black.* 306.

COCKET, a seal belonging to the king's custom-house; or rather, a scroll of parchment sealed, and delivered by the officers of the customs to merchants, as a warrant that their merchandises are customed or have paid the king's duty.

COCOA NUTS. See COFFEE.

CODICIL, *codicillus*, a little book or writing, is a supplement to a will, or an addition made by the testator, and annexed to, and to be taken as part of a testament: being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former disposition of the testator. 2 *Black.* 500.

In case of a real estate, a codicil cannot operate, unless it be executed according to the statute of frauds and perjuries: 1 *Atk.* 426.

But it is not necessary that the codicil be annexed to the will; it may be in a separate instrument; yet the will and codicil make both but one will. 1 *Verz.* 442.

COFFEE, TEA, CHOCOLATE, AND COCOA-NUTS. By several statutes, regulations are made respecting the importation and management thereof, which are to be under the inspection of the officers of the customs and excise:

And by the 27 G. 3. c. 13. all former duties of customs and excise thereon, are repealed, and new duties imposed in lieu thereof, as set forth in schedules annexed to the said act.

COGNISANCE, or *cognizance* (Fr. *connissance*; Lat. *cognitio*) is used diversly in our law: Sometimes it is an acknowledgment of a fine, or confession of a thing done. So there is a cognizance of taking a distress. Sometimes it is the hearing of a matter judicially, as to take cognizance of a cause. And sometimes it is a jurisdiction, as cognizance of pleas is a power to call a cause or plea out of another court. This cognizance of pleas is a privilege granted by the king to a city or town, to hold pleas within the same; and when any one is impleaded in the courts at *Westminster*, the owner of the franchise may demand cognizance of the plea; but if the courts at *Westminster* be possessed of the plea before cognizance be demanded, it is then too late. *Terms of the Law.*

There are three sorts of inferior jurisdictions: one thereof is to hold pleas, and this is the lowest sort; for it is only a concurrent jurisdiction, and the party may sue there, or in the king's courts, if he will. The second, is a *cognizance of pleas*, and by this a right is vested in the lord of the franchise to hold the plea,

and he is the only person that can take advantage of it ; for the defendant cannot plead this to the jurisdiction of the court, but the lord must come in and claim his franchise. The third sort is an *exempt jurisdiction* ; as where the king grants to a great city, that the inhabitants thereof shall be sued within their city, and not elsewhere, this grant may be pleaded to the jurisdiction of the king's court, if there be a court within that city which can hold plea of the cause ; and no person can take advantage of this plea but the defendant. 3 *Salk.* 79.

But cognizance must be demanded before full defence is made, or imparlance prayed : for these are a submission to the jurisdiction of the superior court. And it will not be allowed if it occasions a failure of justice, or if an action be brought against the person himself who claims the franchise, unless he hath a power in such case to make another judge. 3 *Black.* 298.

Cognizance of a distress is, where a person hath taken a distress, and is impleaded for the same ; whereupon, if he took the distress in his own right, he avows the taking of it, as for rent in arrear or other cause, and this is called an *avowry* : but if he justifies in the right of another, as his bailiff or servant, he is then said to make *cognizance*, that is, he *acknowledges* the taking, but insists that such taking was legal, as he acted by the command of one who had a right to distrain. 3 *Black.* 149.

Cognizance signifies also the *badge* of a waterman or servant, which is usually the giver's crest, whereby he is known to belong to this or that nobleman or gentleman.

COIF, a title given to serjeants at law, who are called serjeants of the coif, from the lawn coif they wear on their heads under their caps, when they are created. The use of it was anciently to cover the clerical tonsure, otherwise called *corona clericalis* ; because the crown of the head was close shaved, and a border of hair left round the lower part, which made it look like a crown.

COIN :

1. Coin, in *French*, signifies a *corner*, and from thence hath its name (according to lord *Coke*) because in ancient times money was square, with corners, as it is in some countries to this day. 1 *Inst.* 207.

2. By various statutes, there are many offences relating to the coin ; which may be reduced into the following order :

Counterfeiting the king's money, or bringing false money into the realm counterfeit to the money of *England* ; clipping, washing, rounding, filing, impairing, diminishing, falsifying, sealing, lightening, edging, colouring, gilding, making, mending, or having in one's possession, any puncheon, counterpuncheon, matrix, stamp, dye, pattern, mould, edger, or cutting engine : all these incur the penalty of high treason.

And

And if any person shall counterfeit any such kind of coin of gold or silver, as are not the proper coin of this realm, but current therein by the king's consent, he shall be guilty of high treason.

And if any person shall tender in payment any counterfeit coin, he shall, for the first offence, be imprisoned six months; for the second offence, two years; and for the third offence shall be guilty of felony without benefit of clergy.

Blanching copper or other base metal, or buying or selling the same; and receiving or paying money at a lower rate than its denomination doth import; and also the offence of counterfeiting copper halfpence and farthings; incur the penalty of felony, but within clergy.

Counterfeiting coin, not the proper coin of this realm, nor permitted to be current therein, is misprision of treason.

A person buying, or selling, or having in his possession clippings or filings, shall forfeit 50*l.* and be branded in the cheek with the letter R.

Any person having in his possession a coining press, or casting bars or ingots of silver in imitation of *Spanish* bars or ingots, shall forfeit 50*l.*

Buying or selling bullion or molten silver, by any but a goldsmith or refiner, is six months imprisonment.

3. Any person to whom any money shall be tendered, any piece whereof shall be diminished otherwise than by reasonable wearing, or that he shall suspect to be counterfeit, may cut or deface the same: and if it shall appear so to be diminished or counterfeit, the person tendering the same shall bear the loss: if otherwise, he who cut or defaced the same shall receive it at the rate it was coined for. And if any question shall arise concerning it, the same shall be determined by the mayor or other head officer in a corporation, and elsewhere by a neighbouring justice. 9 & 10 *W. c.* 21. 13 *G.* 3. *c.* 77.

4. A reward of 40*l.* is given for convicting a counterfeiter of the gold or silver coin; and 10*l.* for a counterfeiter of the copper coin. 6 & 7 *W. c.* 17. 15 & 16 *G.* 2. *c.* 28.

5. No person can be enforced to take in payment any money but of gold or silver; except for sums under 6*d.* 2 *Inst.* 577.

COLLATERAL, from the Latin *laterale*, sideways, or that which hangeth by the side, not direct. As collateral *assurance* is that which is made over and above the deed itself; collateral *security* is where a deed is made of other lands besides those granted by the deed of mortgage. If a man covenants with another and enters into bond for performance of his covenant, the bond is collateral to the covenant, because it is external, and without the nature and essence of the covenant. If a man hath liberty to pitch booths, or standings in a fair or market in another man's

ground, it is collateral to the ground. The private woods of a common person, within a forest, may not be cut down without the king's licence; it being a prerogative collateral to the soil. And to be subject to the feeding of the king's deer is collateral to the herbage of the forest. *Crompt. Jurisd.* 185. *Munw.* 66.

Collateral *warranty*, is where the heir's title to the land is not derived from the warranting ancestor; as where a younger brother releases to a disseisor his father's land with warranty, this is collateral to the elder brother. *2 Black.* 301.

Collateral *issue*, is where a criminal attainted pleads some collateral matter in bar of execution, as the king's pardon, an act of grace, or diversity of person; namely, that he is not the same person that was attainted; which last is only, when some considerable time hath intervened between the attainder and the award of execution, in which a jury shall be impanelled to try this collateral issue; namely, the identity of his person; and not whether guilty or innocent, for that has been decided before. *4 Bla k.* 396.

Collateral *kindred*, are such as lineally spring from one and the same ancestor, but differ in this that they do not descend one from the other. As if a man hath two sons, who have each a numerous issue; both these issues are lineally descended from the same grandfather as their common ancestor, and are collateral kindred to each other, all having a portion of the blood of their common ancestor, and are therefore denominated *consanguinei*. *2 Black.* 204.

Collateral *descent*, is derived from the side of the *lineal*, as grandfather's brother, father's brother, and the like. As if a man purchase lands in fee simple, and dies without issue; for default of a lineal heir, he who is next of kin in the collateral line of the whole blood, though never so remote, comes in by descent as heir to him. *1 Inst.* 10.

COLLATIO BONORUM is, where a portion, or money advanced by the father in his life-time to a son or daughter, is brought into hotchpot, in order to have an equal distribution of the personal estate in case of his dying intestate. And this is in pursuance of the statute 22 & 23 C. 2. c. 10.

COLLATION is a benefice is, where the bishop and patron are one and the same person; in which case the bishop cannot present to himself, but he doth, by the one act of *collation* or *conferring* the benefice, the whole that is done in common cases by both presentation and institution.

COLLEGES in the universities are generally lay corporations, although the members of the college may be all ecclesiastical. *2 Salk.* 672.

And in the government thereof, the king's courts cannot interfere, where a visitor is specially appointed: for from him, and him

him only, the party grieved ought to have redress; the founder having reposed in him so entire a confidence, that he will administer justice impartially, that his determinations are final, and examinable in no other court whatsoever. 1 *Black.* 483.

But where the visitor is under a temporary disability, there the court of king's bench will interpose, to prevent a defect of justice. *Id.* 484.

The two universities, in exclusion of the king's courts, enjoy the sole jurisdiction over all civil actions and suits; except in such cases where the right of freehold is concerned. 3 *Black.* 83.

Their proceedings are in a summary way, according to the practice of the civil law. *Wood. b. 4. c. 2.*

An appeal lies from the chancellor's court to the congregation, thence to the convocation, and from thence to the delegates. *Id.*

But they have no jurisdiction unless the plaintiff or defendant is a scholar, or servant of the university, or of some college; but if either of them is a scholar, it is then a matter within their jurisdiction; but yet, if either of them is entered into a college by collusion, to avoid a suit in the king's courts, or to excuse himself from town offices, his privilege shall not be allowed.

And in order to be entitled to this privilege, it must appear, that the person claiming it is resident in the university at that time.

Also they have jurisdiction in criminal offences or misdemeanors, under the degree of treason, felony, or maim.

COMBAT, was a formal trial between two champions, of a doubtful cause or quarrel. See BATTEL.

COMBINATIONS amongst victuallers or artificers to raise the price of provisions, or any commodities, or the rate of labour, are in many cases severely punished by particular statutes; and in general, by the 2 & 3 *Ed.* 6. c. 15. with the forfeiture of 10*l.* or twenty days imprisonment, with an allowance only of bread and water, for the first offence; 20*l.*, or the pillory, for the second; and 40*l.* for the third, or else the pillory, loss of an ear, and perpetual infamy.

COMBUSTIO DOMORUM, burning of houses, anciently called *arson*, was by the common law denied the benefit of clergy, when all other felonies were entitled to it, except *insidiatio viarum*, or lying in wait for one on the highway, and *depopulatio agrorum*, or destroying and ravaging a country; which three offences were excluded from the benefit of clergy, as they were a kind of hostile acts, and in some degree bordered upon treason. 4. *Black.* 372.

COMBUSTIO PECUNIÆ was the ancient way of trying mixed and corrupt money, by melting it down, upon payments into the exchequer. In the time of king *Edm.* 2. a constitution

was

was made called the trial by combustion, the practice whereof differed little or nothing from the present method of assaying silver. *Lowndes on coin*, 5.

COMMAND. A wife shall not be excused the committing of any crime by the command of her husband; nor shall a servant be excused the committing a crime by the command of his master. 1 *Haw.* 3.

At the command of the constable, all persons of ability within his constablewick are bound to assist him in suppressing a riot or an affray, and in keeping the king's peace: and if they disobey his command, they are punishable by fine and imprisonment. 1 *Haw.* 137.

COMMANDRIES were manors or estates belonging to the Knights Hospitalers, otherwise called the knights of *St. John of Jerusalem*, where, erecting churches for the service of God, and convenient houses, they placed some of their fraternity under the government of a *commander*, who were allowed proper maintenance out of the revenues under their care, and accounted for the remainder to the grand prior at *London*: so *New Eagle* in *Lincolnshire*, is still called the *commandry* of *Eagle*. Where such estates belonged to the Knights Templars, the person who presided over them was usually one of those who had by the grand master been created *præceptores templi*, from whence those estates were styled *præceptorias*. They were only cells to the principal house at *London*.

COMMENDAM, is a benefice or ecclesiastical living, which being void, or to prevent its becoming void, *commendatur*, is committed, to the charge and care of some sufficient clerk, to be supplied until it may conveniently be provided of a pastor. Thus when a parson of a parish is made the bishop of a diocese, there is a cession of his benefice by the promotion: but if the king gives him power to retain his benefice, he shall continue parson thereof, and shall be said to hold it *in commendam*. A *commendam* may be temporary, for one, two, or three years; or perpetual, by a kind of dispensation to avoid a vacancy of the living, and is called a *commendam retinere*. There is also a *commendam capere*, which is to take a benefice *de novo*, in the bishop's own gift, or the gift of some other patron consenting to the same; and this is the same to him, as institution and induction are to another clerk. 1 *Black.* 393.

COMMISSARY, is he that is limited by the bishop to some certain part of the diocese; and in most cases has the authority of official principal and vicar general within his limits.

COMMISSION, is taken for the warrant or appointment whereby one or more persons have the charge of any matter committed to them. The *judges* by their commission have power to hear and determine causes. And most of the great officers, judicial

cial and ministerial, of this realm are made by commission. Anciently there was a commission of *anticipation*, to collect a tax or subsidy before the day. Commission of *array* was to muster and array, or set in order, all the men able to bear arms in such a district. Commission of *association*, is to associate certain learned persons with the judges in their circuits. Commission of *bankruptcy*, is a commission issued out of chancery to certain commissioners appointed to take order with the bankrupt's estate for the satisfaction of his creditors. Commission of *charitable uses*, issues out of chancery to divers persons, where lands given to charitable uses are misemployed, or there is any fraud or abuse of the charity, in order to rectify such abuse. Commission of *delegates*, is granted in case of appeal to the king in chancery, directed to certain persons skilled in the ecclesiastical and temporal laws, to determine the matter in issue. Commission of *lunacy*, is a commission out of chancery to inquire whether a person represented to be lunatic, be so or not; that if so, the king may commit the care of him and of his estate to some friend, who in such case is called the committee. Commission of *rebellion*, otherwise called a *writ* of rebellion, issues, where a man, after proclamation made by the sheriff upon a process out of chancery to present himself to the court by a day assigned, makes default in appearance; and this is directed to certain persons to apprehend the party as a *rebel* and contemner of the laws, and bring him to the court on a day therein assigned. It issues after an attachment and a *non inventus* returned thereon. Commission of *sewers*, is directed to certain persons to cause drains and ditches to be well kept and maintained in marshy and fenny grounds, for the better conveyance of the water, and preservation of the land.

COMMISSIONER, is he that hath a commission, or other lawful warrant, to examine any matters, or to execute any public office. Commissioners must pursue the authority of their commission, otherwise their acts will be void. For their office is to do what they are commanded, and herein it is necessarily implied, that they may do that also without which what is commanded cannot be done. If their authority is appointed by any statute law, they must execute it as the statute prescribes. If a commission is given to commissioners to execute a thing against law, they are bound not to accept or obey it.—Besides commissioners relating to judicial proceedings, there are commissioners of the treasury, of the navy, of the customs, of the excise, and many others.

COMMITMENT, is sending of a person to prison, by warrant or order, who is charged with any crime. And it may be, by the judges, justices of the peace, or other magistrates, who have authority for the same by the laws and statutes of this realm.

It must be in *writing*, either in the name of the king, and only

only tested by the person who makes it; or it may be made by such person in his own name, expressing his office or authority, and must be directed to the gaoler, or keeper of the prison. 2 *Haw.* 119.

It should contain the *name* of the party committed, if known; if not known, then it may be sufficient to describe the person by his age, stature, complexion, colour of his hair, or the like, and to add that he refuseth to tell his name. 1 *H. H.* 577.

It ought to contain the *cause*, and the certainty thereof; as if it be for felony, it must contain the special nature of the felony, as felony for the death of such a man; if for burglary, then to say for burglary in breaking the house of such a one: and, therefore, a commitment to answer such things as shall be objected against him, is utterly against law. 2 *Inst.* 591.

It must have an apt *conclusion*; as, where a man is committed as a criminal, it must be until he be discharged by due course of law; if for contumacy, then until he comply and perform the thing required. 2 *Haw.* 120.

It must be under *seal*; unless it be by some court of record, for there the record itself, or a memorial thereof, are a sufficient warrant without any warrant under seal. 1 *H. H.* 584.

COMMON :

1. *Common, what.*
2. *Origin of the right of common,*
3. *Of common appendant.*
4. *Common appurtenant.*
5. *Common by reason of vicinage.*
6. *Common in gross.*
7. *Common of estovers.*
8. *Common of fishery.*
9. *Common of turbary, and other digging the soil.*
10. *Disturbance of common by one who has no right.*
11. *Disturbance of common by uncommonable goods.*
12. *Disturbance of common by surcharging.*
13. *Disturbance by inclosure, or other obstruction.*
14. *Of the lord's right to inclose the surplus.*

1. *Common, what.*

COMMON, is a profit which a man hath in the lands of another. And it is called *common*, because it is common to many. 1 *Inst.* 122.

2. *Origin of the right of Common.*

When a lord of a manor (wherein was great waste ground) did infeoff others of some parcels of arable land, it was necessary that the feoffee should have common in the wastes, or otherwise, as incident to the feoffment. And this was permitted, not only for the

the encouragement of agriculture, but from the necessity of the thing. For a man could not plow or manure his grounds without beasts; and they could not be sustained without pasture; and pasture could not be had but in the lord's wastes, and in the unclosed fallow grounds of himself and the other tenants. The lord therefore annexed this right of common, as inseparably incident to the grant of the lands. 2 *Inst.* 85, 6. 2 *Black.* 33.

3. Of Common Appendant.

COMMON APPENDANT, is a right, belonging to the owners or occupiers of arable land, to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are either beasts of the plough, or such as manure the ground. And for this a man need not prescribe, because he hath it of common right. 1 *Inst.* 122.

But he shall not use the land with hogs, goats, geese, or the like; for these are not necessary to plow the land or to manure it. 1 *Roll's A't r.* 397.

Common appendant ought to be appendant to *arable* land, that is, which is capable of being made arable; and not to any land not arable, nor to an house. *Ibid.*

A *cottage* may prescribe to have common for all beasts levant and couchant as appendant to his cottage. For a cottage contains a curtilage at least; and a cottage by the statute ought to have four acres of land to it. And it hath been holden, that foddering cattle in the yard is an evidence of levancy and couchancy. 1 *Salk.* 169.

If common appendant be claimed to a *manor*, yet in reality it is appendant to the *demesnes*, and not to the *services*; and therefore, if a tenancy *escheat*, the lord shall not increase his common by reason thereof. 1 *Inst.* 122.

If the lord *infranchises* a copyholder's estate, the right of common which he had before as a customary tenant is gone, and cannot be restored but by special words in the enfranchisement, and not by the common words *with the appurtenances*. But a grant of *all commons* usually occupied with the tenement, will pass such common as the first was. *Cro. Ja.* 253. *Mo.* 467.

He that hath common appendant, can keep but a number of cattle proportionable to his land; for he can common with no more than the lands to which his common belongs are able to maintain. 3 *Salk.* 93.

And, generally, so many cattle as the land to which the common is appendant, can maintain in the winter, so many shall be said levant and couchant. *Noy,* 30. 2 *Brownl.* 101.

Generally, the commoner cannot use the common but with his own proper cattle; but if he hath not any cattle to manure the land; he may borrow other cattle to manure it, and may use

use the common with them; for by the loan, they are in a manner made his own cattle for the time. 1 *Roll's Abr.* 398. Also the lord may license a stranger to put in his cattle, if he leaves sufficient room for the commoners besides. 1 *Roll's Abr.* 396.

He who has common appendant to one acre of land, shall not use this common but with beasts that are levant and couchant upon the same acre. *Br. Common, pl.* 8.

Common appendant may be, to common after the corn is sowed till it is sown again. So it may be to common in the meadow ground after the hay is carried off till Candlemas. So it may be to common from the feast of *St. Augustine* to *All Saints*, and the like. 1 *Roll's Abr.* 397.

If all the inhabitants of a town prescribe to have common in such a field after harvest, and one particular man, who hath land within the said field sowed, will not within convenient time gather in his corn, but suffer the same to continue there on purpose to bar the inhabitants of their common; they may put in their cattle, and if they eat his corn he hath no remedy. 2 *Leon.* 202.

Where the inhabitants of one parish have common appendant in certain waste grounds in another parish, they shall pay taxes where the estate lies; for it is to be considered as part of the estate, and the estate to be taxed higher upon that account. 1 *Salk.* 169.

4. Common Appurtenant.

COMMON APPURTENANT is, where the owner of land hath a right to put in other goods besides such as are generally commonable, as hogs, goats, geese, and the like. This, not arising from the necessity of the thing, like common appendant, is therefore not of common right, but can only be claimed by immemorial usage and prescription, which the law esteems sufficient proof of a special grant or agreement for this purpose. 2 *Black.* 33.

If a man purchase part of the land wherein common appendant is to be had, the common shall be apportioned, because it is of common right; but not so of common appurtenant, or of any other common of what nature soever. But both common appendant and appurtenant shall be apportioned by alienation of part of the land to which common is appendant or appurtenant. 1 *Inst.* 122.

Common appurtenant may be to a house, meadow, pasture, as well as to arable land, and ought to be prescribed for by special words, as being against common right, and it may be severed from the land to which it is appurtenant. *Wood. b.* 2. c. 2. f. 6.

If a man grants common appurtenant to such a close, it is good,

good, and shall pass by grant of the close; for common appurtenant may be created at this day. 2 Sid. 87.

Burgagers in a borough may have common appurtenant to their burgages by prescription. 2 Sid. 462.

5. Common by reason of Vicinage.

Common because of VICINAGE, or neighbourhood, is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another, the beasts of the one straying mutually into the other's grounds, without any molestation from either. This is, indeed, only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits; and therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one township a right to put his beasts originally into the other's common, for then they are distrainable; but if the escape, and stray thither of themselves, the law winks at the trespass. 2 Black. 33.

And the inhabitants of one vill shall not put in more beasts, but having regard to the estates of the inhabitants of the other vill. Br. Common, pl. 55.

6. Common in Gros.

Common IN GROSS, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by the parson of a church, or the like corporation sole. This is a separate inheritance, intirely distinct from any landed property, and may be vested in one who hath not a foot of ground in the manor. 2 Black. 34.

Of common appendant, appurtenant, and in gros, some are certain, that is, for a certain number of beasts; some certain by consequence; namely, for such as are levant and couchant upon the land; and some are more uncertain, as common without number in gros; and yet the tenant of the land must common or feed there also. 1 Inst. 122.

If a man prescribes for common appurtenant for a certain number of cattle, it is not necessary, nor material, to shew that they were levant and couchant, because it is no prejudice to the owner of the soil, for that the number is ascertained. L. Raym. 726. 1015.

7. Common of Estovers.

Common of ESTOVERS (from the French *estoffer*, to furnish) is a liberty of taking necessary wood for the use or furniture of a house or farm, from off another's estate. The Saxon word

bote

bote is of the same signification with the French *estovers*, and therefore *housebote* is a sufficient allowance of wood, to repair or to burn in the house, which latter is sometimes called *firebote*; *ploughbote* and *cartbote* are wood to be employed in making and repairing all instruments of husbandry; and *haybote* or *hedgebote* is wood for repairing of hays, hedges, or fences. These botes or estovers must be reasonable; and such, any tenant for life or for years may take from off the land let or demised to him, as incident to his estate, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary. 1 *Inst.* 41. 2 *Black.* 35.

8. Common of Fishery.

Common of FISHERY is, a liberty of fishing in another man's water. 2 *Black.* 34.

If a man claim by prescription any manner of common in another man's land, and that the owner of the land shall be excluded from having pasture, estovers, or the like; this is a prescription or custom against law, to exclude the owner of the soil; for it is against the nature of the word *common*, and it was implied in the first grant that the owner of the soil should take his reasonable profit there. But a man may prescribe or allege a custom to have and enjoy the sole feeding of the land from such a day till such a day, and hereby the owner of the soil shall be excluded to pasture or feed there; and so he may prescribe to have *separate* pasture, and exclude the owner of the soil from feeding there. So a man may prescribe to have a *separate* fishery in such a water, and the owner of the soil shall not fish there; but if he claim to have *common* of fishery, or a *free* fishery, the owner of the soil shall fish there. 1 *Inst.* 122.

9. Common of Turbary, and other digging the Soil.

Common of TURBARY is a liberty of digging turf upon another man's ground. There is also a common of digging *stones, coals, minerals*, and such like. 2 *Black.* 34.

Common of turbary cannot be pendant to land, but only to an house. 1 *Roll's Abr.* 397.

If on an action of trespass the defendant justifies, that he and his ancestors, and all whose estate he hath in a certain house; have used time out of mind to have common of turbary to dig and sell at their pleasure, as belonging to the house; this plea is bad, and repugnant in itself; for turbary, appertaining to an house, ought to be spent in the house, and not sold abroad. *Noy,* 145.

New erected cottages, though they have four acres of ground laid to them, ought not to have common of turbary in the waste. 2 *Inst.* 740.

Where

Where turf is taken away from the common, the lord only can bring his action; but, it is said, the commoners may have an action for the trespass by entering on the common, whereby their herbage is made worse. 1 *Roll's Abr.* 89. 398.

10. *Disturbance of Common, by one who has no right.*

Where one, who hath no right of common, puts his cattle into the land, and thereby deprives the cattle of the commoners of their respective shares of the pasture, the lord, or any of the commoners, may distrain them damage feasant; or, a commoner may bring an action upon the case to recover damages, provided the injury done be any thing considerable, so as that he may lay his action that thereby he was deprived of his common. But for a trivial trespass, the commoner hath no action; but the lord of the soil only, for the entry and trespass committed. 3 *Black.* 237.

If a man, that has no right, comes and cuts fern upon the common, and by burning the same converts it to his own use, a commoner cannot justify dispersing the ashes, but may bring his action. *Str.* 777.

11. *Disturbance of Common by Uncommonable Goods.*

Where one, who hath a right of common, puts in cattle that are not commonable, as hogs and goats, the lord or any of the commoners, as is aforesaid, may distrain them damage feasant, or (if the damages be considerable) a commoner may bring his action. But the lord of the soil, by custom or prescription, but not without, may put uncommonable cattle upon the common. 3 *Black.* 237.

12. *Disturbance of Common by surcharging.*

Disturbance of common by surcharging is, where more cattle are put on the common than the pasture or herbage will sustain, or the party hath a right to do. This injury by surcharging can, properly speaking, only happen when the common is appendant or appurtenant, and of course limited by law; or where, when in gross, it is expressly limited and certain: for where a man hath common in gross, without number or without stint, he cannot be a surcharger. However, even where a man is said to have common without stint, still there must be left sufficient for the lord's own beasts; for the law will not suppose that, at the original grant of the common, the lord meant to exclude himself. 3 *Black.* 237.

The usual remedies for surcharging the common, are either by distraining so many of the beasts as are above the number allowed, or else by an action of trespass; both which may be had by the lord; or by a special action on the case for damages, in which
any

any commoner may be plaintiff. But the ancient and most effectual method of proceeding is, by *writ of admeasurement of pasture*; which is executed by a jury, who upon their oaths are to ascertain, under the superintendence of the sheriff, what and how many cattle each commoner is intitled to feed. And the rule for this admeasurement is generally understood to be, that the commoner shall not turn more cattle upon the common, than are sufficient to manure and stock the land to which his right of common is annexed. And if, after this admeasurement, the same defendant surcharges the common again, the plaintiff may have a writ of second surcharge; and if it is found that he hath again surcharged, he shall forfeit to the king the supernumerary cattle put in, and shall also pay damages to the plaintiff. 3 *Black.* 238.

If the lord surcharges the common, a commoner may not drive his cattle off the common, or distrain them damage feasant, as he may the cattle of a stranger; but the remedy against the lord is either an assize, or an action on the case. *F. N. B.* 125. *Burr. Mansf.* 2426.

A custom of a manor, for the reeve to make a drift of the cattle at any time by the appointment of the steward, is good, and is more reasonable than a custom to drive the common at a certain time; because, if that were the custom, the commoners would surcharge the common all the rest of the year, except at those times. *L. Raym.* 1186.

13. *Disturbance by Inclosure, or other Obstruction.*

Disturbance of common by inclosure or other obstruction is, when the owner of the land, or other person, so incloses or otherwise obstructs it, that the commoner is precluded from enjoying the benefit to which he is by law intitled. This may be done, either by erecting fences, or by driving the cattle off the land, or by plowing up the soil of the common or it may be done by erecting a warren therein, and stocking it with rabbits in such quantities, that they devour the whole herbage, and thereby destroy the common. For in such case, though the commoner may not destroy the rabbits, yet the law looks upon this as an injurious disturbance of his right, and hath given him his remedy by action against the owner. 3 *Black.* 240.

A commoner, without a special custom, may not cut bushes, dig trenches, or get clay upon the common, for this destroys the grass, and carrying it away doth damage to the ground, so that the other commoners cannot enjoy the common in as ample manner as they ought to do. *Godb.* 334.

14. *Of the Lord's Right to inclose the Surplus.*

If any commoner incloses, or builds on the common, every commoner may have an action for the damage. 1 *Roll's Abr.* 398.
And

And if the lord incloses on the common, and leaves not common sufficient, the commoners may not only break down the inclosure, but may put in their cattle, although the lord plows and sows the land. 2 *Inst.* 88.

But by the statute of *Merton*, 20 *H.* 3. c. 4. the lord may approve (which is an old word, and signifies the same as improve) that is, may inclose and convert to the uses of husbandry any waste grounds, in which his tenants have common appendant, provided he leaves sufficient common to his tenants, according to the proportion of their land. And the statute of 13 *Ed.* 1. c. 46. extends this liberty of approving, in like manner, against all others that have common appurtenant or in gross.

Which said statute of 20 *H.* 3. c. 4. is as follows, ' Because
' many great men, which have infeoffed knights and their free-
' holders of small tenements in their great manors, have com-
' plained that they cannot make their profit of the residue of their
' manors, as of wastes, woods, and pastures, whereas the same
' feoffees have sufficient pasture, as much as belongeth to their
' tenements, it is provided, that whensoever such feoffees do
' bring an assize of novel disseisin for their common of pasture,
' and it is knowledged before the justices that they have as
' much pasture as sufficeth to their tenements, and that they
' have free egress and regress from their tenement unto the pas-
' ture, then let them be contented therewith; and they on
' whom it was complained shall go quit of as much as they have
' made their profit of their lands, wastes, woods, and pastures :
' but if they allege, that they have not sufficient pasture, or suffi-
' cient ingress and egress according to their hold, then let the
' truth be inquired of by assize; and if it be found by the assize,
' that the same deforceors have disturbed them of their ingress
' and egress, or that they had not sufficient pasture as aforesaid,
' then they shall recover their seisin by view of the inquest; so
' that by their discretion and oath, the plaintiff: shall have suf-
' ficient pasture, and sufficient ingress and egress in form afore-
' said, and the disseisors shall be amerced and shall yield damages.'

The approvement must be made and divided by some inclosure or defence; for it is lawful for the tenant to put his cattle into the residue of the common, and if they stray into that part whereof the approvement is made, in default of inclosure, he is no trespasser. 2 *Inst.* 87.

And if the lord doth inclose part, and leave not sufficient common in the residue, the commoner may break down the whole inclosure, because it standeth upon the ground which is his common. 2 *Inst.* 88.

If the lord make a feoffment of certain acres, the feoffee may inclose, because the feoffment is an approvement in its nature. 2 *Inst.* 87.

If a man incloses where by law he may, he is bound to leave a good way, and also to keep it in repair continually at his own charge. *Yo.* 296. 8. *Car.* Henn's case.

COMMON, *tenants in.*

TENANTS IN COMMON, are they that have lands or tenements in fee simple, fee tail, or for term of years, or any other fixed estate, and they have such lands or tenements by several titles, and not by joint title, and none of them knoweth of this his several, but they ought not by the law to occupy these lands or tenements in common, and *proindiviso*, to take the profits in common. *Litt.* sect. 292.

And because they come to such lands or tenements by several titles, and not by one joint title, and their occupation and possession shall be by law between them in common, they are therefore called tenants in common. *Ibid.*

Parceners are only by descent, jointenants are only by purchase, and tenants in common are by descent, purchase, or prescription. *1 Inst.* 188.

An estate given to two persons *equally to be divided* between them, though in *deeds* it hath been said to be a joint tenancy, yet in *wills* it is a tenancy in common. This nicety in the wording of grants makes it the most usual, as well as the safest way, when a tenancy in common is meant to be created, to add express words of exclusion as well as description, and limit the estate to hold as tenants in common, and not as jointenants. *2 Black.* 193.

As they take by distinct moieties, and have no intirety of interest, therefore there is no survivorship between tenants in common. *2 Black.* 194.

If tenants in common be disseised, they must have several actions, and not one joint action; and the reason is, for that they were seised by several titles. But otherwise it is of jointenants; for if there be twenty jointenants, and they be disseised, they shall have in all their names but one action, because they have only one joint title. *Litt.* sect. 311.

But as to actions personal, tenants in common may have such actions personal jointly in all their names, as of trespass, or of offences which concern their tenements in common, as for breaking their houses, breaking their closes, feeding, waisting, and destroying their grags, cutting their woods, fishing in their piscary, and such like. In this case, they shall have one action jointly, and shall recover jointly their damages, because the action is in the personalty, and not in the reality. *Litt.* sect. 315.

Tenants in common, like as jointenants, are compellable to make partition. *2 Black.* 194.

COMMON LAW is so called, as it is the common municipal law, or rule of justice, throughout the kingdom. For although there are divers particular laws, some by custom applied to particular

ticular places, and some to particular causes, yet that law, which is common to the generality of persons, things, and causes, and hath a superintendency over those particular laws that are admitted in relation to particular places or matters, is the common law of *England*.

It is distinguished from the *statute* law, or acts of parliament, as having been the law of the land, before any acts of parliament that are now extant were made, though possibly a considerable part of it might have been acts of parliament in ancient time, which are now lost : for there are no acts of parliament now anterior than the reign of king *Henry* the third.

This common law is delivered down to us in the writings of divers learned men, such as *Glanvil*, *Bracton*, *Briton*, the author of *Fleta*, and above all Sir *Edward Coke*, whose works may justly be stiled the grand repository of the common law.

COMMON PLEAS is one of the king's courts of record at *Westminster*, frequently termed in law the *common bench*. By the ancient Saxon constitution, there was only one superior court of justice in the kingdom, and that had cognizance both of civil and spiritual causes ; namely, the *wittena gemot*, or general council, which assembled annually or oftener, and attended the king wherever he resided, as well to do private justice, as to consult upon public business. At the conquest, the ecclesiastical jurisdiction was separated from the temporal ; and of the temporal judges, the Conqueror separated their deliberative power as counsellors to the crown, from their ministerial power as judges. Of those who constantly attended him as judges, he established a regular court in his own hall, thence called by ancient authors *aula regia*, or *aula regis*. And these were bound to follow the king's household in all his progresses and expeditions ; which being found very inconvenient to the subject, it was afterwards established by *magna charta*, that common pleas should not follow the king's court, but be holden in some place certain. Which place certain was appointed to be in *Westminster-hall*, the place where the *aula regis* originally sat, when the king resided in that city ; and there it hath ever since continued. And this jurisdiction became afterwards subdivided and broken into several distinct courts of judicature, and the distribution of justice was thrown into so provident an order, that the judicial officers were made to form a cheque upon each other ; the court of chancery issuing all original writs under the great seal to the other courts ; the common pleas being allowed to determine all causes between private subjects ; the exchequer managing the king's revenue ; and the court of king's bench retaining all the jurisdiction which was not cantoned out to the other courts, and particularly the superintendance of all the rest by way of appeal ; and the sole cognizance of pleas of the crown or criminal causes. For pleas or suits are

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regularly

regularly divided into two sorts: *pleas of the crown*, which comprehend all crimes and misdemeanors wherein the king (on behalf of the public) is plaintiff; and *common pleas*, which include all civil actions depending between subject and subject. The former of these were the proper object of the court of king's bench, the latter of the court of common pleas: and in this court only can *real* actions, that is, actions which concern the right of freehold or the *realty*, be originally brought; and in this court also, all other, or *personal*, pleas between man and man, are determined; but in some of these the king's bench hath a concurrent authority. But a writ of error, in the nature of an appeal, lies from the court of common pleas to the court of king's bench. 3 *Black.* 37.

This court can hear and determine causes removed out of inferior courts by *pone*, *recordare*, or other like writs. They can also grant prohibitions to keep other courts, as well ecclesiastical as temporal, within due bounds.

COMPOSITION REAL, for tithes, is, where the incumbent of any church, together with the patron and ordinary, do agree by deed under their hands and seals, or by fine in the king's court, that certain lands shall be freed and discharged of the payment of tithes for ever, paying some annual payment, or doing some other thing, to the benefit of the parson or vicar to whom the tithes did belong. And from these real compositions it is presumed, that all prescriptions *de modo decimandi* took their first rise and beginning; but it is more probable, that most of them at this day have grown from the negligence and carelessness of the clergy themselves. *Degge*, p. 2. c. 20.

COMPURGATOR, was one who made oath, together with the defendant, of the defendant's innocence with respect to the matter charged against him. This practice was frequent in the ecclesiastical courts; and in the temporal courts it is still essential in what is called waging of law; in which case the defendant makes oath of the truth of his allegation, and brings a certain number of others who avow, upon their oaths, that they believe what he said is true.

CONCORD, is a supposed *agreement* between the parties in levying a fine of lands, in which the deforciant (or he who keeps the other out of possession) acknowledges that the lands in question are the right of the complainant; which acknowledgment is made before one of the judges of the court, or before commissioners in the country, and is entered in this form: "And the agreement is such, to wit, that the aforesaid *A. B.* hath acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said *C. D.* as those which the said *C. D.* hath of the gift of the said *A. B.* and those he
" hath

“ hath remised and quitted claim from him and his heirs
 “ to the aforefaid C. D. and his heirs for ever.” 2 *Black.* 350.
CONDITION :

ESTATES which men have in lands or tenements upon
 CONDITION, are of two forts ; either upon Condition *in deed*, or
 upon Condition *in law*.

Condition *in deed* is, as if a man, by deed indented, enfeoffs
 another in fee fimple, referving to him and his heirs yearly a
 certain rent payable at one feaft or divers feasts, on condition,
 that if the rent be behind, it fhall be lawful for the feoffor and his
 heirs to enter into the fame lands or tenements ; or if it happen
 the rent be behind by a week, or a month, or half a year, after
 any day of payment of it, that then it fhall be lawful to the
 feoffor and his heirs to enter : in thefe cafes, if the rent be not
 paid at fuch time, or before fuch time limited and fpecified
 within the condition comprized in the indenture, then may the
 feoffor or his heirs enter into fuch lands or tenements, and oust
 the feoffee thereof quite, and have and hold the fame in his
 former eftate. And it is called an eftate *upon condition*, becaufe
 that the eftate of the feoffee is defeafible, if the condition be not
 performed. In the fame manner it is, if lands be given in
 tail, or let for term of life or years upon condition. *Litt.*
 325, 326.

But where a feoffment is made of certain lands, referving a
 certain rent, upon fuch condition, that if the rent be behind,
 it fhall be lawful for the feffor and his heirs to enter, and to
 hold the land until he be fatisfied of the rent behind ; in this
 cafe, if the rent be behind, and the feoffor or his heirs enter, the
 feoffee is not altogether excluded from this, but the feoffor
 fhall have and hold the land, and thereof take the profits, until
 he be fatisfied of the rent behind, and when he is fatisfied, then
 may the feoffee re-enter into the fame land, and hold it as he held
 it before. *Litt.* 327.

There are divers words (amongft others) which of themfelves
 make eftates upon condition ; one is the word *condition*, as if
 A. infeoff B. of certain land, to have and to hold to the faid B.
 and his heirs, *upon condition* that the faid B. and his heirs do
 pay or caufe to be paid to the aforefaid A. and his heirs yearly
 fuch a rent ; in this cafe, without any more faying, the feoffee
 hath an eftate upon condition. *Litt.* 328.

Alfo, if the words were fuch, *provided always*, that the
 aforefaid B. do pay or caufe to be paid to the aforefaid A. fuch
 a rent ; or thefe, *fo that* the faid B. do pay or caufe to be paid
 to the faid A. fuch a rent : in thefe cafes, without more faying,
 the feoffee hath but an eftate upon condition ; fo as if he doth
 not perform the condition, the feoffor and his heirs may enter.
Litt. 329.

Also there are other words in a deed which cause the tenements to be conditional; as if upon such feoffment a rent be reserved to the feoffor and his heirs, and afterward these words are put into the deed, that if it happen the aforesaid rent be behind in part or in whole, it shall then be lawful for the feoffor and his heirs to enter; this is a deed upon condition. *Litt.* 330.

Estates which men have upon condition *in law*, are such estates which have a condition by the law to them annexed, although it be not specified in writing. As if a man grant by his deed to another the office of parkership of a park, to have and occupy the same office for term of his life; the estate which he hath in the office is upon condition in law, namely, that the parker shall well and lawfully keep the park, and shall do that which to such office belongeth; or otherwise it shall be lawful to the grantor and his heirs to oust him, and to grant it to another if he will. And such condition as is intended by the law to be annexed to any thing, is as strong as if the condition were put in writing. *Litt.* 378.

Also estates of lands or tenements may be made upon condition in law, although upon the estate made there was not any mention or rehearsal made of this condition. As if a lease be made to the husband and wife, to have and to hold to them during the coverture between them; in this case they have an estate for term of their lives upon condition in law; that is, if any of them die, or that there be a divorce between them, then it shall be lawful for the lessor and his heirs to enter. *Litt.* 380.

If the condition of a bond be, to pay money by instalments, the bond becomes forfeited on failure of the first payment: for in this case there is a difference between an *action of debt* upon a bond, and an *action on a contract* for paying several sums at several times. 1 *Wilson*, 80. 1 *Inst.* 292.

CONFEDERACY, is when two or more combine together to do any damage or injury to another, or to do any unlawful act. And in some cases it is punishable, though nothing be put in execution. But to render it punishable before it is executed, it ought to have these incidents: 1. It must be declared by some matter of prosecution, as by making of bonds or promises one to another. 2. It should be malicious, as for unjust revenge. 3. It ought to be false, against an innocent person. 4. It is to be out of court voluntarily. *Terms of the law.*

CONFESSION is, where a prisoner being arraigned for an offence, and being asked whether he is guilty or not guilty, confesses the crime with which he is charged; which is the highest conviction that can be. But it is usual for the court, especially if it be for a capital offence, to advise the party to plead, and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 2 *H. H.* 225.

Besides

Besides the *express* confession, there is also an *implied* confession, in inferior offences that do not amount to felony, whereby the party doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine; which submission the court may accept of if they think fit, without putting him to a direct confession. 2 *Haw.* 333.

There is also another species of confession, which is called an *approvement*. And that is, when a person indicted of treason or felony, and arraigned for the same, doth confess the fact before any plea pleaded; and accuseth others his accomplices of the same crime, in order to obtain his pardon. But this course hath been long disused. And in many cases, by several acts of parliament, encouragement is given to accomplices, for the convicting of offenders, by offering to the said accomplices a pardon. 4 *Black.* 330.

Confession of the defendant taken upon an examination before justices of the peace, or in discourse with private persons, may be given in evidence against the party confessing, but not against others. But wherever a man's confession is made use of against him, it must be all taken together, and not by parcels. 2 *Haw.* 429.

Sometimes there is a confession in a civil action; but not usually of the whole complaint, for then the defendant would probably end the matter sooner, or not plead at all, but suffer judgment to go by default: but, sometimes, after tender and refusal of debt, if the creditor harasses his debtor with an action, it then becomes necessary for the defendant to confess the debt and plead the tender; for a tender by the debtor, and refusal by the creditor, will in all cases discharge the costs. 4 *Black.* 303.

So, in order to strengthen the creditor's security, it is usual for the debtor to execute a warrant of attorney to confess judgment in an action to be brought by such creditor; which judgment, when confessed, is complete and binding. 3 *Black.* 397.

CONFIRMATION of lands, is of a nature nearly allied to a release. Lord *Coke* defines it to be, a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased. It is a strengthening of an estate formerly made, which is voidable, though not presently void: as for example; a bishop granteth his chancellorship by patent, for term of the patentee's life: this is not a void grant, but voidable by the bishop's death, except it be strengthened by the confirmation of the dean and chapter. 2 *Black.* 325.

If tenant for life leases for forty years, and dies during that term, the lease for years is voidable by him in reversion; yet if he hath confirmed the estate of the lessee for years, before the death

death of the tenant for life, it is no longer voidable, but sure. *Id.*

Confirmation is either *express* or *implied*. *Express*, as by the words "ratify, approve, and confirm." *Implied*, as by the words "have given and granted," "have demised," or the like; which in some cases shall enure to the same intent as the words "have confirmed." *Wood. b. 2. c. 3.*

Every confirmation is *perfecting*, *increasing*, or *diminishing*. *Perfecting*; as when one makes an estate absolute that was conditional. *Increasing*; as when an estate at will is increased to an estate for years. *Diminishing*; as where a landlord confirms the estate of his tenant to hold by lesser rent, or the like. *Id.*

CONFISCATION, from the Latin, *fyfus*, which signified the emperor's treasury, is a forfeiture of lands or goods to the king for certain crimes or misdemeanors. These are by our lawyers termed *forisfacta* (forfeited); that is, such whereof the property is gone away or departed from the owner. Every offence is deemed an injury against the public; and hence in every offence of an atrocious kind, the law hath exacted a total confiscation of the *goods*, and in some cases a temporary, in other cases a perpetual, confiscation of the *lands* of the offender to the king as representative of the public. 1 *Black. 299.*

CONGEABLE, from the French *conge*, leave or permission, signifies in our law as much as *lawful*, or lawfully done with permission; as entry congeable, or the like.

CONGE D'ESLIRE, *leave to chuse*, is the king's writ or licence to the dean and chapter to chuse a bishop, in the time of vacancy of the see.

CONIES: killing conies in the day time, in a lawful warren, inclosed or uninclosed, incurs a forfeiture of treble damages, and three months imprisonment, by 22 & 23 *C. 2. c. 25*: if it is in the night time, the penalty is transportation for seven years; or lesser punishment by whipping, fine, or imprisonment, as the court shall award, by 5 *G. 3. c. 14*. But by the Black Act, 9 *G. c. 22*. if the offender be armed and disguised when he commits such offence, he shall be guilty of felony without benefit of clergy.

If conies are out of the warren, no person hath any property in them, and a man may justify killing them if they eat up his grafs and corn; but no action lies against the owner of the warren. 5 *Co. 104*.

Conies in a warren go to the heir, and not to the executor. 1 *Inst. 8*.

CONJURATION. No prosecution shall be commenced or carried on against any person for witchcraft, sorcery, enchantment or conjuration: but if any person shall pretend to exercise any of these, he shall be imprisoned for a year, and set on the pillory

lory once in every quarter of that year, and be further bound to the good behaviour at the discretion of the court. 9 G. 2.

c. 5.

CONSANGUINITY, or kindred, is the connexion or relation of persons descended from the same stock or common ancestor: and is either *lineal*, or *collateral*. *Lineal* consanguinity, is that which subsists between persons, of whom one is descended in a direct line from the other; as grandfather, father and son. *Collateral* consanguinity, is that which subsists between persons descended from the same common ancestor, but not one from another; as brothers, uncles, and nephews. 2 *Black.*

204.

CONSCIENCE, court of. So early as the reign of king *Hen. 8.* a court of conscience was established in *London*, for the recovery of small debts, but not confirmed by act of parliament till the reign of king *James* the first, which hath since been explained and amended by the statute 14 G. 2. c. 10. The constitution thereof is this: two aldermen and four commoners, sit twice a week, to hear all causes of debt, not exceeding the value of 40*s.*; which they examine in a summary way, by the oath of the parties, or other witnesses, and take such order therein as is consonant to equity and good conscience. Which method hath been found so convenient, that divers trading towns, and other districts, have obtained acts of parliament upon nearly the same plan.

But this bearing hard against the course of the common law, and dispensing with the constitutional establishment of trial by jury, another plan had been recommended, which hath been adopted by the county of *Middlesex*, and carried into execution by the statute 23 G. 2. c. 33. the substance of which is, 1. That a special county court shall be holden, at least once a month, in every hundred, by the county clerk. 2. That twelve freeholders of that hundred, qualified to serve as juries, and struck by the sheriff, shall be summoned to appear at such court by rotation, so as none shall be summoned oftener than once a year. 3. That in all causes, not exceeding the value of 40*s.* the county clerk and twelve suitors shall proceed in a summary way, examining the parties and witnesses upon oath, and make such order therein as they shall judge agreeable to conscience. 4. That no plaint shall be removed out of this court, but the determination therein shall be final. 5. That if any action be brought in any of the superior courts against the person resident in *Middlesex*, for a debt or contract, upon the trial whereof the jury shall find less than 40*s.* damages, the plaintiff shall recover no costs, but shall pay to the defendant double costs; unless upon some special circumstances to be certified by the judge who tried it. 6. A very moderate table of fees is prescribed and set down
in

in the act, which are not to be exceeded upon any account whatsoever. 3 *Black.* 81.

CONSERVATOR, is a protector, or *preserver*, in general: as, anciently, a conservator of truce and safe conduct, a conservator of the privileges of the Templars and Hospitallers, conservators of the levels of the fens. But there was more especially one kind of conservator of which the law took particular notice, and which is of some regard to this day; and that is, a conservator of the peace. Before the institution of the office of justices of the peace, the peace was kept by conservators of the peace in every county, chosen in pursuance of the king's writ by the freeholders in the county court.

And besides these conservators of the peace, properly so called, there were and are other conservators of the peace by virtue of certain offices. As, for instance, the lord chancellor, and every judge of the court of king's bench, have, as incident to their offices, a general authority to keep the peace throughout all the realm, and to award process for the surety of the peace, and to take recognizances for it. Also every court of record, as such, hath power to keep the peace within its own precinct. Also every justice of the peace is a conservator of the peace. So is also the sheriff, coroner, and every high and petty constable; who have power to preserve the peace in danger of being broken in their presence, but they have not power to punish the breach of it.

There were also other conservators of the peace by *tenure*, who held lands of the king for that service; others by *prescription*, claiming that power by immemorial usage in themselves, and those whose estate they have in certain lands.

The general authority which such conservators of the peace, whether by election, or tenure, or prescription, is, to employ their own, and command the help of others, to arrest and pacify all such who in their presence, and within their jurisdiction and limits by word or deed, shall go about to break the peace. 2 *Haw.* 32.

CONSIDERATION, is the material cause of any agreement or contract, without which it will not be effectual or binding.

A deed of lands must be founded on good and sufficient consideration. Not upon an usurious contract; nor upon fraud or collusion, either to deceive *bona fide* purchasers, or just and lawful creditors; any of which bad considerations will vacate the deed. 2 *Black.* 296.

A deed, or other grant, made without any consideration, is, as it were, of no effect; for it is construed to enure, or to be effectual, only to the use of the grantor himself. *Id.*

The consideration may be either a *good* or a *valuable* one. A *good* consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation: a *valuable*

valuable consideration is such as money, marriage, or the like; which the law esteems an equivalent given for the grant. Deeds made upon *good* consideration only, are considered as merely voluntary; and are frequently set aside in favor of creditors, and *bona fide* purchasers. *Id.* 297.

Consideration in *contracts*, is something given in exchange, something that is mutual and reciprocal; as money given for goods sold, work performed for wages. And a consideration of some sort or other is so absolutely necessary to the forming a contract, that a *nudum pactum*, or agreement, to do or pay any thing on one side, without any compensation on the other, is totally void in law; and a man cannot be compelled to perform it. As if a man promises to give another 100*l.* here is nothing contracted for or given on the one side, and therefore there is nothing on the other. But if such promise is authentically proved by written documents, as if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment; for every bond, from the solemnity of the instrument, and every note, from the subscription of the drawer, carries with it an internal evidence of a good consideration. Courts of justice will therefore support them both, as against the contractor himself, but not to the prejudice of creditors, or strangers to the contract. 2 *Black.* 445. *Burr. Mansf.* 1671.

Consideration is either *express*, as when a man bargains to give so much for a thing bought, or to sell his land for so much, or grants it in exchange for other lands, or where a man promises to give a sum of money for work to be done by him; or it is *implied*, when the law itself enforces a consideration; as where a man comes to an inn, and, there staying, eats and drinks and lodges, the law presumes he shall pay for the same, though there be no express contract for it.

CONSIMILI CASU, is a writ of entry for the reversioner after alienation by tenant for life. It was given by the statute of 13 *Ed.* 1. c. 24. which ordains, that where a *like case* happens to that of alienation by tenant in dower, for which a writ is given by 6 *Ed.* 1. c. 7. the chancery shall make out a writ accordingly. 3 *Black.* 183.

CONSISTORY, is the court christian or spiritual court, held formerly in the nave of the cathedral church, or in some chapel, ile, or portico, belonging to it; in which the bishop presided, and had some of his clergy for his assessors and assistants. But this court is now held by the bishop's chancellor or commissary, and by archdeacons and their officials, either in the cathedral church or other convenient place of the diocese, for the hearing and determining of matters and causes of ecclesiastical cognizance happening within that diocese. From the bishop's court the appeal

peal is to the archbishop, from the archbishop's court to the delegates.

CONSPIRACY. By act of parliament 33 *Ed. 1. ft. 2.* conspirators are defined to be those that confederate or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict or cause to be indicted, or falsely to move or maintain pleas. From which definition it seems clearly to follow, that not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence, who basely conspire to indict a man falsely and maliciously, whether they do any act in prosecution of such confederacy or not. 1 *Haw.* 189.

For this offence, the conspirators (for there must be at least two to form a conspiracy) may be indicted at the suit of the king, and were by the ancient common law to receive what is called the villenous judgment; namely, to lose their freedom of the law, whereby they are discredited and disabled as jurors or witnesses; to forfeit their goods and chattels, and their lands, during life; to have their lands wasted, their houses rased, their trees rooted up, and their bodies committed to prison. But this villenous judgment is by long disuse become obsolete; it not having been pronounced for some ages; but, instead thereof, the delinquents are usually sentenced to fine, imprisonment, and pillory. 4 *Black.* 136.

Or an action of conspiracy may be brought, to obtain a recompence in damages, for the danger to which the party hath been exposed: but in order to this, it is necessary that the plaintiff should obtain a copy of the record of his indictment and acquittal; but in prosecutions for felony, it is usual to deny a copy of the indictment, where there is any, the least, probable cause to found such prosecution upon. For it would be a very great discouragement to the public justice of the kingdom, if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried. But the more usual way is, to bring a special action on the case, for a false and malicious prosecution; which may be brought against one only, and although there hath been no acquittal upon the indictment; for the action may be brought on such an indictment whereon no acquittal can be; as if it be rejected by the grand jury, or be *coram non judice*, or be insufficiently drawn. 3 *Black.* 126.

CONSTABLES are of two sorts: high constables, and petty constables. High constables are commonly chosen and sworn by the justices of the peace in fessions; and their jurisdiction extends through the several hundreds respectively. Petty constables

bles are chosen and sworn in the leet, and in defect thereof most commonly by the justices. The general duty of both high and petty constables is, to keep the king's peace in their several districts: and they have both of them abundance of particulars committed to their charge, as well by the common law, as by sundry acts of parliament.

CONSULTATION, is a writ whereby a cause being formerly removed by prohibition out of an inferior court into some of the king's courts at *Westminster*, is returned thither again. For if the judges of the superior court, comparing the proceedings with the suggestion of the party, find the suggestion false, or not proved, and therefore the cause to be wrongfully called from the inferior court, then, upon *consultation* or deliberation thereof, they decree it to be returned again; whereupon the writ in this case obtained is called a *consultation*. T. L.

CONTEMPT, is an high misdemeanor, by doing what one is forbidden, or not doing what he is commanded. If the sheriff, being required to return a writ directed to him, doth not return it; or if a person, required by such writ to do something, doth not perform it; this is a contempt, punishable by fine and imprisonment. So disobedience to an act of parliament, where no particular penalty is assigned, is a contempt of the statute, and punishable by fine and imprisonment at the discretion of the court. For a contempt of the king's superior courts of justice, the offender is liable to an attachment.

CONTENEMENT, (*contenementum*,) is said to signify a man's *countenance* or credit, which he hath together with and by reason of his freehold. But it seems more properly to be restricted to the estate which he holds in land; as where the *magna charta*, c. 14. says, a freeman shall not be amerced for a small fault, but after the manner of the fault, and for a great fault after the greatness thereof, saving to him his contenement (*salvo contenemento suo*): that is, that he shall not be fined above what he is able to bear, and leaving to him the means of his future support: so the statute goes on—a merchant shall not be fined, but saving to him his merchandize; and a villein, saving to him his wainage.

CONTENTIOUS JURISDICTION, in ecclesiastical causes, is where there is an action or judicial process, and it consists in hearing and determining the matter between party and party; in contradistinction to *voluntary* jurisdiction, which is exercised in matters that require no judicial proceeding, as in granting institution, probate of wills, letters of administration, sequestration of *vacant benefices*, and such like.

CONTINGENT LEGACY, is a legacy which may happen or not happen, according to the circumstances of a future event. If a legacy be left to one *when* he shall attain, or *if* he shall attain, the age of twenty-one years, this is a contingent legacy; and

and if the legatee dies before that time, the legacy shall not vest. But a legacy to one, *to be paid* when he attains the age of twenty-one years, is a vested legacy; an interest which commences *in presenti*, although it be *solvendum in futuro*: and if the legatee dies before that age, his representatives shall receive it out of the testator's personal estate, at the same time that it would have become payable in case the legatee had lived. But if such legacy be charged upon a real estate, the temporal courts will not suffer it to be raised, but it shall lapse for the benefit of the heir at law. 2 *Black.* 513.

CONTINGENT REMAINDER, is where no present interest passes, but the estate is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious and uncertain *event*; so that the particular estate may chance to be determined, and the remainder never take effect. As if a tenant for life, with remainder to *B.*'s eldest son (then unborn) in tail, this is a contingent remainder, with respect to the *person*, for it is uncertain whether *B.* will have a son or no; but the instant that a son is born, the remainder is no longer contingent, but vested: though, if *A.* had died before the contingency happened, that is, before *B.*'s son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. So, where the *person* to whom the remainder is limited is fixed and certain, it may be contingent with respect to the *event*, where that event is vague and uncertain. As where land is given to *A.* for life, and in case *B.* survives him, then with remainder to *B.* in fee; here *B.* is a certain person; but the remainder to him is a contingent remainder depending upon a dubious event, the uncertainty of his surviving *A.* During the joint lives of *A.* and *B.* it is contingent; and if *B.* dies first, it never can vest in his heirs, but it is gone for ever; but if *A.* dies first, the remainder to *B.* becomes vested. A contingent remainder is *executory*, and a vested remainder is *executed*. 2 *Black.* 169.

CONTINGENT USE, is a use limited in a deed of lands, which may or may not happen to vest, according to the contingency expressed in the limitation of such use: and a use in contingency is such as by possibility may happen in possession, reversion, or remainder. 1 *Co.* 121.

CONTINUAL CLAIM, is a claim made from time to time, within every year and day, to land or other thing, which in some respect a man cannot obtain without danger: as if a man be disseised of land, into which, though he hath a right of entry, he dares not enter for fear of death, or of maiming or beating, it behoves him to hold on his right of entry at his best opportunity, by approaching as near as he dares, once a year, as long as he lives, and to save the right of entry to his heir. And in such case,

case, although the disseisor dieth seised in fee, and the land descend to his heir, yet may he who is disseised enter upon the possession of the heir, notwithstanding the descent; for by such claim he hath presently a possession or seisin in the lands, as well as if he had entered in deed, although he never had possession or seisin of the same lands or tenements before the said claim. *Litt. f. 414. 419.*

Also, if land be let to a man for term of his life, remainder to another for term of life, remainder to a third in fee, if tenant for life alien to another in fee, and he in remainder for life maketh continual claim to the land before the dying seised of the alienee, and after the alienee dieth seised, and after he in remainder for life die before any entry made by him; in this case, he in the remainder in fee may enter upon the heir of the alienee, by reason of the continual claim made by him who had the remainder for life, because that such right as he had of entry shall go and remain to him in the remainder after him, inasmuch as he in the remainder in fee could not enter upon alienee in fee during the life of him in the remainder for life, and for that he could not then make continual claim. For none can make continual claim but when he hath title to enter. *Litt. f. 416.*

But every doubt or fear in such case is not sufficient, for it must concern the safety of the person of a man, and not his houses or goods; for if he fear the burning of his houses, or the taking away or spoiling of his goods, this is not sufficient, because he may recover the same, or damages to the value, without any corporal hurt. 1 *Inst.* 253.

And if the fear do concern the person, yet it must not be a vain fear, but such as may befall a constant man; as if the adverse party lie in wait in the way with weapons, or by words menace to beat, maim, or kill him that would enter; and so, in pleading, he must shew some just cause of fear, for fear of itself is internal and secret. *Id.*

CONTINUANCE, is the continuing of a cause in court, by an entry upon the record there for that purpose. For during the whole course of proceeding in an action, it is necessary that both the parties be kept or *continued* in court from day to day till the final determination of the suit. For the court can determine nothing unless in the presence of both the parties, in person, or by their attorneys, or upon default of one of them, after his original appearance, and a time prefixed for his appearance in court again. And in the course of proceeding, a day is continually given and entered upon the record, for the parties to appear on from time to time, as the exigency of the case may require. And the giving of this day is called the *continuance*, because thereby the proceedings are continued without interruption from one adjournment to another. And if these continuances are omitted, the cause is there-
by

by said to be *discontinued*, and the whole must begin *de novo*. 3 *Black.* 315.

CONTINUANDO, is a word used in a special declaration of trespass, when the plaintiff would recover damages for several trespasses in the same action; and to avoid multiplicity of suits, a man may in one action of trespass recover damages for many trespasses, laying the first to be done with a *continuando* to the whole time in which the rest of the trespass was done. As where the herbage is spoiled or consumed by the defendant's cattle, the declaration may allege the injury to have been committed by continuation from one given day to another (which is called laying the action with a *continuando*), and the plaintiff shall not be compelled to bring separate actions for every day's separate offence. 3 *Black.* 212.

CONTRABAND GOODS (from *contra*, against, and *ban*, an edict or proclamation) are those which are prohibited by act of parliament, or the king's proclamation, to be imported or exported.

CONTRACT, is a covenant or agreement between two or more persons, with a lawful consideration or cause. And it is twofold; either *express*, or *implied*. *Express* contracts are, where the terms of the agreement are openly uttered and avowed at the time of the making; as to deliver an ox, or a load of timber, or to pay a stated price for certain goods. *Implied*, are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform: as, if I employ a person to do any business for me, or perform any work, the law implies that I undertook, or contracted, to pay him as much as his labour deserves: if I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value. 2 *Black.* 443.

When a seller says to a buyer, he will sell his horse for so much, and the buyer says he will give it; if he presently tell out the money, it is a contract; but if he do not, it is no contract. *Noy, Max.* 87. *Hob.* 41.

The property of any thing sold is in the buyer immediately by the contract; though regularly it must be delivered to the buyer, before the seller can bring his action for the money. *Noy,* 88.

If one contract to buy a horse or other thing of me, and no money is paid, or earnest given, nor day set for payment thereof, nor the thing delivered; in these cases no action will lie for the money or the thing sold, but it may be sold to another. *Plowd.* 128. 309.

All contracts are to be certain, perfect, and complete: for an agreement to give so much for a thing as it shall be reasonably worth, is void for uncertainty; so a promise to pay money in a short time, or to give so much if he likes the thing when he sees it.

it. *Dyer*. 91. 1 *Bulfr*. 92. But if I contract with another, to give him 10*l.* for such a thing, if I like it on seeing the same, this bargain is said to be perfect at my pleasure. Yet I may not take the thing before I have paid the money; if I do, the seller may have trespass against me; and if he sell it to another, I may bring an action upon the case against him. *Nov*, 104.

By the statute of frauds and perjuries, 29 C. 2. c. 3. no contract for the sale of goods, to the value of 10*l.* or more, shall be valid, unless the buyer actually receive part of the goods sold, by way of earnest on his part; or unless he gives part of the price to the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party or his agent, who is to be charged with the contract. And with regard to goods under the value of 10*l.* no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party who is to be charged therewith.

CONTRAFACIION, counterfeiting.

CONTRAMANDATIO, a countermand.

CONTRIBUTION is, where every one pays his share, or contributes his part to any thing. One parcener shall have contribution against another; one heir, against another heir, in equal degree; and one purchaser shall have contribution against another. So where goods are cast into the sea for the safeguard of the ship, there is a contribution amongst the merchants, towards the loss of the owners of the goods.

CONTROLLER, (*contra rotulator*,) is an overseer or officer relating to the public accounts. There are divers officers of that denomination; as controller of the king's household; of the navy; of the customs; of the excise; of the mint; and many others.

CONVENT, *conventus*, signifies the fraternity of a religious house; as of an abbey, or priory. So a *conventual church*, is a church that consists of regular clerks, professing some of the religious orders. In the conventual cathedrals, the bishop was in the place of the abbot or prior.

CONVENTICLE, a private assembly or meeting for the exercise of religion.

CONVENTIO, in the ancient law proceedings, signifies a covenant, or agreement.

CONVENTION PARLIAMENT, was a parliament that convened or assembled on the abdication of king James the second, and settled the crown on king William and queen Mary.

CONVERSION is, where a man hath applied (converted) the goods of another to his own use. In every action of *trover*, it is necessary to prove a *conversion*. For a man may come lawfully into the possession of another man's goods, but the injury lies in the

conversion. Evidence of a conversion is, if a man sells the goods, or uses them without the owner's consent, or refuses to deliver them when demanded; for refusal alone is *prima facie* sufficient evidence of a conversion. 3 *Black.* 152.

CONVEYANCE, is a writing sealed and delivered, whereby the property of lands and tenements is *conveyed* from one person to another. Of conveyances, some are called *original* or *primary* conveyances, which are those by means whereof the estate is created, or first arises; namely, feoffment, gift, grant, lease, exchange, partition: others are *derivative* or *secondary*, whereby the estate, originally created, is enlarged, restrained, transferred, or extinguished; and these are, release, confirmation, surrender, assignment, defeazance. 2 *Black.* 309.

CONVICTION is, when the party upon his trial is found guilty of the charge laid against him; and this may be two ways, either by confessing the offence, or being found guilty upon evidence.

CONVOCATION, is a word that is most commonly applied to assemblies of the clergy, *called together*, originally by mandate from the archbishop, and afterwards by the king's writ. Their assembly by virtue of the archbishop's mandate, was to transact affairs relating to the order and government of the church. The king called them together, chiefly to grant aids and subsidies for the support of government; and in the reign of king *Hen. 8.* they were restrained from proceeding in ecclesiastical matters without the king's licence. Afterwards, in the reign of king *Charles* the second, by a sort of tacit agreement, the clergy waved their privilege of taxing themselves, and were included with the temporality in the money bills prepared by the house of commons, and were admitted to vote in the election of members of that house; and from that time have become only a shadow of an ecclesiastical assembly, and have never passed any synodical act.

COPARCENARY. An estate held in coparcenary is, where lands of inheritance descend from the ancestor to two or more persons. It arises either by *common law*, or *particular custom*. By *common law*; as where a person seised in fee simple or fee tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case, they shall all inherit. And these coheirs are then called *coparceners*; or, for brevity sake, *parceners* only. Parceners by *particular custom* are, where lands descend, as in gavel-kind, to all the males in equal degree, as sons, brothers, uncles, or other kindred; and, in either of these cases, all the parceners put together make but one heir, and have but one estate among them. 2 *Black.* 187.

Coparceners always claim by descent, whereas jointenants always claim by purchase or acquisition. Therefore, if two sisters purchase

purchase lands, to hold to them and their heirs, they are not parceners, but jointenants. 2 *Black.* 188.

By the death of any of the coparceners, the coparcenary is not severed or divided; for if one die, her part shall descend to her issue. 1 *Inst.* 164.

And sometimes the descent is *in stirpes*, to the stocks or roots; and sometimes *in capita*, to the heads: as if a man hath issue two daughters, and dieth, that descent is *in capita*, viz. that every one shall inherit alike. But if a man hath issue two daughters, and the elder daughter hath issue three daughters, and the younger one daughter, all these four shall inherit: but the daughter of the younger shall have as much as the three daughters of the elder, by reason of the roots, and not by reason of the heads; for in judgment of law every daughter hath a several stock or root. 1 *Inst.* 164.

Also, if a man hath issue two daughters, and the elder hath issue divers sons and divers daughters, and the younger hath issue divers daughters; the eldest son of the elder daughter shall only inherit, for this descent is not *in capita*; but all the daughters of the younger shall inherit, and the eldest son is coparcener with the daughters of the younger, and shall have one moiety; namely, his mother's part. So that man descending of daughters may be coparceners, as well as women, and shall jointly implead, and be impleaded. 1 *Inst.* 164.

If they cannot agree about a partition, the compulsory method is, for one or more to sue out a writ of partition against the others; whereupon the sheriff shall go to the lands, and make partition thereof by the verdict of a jury there impanelled, and assign to each of the parceners her part in severalty. For the easier proceeding wherein, the statute of 8 & 9 *W. c.* 31. hath given particular directions.

But there are some things that are in their nature impartible. The mansion house, common of estovers, common of piscary uncertain, or any other common without stint, shall not be divided; but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance; or, if that cannot be, then they shall have the profits of the things by turns. 2 *Black.* 189.

In the case of an advowson, if they cannot agree in the presentation, the eldest and her issue, or even her husband or her assigns, shall present alone before the younger. *Ibid.*

COPPER COIN, counterfeiting it, by statute 15 & 16 *G.* 2. *c.* 28. incurs the penalty of two years imprisonment, and binding to the good behaviour for two years more. And by 11 *G.* 3. *c.* 40. the said offence, as also the buying, selling,

receiving, or putting off, any counterfeited copper money at less value than it imports to be of, is made felony (but within clergy).

COPY (*copia*), is in a legal sense the transcript of an original writing; as the copy of a patent, of a charter, of a deed, and the like.

Where a deed is inrolled, a copy thereof may be given in evidence. 3 *Lev.* 387. So the copy of a record is admitted as evidence, because the party cannot have the record itself. 10 *Co.* 92.

Where writings have been lost by burning of houses, by rebellion, or when robbers have destroyed them, or the like, copies of them, in such cases of necessity, have been allowed as evidence. *Jenk.* 19.

The copy of the probate of a will is good evidence, where the will itself is of chattels; for there the probate is an original, taken by authority, and of a public nature: otherwise where the will is of things in the realty, for as to these the probate is of no force or validity. 3 *Salk.* 154.

So the copy of a court roll of a manor is good evidence, as also the copy of a parish register, the copies of town books, and the like; for where the original itself is good evidence, the immediate copy thereof is also good evidence. *L. Raym.* 154.

And, generally, wherever an original is of a public nature, and would be evidence if produced, an immediate sworn copy thereof will be evidence, as a copy of a bargain and sale, of a deed inrolled, and the like; but where an original is of a private nature, a copy is not evidence, unless the original is lost or destroyed. 3 *Salk.* 154.

A copy of an indictment and acquittal of felony is necessary, in order to intitle the person acquitted to bring his action against the prosecutor of the indictment: but such copy is seldom granted, if there is any the least probable cause upon which to found such prosecution. For it would be a great discouragement to the public justice of the kingdom, if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law, whenever their indictments miscarried. *L. Raym.* 253. 3 *Black.* 126.

COPYHOLD :

1. *Origin of copyhold.*
2. *Of courts baron.*
3. *Copyhold, how transferable.*
4. *Surrender.*
5. *Presentment.*
6. *Admittance.*
7. *Fine.*
8. *Waste.*

8. *Waste.*
9. *Forfeiture and escheat.*
10. *In what cases equity will relieve.*
11. *Heir of the copyholder.*
12. *Tenant in dower and by curtesy.*

1. *Origin of Copyhold.*

A MANOR, manerium, a *manendo*, because the usual residence of the owner, was a district of ground holden by lords or other great men; who kept in their own hands so much as was necessary for the use of their families, which were called *terra dominicales*, or demesne lands; others they distributed among their tenants; and the residue, being uncultivated, was termed the lord's waste, and served for common of pasture to the lord and his tenants. 2 *Black.* 90.

Before the statute of *quia emptores terrarum*, 18 *Ed.* 1. the king's greater barons, who had a large extent of territory holden under the crown, granted out frequently smaller manors to inferior persons to be holden of themselves; which, therefore, now continue to be holden under a superior lord, who is called in such cases the lord *paramount* over all those manors; and his seigniorship is frequently termed an *honour*, not a manor, especially if it hath belonged to an ancient feudal baron, or hath been at any time in the hands of the crown. 2 *Black.* 91.

In imitation whereof, these inferior lords began to carve out and grant to others still more minute estates, to be holden as of themselves, and were so proceeding downwards *in infinitum*, till the superior lords observed, that by this method of subinfeudation, they lost all their feudal profits, of wardships, marriages, and escheats, which fell into the hands of these mesne or middle lords, who were the immediate superiors of terretenant, or him who occupied the land. *Ibid.*

This occasioned the statute of *quia emptores terrarum* to be made; which directs, that upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it. And from hence it is holden, that all manors existing at this day, must have existed by immemorial prescription, or at least ever since the 18 *Ed.* 1. when the statute of *quia emptores terrarum* was made. *Ibid.*

The tenants to whom these lands were granted, were of two different kinds: to wit, such as had the honour to attend the lord in his wars, and were therefore termed free tenants; and such as were to perform the drudgery or viler offices, and were thereupon styled *villains*, and their tenure *villanage*, or *base* tenure.

These villeins were in a state of downright servitude, and belonging, both they, their children, and effects, to the lord or the soil, like the rest of the cattle or stock upon it. 2 *Black.* 92.

They were either villeins *regardant*, that is annexed to the manor or land; or else they were *in gross*, or at large; that is annexed to the person of the lord, and transferrable by deed from one owner to another. They held indeed small portions of land by way of sustaining themselves and families; but it was at the mere will of the lord, who might dispossess them whenever he pleased, 2 *Black.* 93.

The *customs* of manors differ as much as the humour and temper of the respective ancient lords: so a copyholder by custom may be tenant in fee simple, in fee tail, for life, by the curtesy, in dower, for years, at sufferance, or on condition; subject, however, to be deprived of these estates upon the concurrence of those circumstances, which the will of the lord, promulged by immemorial custom, hath declared to be a forfeiture or absolute determination of those interests; as in some manors the want of issue, in others the want of issue male, in others the cutting down timber, in others the non-payment of rent or fine. Yet none of these interests amount to freehold; for the freehold of the whole manor abideth always in the lord only, who hath granted out the use of occupation, but not the corporal seisin, or true possession, of certain parts or parcels thereof, to these his customary tenants at will. 2 *Black.* 148.

And, in general, every thing still remaineth in the lord, that custom hath not taken out of him. *Bur. Mansf.* 1277.

Originally, the copyholder had in judgment of law only an estate at will; but, in process of time, custom hath so established and fixed his estate, that, by the custom of the manor, it is descendible, and his heir shall inherit it; and therefore his estate is not merely at the will of the lord, but at the will of the lord *according to the custom of the manor*. So that custom is the life and soul of copyhold estates; for without custom, or if the copyholders have broken their custom, they are subject to the will of the lord. And by custom a copyholder may as well inherit according to the custom, as a freeholder may inherit at the common law. 4 *Co.* 21, 22.

And when custom hath created such inheritances that they shall be descendible, then the law will direct the descent according to the maxims and rules of the common law, as incident to every estate descendible; as when uses had gained the reputation of inheritances descendible, the common law directed the descent thereof, as of other inheritances at
common

common law. But such customary inheritances shall not have by law any other collateral qualities which concern not the descent of the inheritance, which other inheritances at the common law have; and therefore such customary inheritance shall not be *assets* to charge the heir in an action of debt upon an obligation made by his ancestor, although he bound himself and his heirs; nor shall the widow of such customary tenant have *dower*; nor the husband be tenant by the *curtesy*; nor shall a descent of such estate take away the *entry* of him who hath a customary right thereto. For, if without custom such estate at will cannot be descendible, so without custom it cannot have any collateral quality incident to inheritances at common law. 4 Co. 22.

But by special custom it may have any or all these qualities; and by the statute of the 13 *El. c. 7.* the copyhold or other customary estate of a bankrupt is made liable to the payment of his debts.

If the custom be, that copyhold land may be granted in fee simple, a grant to one and the heirs of his body is also within the custom; so also it may be granted for life, or for years, by the same custom; for an estate in fee simple includes the whole; and it is a maxim in law, that he who can do the greater, can impliedly do the less. 4 Co. 23.

They are called tenants by copy, because they have no other evidence concerning their tenements, than the copies of the rolls of the court. 4 Co. 25.

2. Of Courts Baron.

A court baron is an inseparable incident to a manor, and must be held by prescription; for it cannot be created at this day.

It must be holden within the manor; for if it be holden out of the manor, it is void; unless a lord, being seised of two or three manors, hath usually time out of mind kept at one of his manors courts for all the said manors, then by custom such courts are sufficient in law, although they be not holden within the several manors. 1 *Inst.* 58.

This court is of two natures:

1. By common law, which is the baron's or freeholders' court, or the court baron that is incident to every manor; of which the freeholders being suitors are the judges, and the steward is only the register. It was formerly held every three weeks, and its most important business is to determine, by writ of right, all controversies relating to the right of land within the manor. It may also hold plea of any personal actions, of debt, trespass on the case, or the like, where the debt or damages do not amount to 40s. But the proceedings on a writ of right may be removed into the county court by a precept from the sheriff; and the proceedings

ceedings in all other actions may be removed into the superior courts by the king's writs. 3 *Black.* 33.

2. The copyholders' or customary court ; which is for grants and admittances upon surrenders and descents, on the presentment of the homage or jury. They may inquire of all persons that owe suit to this court, and make default, and present their names. They may inquire of the death of tenants since the last court, and who is the next heir : of fraudulent alienations of lands to defeat the lord of his profits : of rent, custom, or service withdrawn : of escheats and forfeitures : of incroachments, cutting down trees, suffering houses to decay, or other like wastes : of suits not performed at the lord's will by reason of tenure : of surcharging or putting uncommonable beasts upon the common : of trespass in the common by digging, building, or inclosing : of removing mere-stones or land-marks : of by-laws not observed, and other violations of the custom.—The punishment is by americiament : but the steward cannot amerce without affectors, sworn to affect or moderate the americiament ; and then the lord may have an action in his court for the americiament affected. *Wood. b. 4. c. 1. f. 17.*

3. Copyhold, how transferable.

Copyholds are not transferable by matter of record, even in the king's courts ; but only in the court baron of the lord, by surrender and admittance. 2 *Black.* 366.

If one would exchange a copyhold with another, both must surrender to each other's use, and the lord admit accordingly. *Co. Copyh. f. 36. 39.*

If a man will devise his copyhold estate, he cannot do it by his will, but he must surrender to the use of his will, and in his will declare his intent. *Id.*

But when the legal estate is in trustees, a man cannot in that case surrender the copyhold lands to the use of his will ; but they will pass by his will only. 2 *Atk.* 38. 1 *Vez.* 489.

So a mortgagor may dispose of the equity of redemption by will, without surrender ; for he hath at that time no estate in the land whereof to make a surrender. *Prec. Cha.* 322. 520.

A devise of a copyhold to the heir is void ; for where two titles meet, the worthier is to be preferred. *Str.* 489.

A copyhold may be intailed by special custom, and the intail cut off by recovery or surrender in the lord's court.

But a recovery in the lord's court, without custom to warrant it, will not be a bar to an intail ; but a surrender in that case will bar it. 2 *Vez.* 603.

But where there are two customs to bar estates tail, one by recovery, the other by surrender, either of them may be pursued. *Str.* 1197.

Recovery

Recovery in the lord's court differs in nothing that is material from recoveries of freehold land in the king's courts; but the method of surrender is easier and cheaper. 2 *Black.* 365. *Str.* 1197.

A copyhold is not barred by *fine* and five years non-claim. *Noy*, 23.

4. *Surrender.*

Surrender, is the yielding up of the estate by the tenant into the hands of the lord, for such purposes as in the surrender are expressed. 3 *Black.* 365.

A steward of a manor may take a surrender out of the manor, but cannot admit out of the manor. 4 *Co.* 26.

The process in most manors is, that the tenant comes to the steward, either in court (or, if the custom permits, out of court), or to two customary tenants of the same manor (provided that also have a custom to warrant it); and there, by delivering up a rod, or glove, or other symbol, as the custom directs, relin- quishes into the hands of the lord, by the hands and acceptance of his steward, or of the said two tenants, all his interest and title to the estate; in trust to be again granted out by the lord, to such persons and to such uses as the custom of the manor will warrant. 2 *Black.* 366.

A feme-covert is to be secretly examined by the steward, on her surrendering her estate. 1 *Inst.* 59.

5. *Presentment.*

If the surrender be made out of court, then, at the next or some subsequent court, the jury or homage must present and find it upon their oaths: which presentment is an information to the lord or his steward, of what had been transacted out of court. 2 *Black.* 366.

It is the general custom of copyholds, that the surrenderee must come and have the surrender presented at the next court, otherwise it is void, and a new surrender must be taken; but there are several copyholds and other customary estates, where the tenant need not come under three courts. 2 *Vez.* 302.

So a custom that the mortgagee need not to present his mortgage deed at the first court, nor until the third court, is a good custom. *Id.*

And if the surrenderor die before the next court, yet the surrenderee may come and be admitted afterwards; the death of the surrenderor in the mean time making no difference. *Id.*

So if the surrenderee dies before presentment, yet, upon presentment made after his death, his heir shall be admitted. So also if those, into whose hands the surrender is made, die before presentment; for, on proof in court that such surrender was made,

made, the lord may be compelled to admit accordingly. 2 *Black.* 369.

.6. *Admittance.*

Immediately upon such surrender out of court, or upon presentment of a surrender made out of court, the lord by his steward grants the same land again to the surrenderee or *cestuy que use*, to hold by the ancient rents and customary services, and thereupon admits him tenant to the copyhold, according to the form and effect of the surrender. And this is done by delivering up to the new tenant the rod or glove, or the like, in the name, and as the symbol, of corporal seisin. 2 *Black.* 366.

The lord himself may admit out of the manor at what place he pleases; but the steward cannot admit at any court out of the manor. 4 *Co.* 26.

But where by custom, as is aforesaid, a court is holden out of the manor, as where a court is holden in one manor for the same and divers other manors, admittances made there will be sufficient. 1 *Inst.* 58.

Admittance of tenant for life is an admittance of him in remainder, but not to prejudice the lord of his fine which was due by custom. 4 *Co.* 23.

Where a grant or admittance is made by one who hath a lawful estate or interest, the copyholder is in by the custom, without any regard to the condition or person of the grantor; and therefore such admittance made by husband and wife shall bind the wife, notwithstanding the coverture: so also of a grant made by one *non compos mentis*, or an infant, or by a bishop, prebendary, parson, or the like, this shall bind for ever. 4 *Co.* 23.

Until admittance of the surrenderee, the surrenderor continues tenant, and shall receive the profits, and discharge all services due to the lord; but he cannot revoke his surrender, except in the case of a surrender to the use of his will, which is always revocable. And if the lord will not admit the surrenderee, he may be compelled to it by a bill in chancery, or a mandamus. 2 *Black.* 368.

And this method of conveyance, by surrender and admittance, is so essential to the nature of a copyhold estate, that it cannot possibly be transferred by any other assurance. No feoffment, fine, or recovery, in the king's courts has any operation upon it. *Ibid.*

7. *Fine.*

Upon admittance, the tenant pays a fine to the lord, according to the custom of the manor, and takes the oath of fealty. 2 *Black.* 366.

And no fine is due to the lord, either upon surrender or del
scant,

fcnt, until admittance, for the admittance is the cause of the fine. 4 Co. 28.

Of fines, some are by the change or alteration of the lord, and some by the change or alteration of the tenant. The change of the lord ought to be by the act of God, otherwise no fine can be due; but by the change of the tenant, either by the act of God, or by the act of the party, a fine may be due. For if the lord do allege a custom within his manor, to have a fine of every of his copyholders of the said manor, at the alteration or change of the lord of the manor, be it by alienation, demise, death, or otherwise, this is a custom against law, as to the alteration or change of the lord of the manor by the act of the party, for by that means the copyholders may be oppressed by multitude of fines by the act of the lord. But when the change groweth by the act of God, there the custom is good, as by the death of the lord. 1 Inst. 59.

Again, of fines some are *certain* by custom, and some are *uncertain*; but that fine though it be uncertain, yet must be reasonable; and if the court, where the cause dependeth, adjudges the fine exacted to be unreasonable, then is not the copyholder compellable to pay it; for all excessiveness is abhorred in law. 1 Inst. 59.

Even where the fines are *arbitrary*, the courts of law have tied them down to be reasonable in their extent, otherwise they might amount to a disherison of the estate. No fine therefore is allowed to be taken upon descents or alienations (unless in particular circumstances) of more than two years improved value of the estate. 2 Black. 98.

If the lord, where the fines are *uncertain*, assesses a reasonable fine, and require the copyholder to pay it, the copyholder is not bound to pay this immediately, because he could not know what fine the lord would assess, and therefore he could not provide any certain sum, and for this cause he shall have a convenient time to pay it in, if the lord himself limit no certain day for the payment thereof; but otherwise it is of fines certain. 4 Co. 27, 28.

If the fines of infants and femmes covert are not paid in three months after demand, the lord may enter and receive the profits till he is satisfied. And if the guardians or husbands pay the fine, they or their executors or administrators may enter and repay themselves out of the rents and profits. 9 G. c. 29.

But by the custom of divers manors, if an infant comes in by descent, the fine is not payable until he is of full age.

8. Waste.

The copyholder, by the custom in some places, ought to repair and uphold the houses; for what a copyholder may or ought to do

or

or not do, the custom of the manor must direct: but if there be no custom to the contrary, *waste*, either permissive or voluntary, of a copyholder is a forfeiture of his copyhold. 1 *Inst.* 63.

A copyholder by the common law may cut off the under boughs, which cannot cause any waste, but the amputation of the top boughs will cause the putrefaction of the whole tree, wherefore it is waste as well as the decapitation thereof. *Cro. El.* 361.

9. Forfeiture and Escheat.

If the copyholder doth not pay the services due to the lord, or refuses to attend at the lord's court, or to be of the homage, or to pay his fine for admittance, or to do suit to the lord's mill, or the like, it is in law a forfeiture. 1 *Roll's Abr.* 509.

If there be tenant for life, remainder in fee, and the tenant for life commits a forfeiture, by which the estate of the tenant for life is forfeited, and the lord enters for the forfeiture, yet this shall not bind him in remainder, but only the tenant for life. 1 *Roll's Abr.* 509.

If a copyholder commits felony or treason, he forfeits his copyhold to the lord, without any particular custom; only the king shall first have thereof the year, day, and waste. *Gilb. Ten.* 226.

If a copyhold escheats, the lord may grant it out again with what improved fine he will. *Het.* 6.

10. In what Cases Equity will relieve.

In case of non-payment of rent or fine, the chancery may relieve a copyhold tenant; for the estate in such cases is but in nature of a security for those sums, and the lord may be recompensed in damages. *Ch. Prec.* 572.

And it is a rule in equity to relieve against forfeitures, where a complete satisfaction can be made for the injury which is the cause of the forfeiture. *Str.* 449.

But equity will not supply the defect of a surrender to the use of a will in disfavour of the heir at law, unless it be in behalf of a son or a daughter, and not then neither, if it be to disinherit the eldest son, unless he be otherwise provided for. 1 *Salk.* 187.

But a defect of surrender will be supplied for creditors, where there is a general devise of real estate, and no other real estate, to pay debts. 2 *Vez.* 582.

11. Heir of a Copyholder.

Where a customary estate of inheritance is descendible to the heir, he may before admittance enter and take the profits, and may surrender to the lord to the use of another person, but not to prejudice the lord of the fine due to him by the custom of the manor upon descent. And in this case he is tenant by copy of court roll, the copy made to his ancestor appertaining unto

unto him, even as the admittance of a tenant for life is the admittance of him in remainder, to vest the estate in him, but not to bar the lord of his fine which he ought to have by the custom.

4 *Co.* 22.

Infants and femes covert may be admitted by guardian or attorney; and on non-payment of the fine, the lord may enter and hold it till he is reimbursed. 9 *G. c.* 29.

12. *Tenant in Dower, ory the Curtesy.*

A wife shall not have dower of a copyhold, unless by special custom. 4 *Co.* 30.

But by custom she shall have dower; as in some places she hath one-third of the copyhold, in others one half, in others the whole, according as the custom hath been. *Litt. f.* 37.

Also by custom the husband shall be entitled by the curtesy; and whether any or what fines, or proportion thereof, he or the widow shall pay, or whether they shall be admitted, or the heir, depends upon the custom of the respective manors.

The widow's title doth not commence till after the death of the husband, and not immediately upon the marriage, as in freehold lands; and therefore the husband in his lifetime may defeat her title by alienation, and she shall only have her widow's estate out of the lands whereof her husband died possessed.

4 *Mod.* 452.

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CORBEL, is a nich in the wall of a church or other structure, in which an image was placed; and *corbel-stones* were smooth polished stones for the front or outside of the corbels or niches; some of which images still remain in several churches; but most of them have been demolished. And the word is still retained in the North.

CORD of wood, is a quantity of wood eight foot long, four foot broad, and four feet high.

CORDAGE FOR SHIPPING. By 25 *G. 3. c.* 56. several regulations are made concerning the making and using thereof.

CORDINER, from the French *cordouannier*, a shoemaker, vulgarly called a *cordwainer*.

CORIUM, a hide or skin: *corium forisfacere*, to forfeit his skin, was, when a person was condemned to be whipped: so also *corium perdere*. And *redimere corium* was when the party compounded for a whipping.

CORNAGE, according to *Littleton*, was a species of grand serjeanty, in the North parts of *England*, by blowing a horn to give notice when the enemy was approaching. But it seems rather to have been a payment in money to find scouts and horners in general. In *Westmorland* it still exists, and was granted in the reign

reign of king *John*, together with the sheriffwick, by the name of the *rent* of the county of *Westmorland*; and is now paid by the name of *neatgeld*.

CORODY, is an allowance of meat, drink, money, cloathing, lodging, and such like necessaries for sustenance. The king, by the ancient law, is intitled to a corody, out of every bishoprick; that is, to send one of his chaplains to be maintained by the bishop, or to have a pension allowed him, till the bishop promotes him to a benefice. This is in the nature of an acknowledgment to the king, as founder of the fee; since he had formerly the same corody or pension from every abbey or priory of royal foundation. But these corodies are now totally fallen into disuse. 1 *Black.* 283.

CORONATUS, was anciently the designation of a clergyman; properly such an one as had received the first tonsure, as preparatory to superior orders; which tonsure was in the form of a *corona* or crown of thorns.

CORONERS, are ancient officers by the common law, so called, because they deal principally with the pleas of the crown, and were of old time the principal conservators of the peace. 2 *Haw.* 42.

On a vacancy of the office of coroner, a writ issues out of chancery, called a writ *de coronatore eligendo*, directed to the sheriff to call together the freeholders of the county, for the choice of another coroner; and to certify into the chancery both the election, and the name of the party elected, and to administer to him his oath duly to execute his office. In some places, lords of franchises or others have by charter power to appoint coroners.

Commonly there are four coroners in every county, except in *Wales* and *Cheeshire*, where there are but two. 4 *Inst.* 271. And in *Westmorland* there are but two.

The coroner's power is chiefly in taking inquisition, when any person comes to an unnatural death. In which case, he must summon a jury to attend at the place, unto whom he shall administer an oath to enquire, upon view of the body, how the party came by his death. He shall also inquire of the murderer's lands or goods, and whether he fled; and shall also inquire of deodands; and where any is found culpable, he shall certify the inquisition, and bind over the witnesses to the next assizes. He is also to enquire of treasure trove; and execute process in case there be any just exception to the sheriff; and must pronounce judgment of outlawry in the county court.

For his fees, he shall have 20s.; and also 9d. for every mile he shall travel from home to take the inquisition, 25 *G.* 2. c. 29.

He is chosen for life; but he may be removed by the king's writ *de coronatore exonerando*, for a cause to be therein assigned;

as that he is incapacitated by years, or sickness, or absence; or if he shall be convicted of extortion, or neglect of duty, or misdemeanor; in such case the court, before whom he shall be convicted, may adjudge him to be removed from his office.

CORPORATION:

1. A *corporation* is a person or persons in a *political* capacity, created by the law, and styled a *body politic*; that is, framed by *policy* or *fiction* of law, to endure in perpetual succession, with capacity to take and grant, sue and be sued. *Wood. b. 1. c. 8.*

For in judgment of law, a corporation never dies; and therefore the predecessors who lived many ages ago, and their successors now in being, are one and the same body corporate. So that a gift to such a corporation, either of lands or of chattels, without naming their successors, vests an absolute property in them, so long as the corporation subsists. *2 Black. 430.*

2. Corporations are either *aggregate* or *sole*. A corporation *aggregate* consists of many persons united together in one society; of which kind are, the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. *1 Black. 469.*

3. A corporation *sole* consists of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In which sense the king is a sole corporation, so is a bishop, so are some deans and prebendaries, distinct from their several chapters, and so is every parson and vicar. *Id.*

4. Another division of corporations, whether aggregate or sole, is into *ecclesiastical* and *lay*. *Ecclesiastical* corporations are, where the members that compose the same are intirely spiritual persons; such as bishops, deans, and chapters, certain deans and prebendaries in their sole capacity, all archdeacons, parsons, and vicars. *Id.*

5. *Lay* corporations are erected for a variety of *temporal* purposes. The king, for instance, is made a corporation to prevent in general the possibility of an interregnum or vacancy of the throne, and to preserve the possessions of the crown intire; for immediately upon the demise of one king, his successor is in full possession of the regal rights and dignity. Other lay corporations are erected for the good government of a town or particular district; as a mayor and commonalty, bailiff and burgeses, or the like: some, for the advancement and regulation of manufactures and commerce; as the trading companies of London and other towns: and some for the better carrying on of divers special purposes, as church wardens, for conservation of the goods of the parish; the college of physicians and company of surgeons in
London,

London, for the improvement of medical science; the royal society, for the advancement of natural knowledge. *Id.* 470.

6. Of these lay corporations some are stiled *eleemosynary*, being such as are constituted for the perpetual distribution of the free alms or bounty of the founder of them, to such persons as he hath directed. Of this kind are all hospitals for maintenance of the poor, sick, and impotent; and all colleges, both in and out of the universities, as at *Manchester*, *Winchester*, and *Eaton*. And all these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons, and although in some things they partake of the nature, privileges, and restrictions of ecclesiastical bodies. *Id.* 471.

7. A corporation or body politic may commence or be made by the common law, by the king's charter or letters patent, by act of parliament, or by prescription. 1. By the common law, as the king, bishops, some deans, archdeacons, prebendaries, parsons, vicars, churchwardens, to some purposes. 2. By the king's charter or letters patent; to which purpose he may also communicate his authority to others. 3. By act of parliament; so the college of physicians in *London* was made a corporation. 4. By prescription; as that which hath been and continued a corporation time out of mind, though the charter by length of time or other accident hath been lost. *Wood. b. 1. c. 8.*

8. When a corporation is erected, a *name* must be given to it; and by that name alone it must sue and be sued, and do all other legal acts. 1 *Black. 474.*

9. To every corporation there are several essential incidents: As, 1. To have perpetual succession, for this is the very end of the incorporation, as there cannot be a succession for ever without incorporation. 2. To sue or be sued, to grant or receive, by its corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them, for the benefit of themselves and successors; but under several restrictions imposed by act of parliament. 4. To have a common seal; for though the particular members may express their private consents to any act by words or signing their names, yet this doth not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals. 5. To make by-laws, or private statutes, for the better government of the corporation; which are binding upon themselves, unless contrary to the laws of the land. But these two last are not applicable to sole corporations. 1 *Black. 475.*

10. In ecclesiastical and eleemosynary foundations, the king or the founder may give them rules and *statutes*, which they are bound to observe; but corporations merely lay, constituted for civil purposes, are subject to no particular statutes but to the common law, and to their own by-laws. *Id.* 477.

11. Of

11. Of all *ecclesiastical* corporations, in order to inquire into and correct irregularities, the ordinary is *visitor*: so the king, as supreme ordinary, is visitor of the archbishop; the archbishop, of the bishops; the bishops in their several dioceses are visitors of deans and chapters, of persons and vicars, and of all other spiritual corporations. With respect to *eleemosynary* corporations, the founder and his heirs, or such other as the founder hath appointed, are visitors. Of *civil* corporations, the king is visitor in his court of king's bench. *Id.* 480.

12. In aggregate corporations, the act of the *major part* is the act of the whole. *Id.* 478.

But where the head of a corporation dies, nothing can be done during the vacancy. *1 Inf.* 263, 4.

13. If an assembly of a corporation be not holden on a charter day or a general day of meeting, there must be previous *notice* to every member, that he may come prepared, and have an opportunity to give his reasons. *Burr. Mansf.* 735.

Where notice is given for one particular business only, the body cannot go on to other business, unless the whole body is met, and it is done by consent. *1 Barnard.* 80.

When the electors are assembled, to chuse one to fill up a vacancy, those who do not vote, do thereby acquiesce in the election made by those who do: as where there were eleven voters, five voted, and six refused, the court held, that the six virtually consented. *Burr. Mansf.* 1021:

To make a man an *inhabitant* in a corporation, to qualify him to do several corporate acts, it is not sufficient that he barely live in the town, but he ought to be a householder, and also to pay scot and lot. *2 Barnard.* 408.

No person can be obliged to be a member of a corporation, without his consent. *Burr. Mansf.* 2199.

An election by one single elector only; being the only remaining one, is good, though the power of election be given to the *residue*, or the greater number of them. *Id.* 541.

14. Any particular member may be *disfranchised*, or lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land, or by having come in by a void election, or the like. *1 Black.* 484.

But after twenty years unimpeached possession of a corporate franchise, no rule will be granted to shew by what right the possessor holds it: under twenty years, every case must depend upon its own particular circumstances. *Burr. Mansf.* 1962.

Also a man may resign his place in the corporation, if he pleases, by his own voluntary act. *1 Black.* 484.

15. The corporation itself may be dissolved several ways: As,
1. By act of parliament. 2. By the natural death of all its members

bers without others elected in their places, in case of an aggregate corporation. 3. By surrender of its franchises into the hands of the king. 4. By forfeiture of its charter through negligence or abuse of its franchises: and in this case, the regular course is, to bring an information in the nature of a writ of *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. *Id.* 485.

And by the common law, corporations were dissolved, in case the mayor or other head officer was not duly elected on the day appointed by charter or established by prescription: but by the 11 G. c. 4. this is remedied, and ample directions given for appointing another.

16. If the corporation, by any of the aforesaid means, comes to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by escheat: for the law doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant faileth. 2 *Black.* 256.

CORPORATION ACT, is an act of parliament, 13 C. 2. *ff.* 2. c. 1. for preventing dissenters from being appointed to offices in towns corporate; whereby it is enacted, that no person shall be elected to any office relating to the government of any city or corporation, unless within a year before he hath received the sacrament of the lord's supper according to the rites of the church of *England*; and he is also enjoined to take the oaths of allegiance and supremacy at the same time that he takes the oath of office; in default of either of which requisites, the election shall be void.

CORPSE, stealing out of a grave, though it is a matter of great indecency, yet is not felony; but if the shroud or other apparel be stolen with it, this is felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral. And the parson, who has the freehold of the soil, may bring an action of trespass for breaking the ground. 2 *Black.* 429.

CORPUS CHRISTI day, is a feast instituted in the year 1264, in honour of the blessed sacrament. The anniversary thereof is the 25th of May.

CORPUS CUM CAUSA, is a writ issuing to bring the body of a prisoner into court, together with the cause for which he is committed.

CORRECTION, house of, is to be built, fitted up, and furnished with tools and implements both for labour and punishment of offenders, at the expence of the county, by the statute 17 G. 2. c. 5. 22 G. 3. c. 64. & 24 G. 3. c. 55.

CORRUPTION OF BLOOD, is where a person is attainted of treason or felony, in which case his blood is so far stained or corrupted,

corrupted, that the party loses all the nobility or gentility he might have had before, and becomes ignoble, and he can neither inherit lands as heir to an ancestor, nor have an heir; but his lands shall escheat to the lord of the fee, subject to the king's year, day, and waste: and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor. But the king's pardon, though it doth not restore the blood, yet as to issues born after, has the effect of a restitution, so as to render them capable to inherit. But restitution of blood, in its true nature and extent, can only be by act of parliament. 2 *Haw.* 456. 4 *Black.* 388.

CORSELET (*corpuseulum*), was armour covering the *body* or *trunk* of a man, heretofore used by pikemen, for the better resistance of the assaults of the enemy.

CORSE PRESENT, is said by some to be the same as a *mortuary*, but others distinguish the same from the mortuary, in that the mortuary was a right settled on the church upon a person's decease; and that a corse present was a voluntary oblation usually made at funerals. 1 *Still.* 172.

CORSNED bread, *panis conjuratus*, the morsel of execration. This was a kind of superstitious trial among our *Saxon* ancestors, to purge themselves of any accusation, by taking a piece of bread of about an ounce weight, which was consecrated by a sort of exorcism, praying of the Almighty that it might cause convulsions, and find no passage, if what they affirmed or denied were not true. The form of execration was thus: *We beseech thee, O Lord, that when he who is guilty of this theft hath the exorcised bread offered to him in order to discover the truth, his jaws may be shut, his throat so narrow that he may not swallow, and that he may cast it out of his mouth, and not eat it.* Du Cange. The old form, or *Exorcismus panis hordeacei ad probationem veri*, is extant in *Lindenbrogius*, p. 107. And in the laws of king *Canute*, cap. 6. *Si quis alteri ministrantium accusetur, et amicis destitutus sit, cum sacramentales non habeat, vadat ad iudicium quod Anglice dicitur corsned, et fiat sicut Deus velit, nisi super sanctum corpus Dei permittatur ut se purget.* From whence it may seem that the purgation was originally by the very sacramental bread itself, received with solemn abjuration and devout expectation that it would prove mortal to those who dared to swallow it in falsehood, till at length the bishops and clergy were not willing to prostitute the communion bread to such like purposes, but they allowed the people to practice the same judicial rite, in eating some other morsels of bread consecrated to the like uses. This mode of trial seems to have been an imitation of the trial of jealousy, by the *bitter water* that caused the curse under the *Mosaic* law. *Num.* v. It is recorded of the perfidious *Godwin*, earl of *Kent*, in the time of king *Edward* the

the Confessor, that, on his abjuring the murder of the king's brother, by this way of trial, as a just judgment for his solemn perjury, the bread stuck in his throat and choaked him. *Cum Godwinus comes in mensa regis de nece sui fratris impeteretur, ille post multa sacramenta tandem per buccellam deglutiendam abjuravit, et buccella gustata continuo suffocatus interiit. Ingulph.* This, with other barbarous ways of purgation, was by degrees abolished: though we have still some remembrance of this superstitious custom in our usual phrases of abjuration; as, I will take the sacrament upon it—May this bread be my poison—May this bit be my last, and such like.

COSTARD, an apple: whence *costard-monger*, a seller of apples.

COSTS. The common law did not professedly allow any *costs*; though in reality costs were always considered and included in the quantum of damages, in such actions where damages are given; and now, in most cases, costs are given by several statutes. 3 *Black.* 399.

But the king, or any person suing to his use, also executors or administrators suing in the right of the deceased, and persons suing *in forma pauperis*, shall not pay costs: and for slanderous words spoken, for assault and battery, and for trespasss, where the jury shall give less damages than 40s. the plaintiff shall have no more costs than damages, unless, in case of assault and battery, the judge shall certify on the back of the record, that an actual battery was proved; and, in case of trespasss, that the freehold or title of the land came in question. *Id.* 400.

But if it be in an action wherein there can be no such certifying, as debt, assumpsit, trover, trespass for taking his goods, trespass for spoiling his goods, trespass for beating his servant, whereby he lost his service, it is out of the statute, and the plaintiff may have full costs. 1 *Salk.* 208.

Where a statute gives a penalty or sum certain to the *party grieved*, he shall in consequence have costs, because he had a right of action antecedent to bringing the action: but where a sum certain is given to a stranger, as where it is to a *common informer*, or him that shall prosecute, he shall not have his costs; for till he commenced his action he had no right of action in him. 1 *Salk.* 206.

If any person sues in any court any action wherein the plaintiff might have costs, if judgment should be given for him, the defendant shall have costs against the plaintiff, if the plaintiff be nonsuit, or a verdict pass against him. *Bur. Mansf.* 1724.

Where double damages are given by any act of parliament, the costs shall be doubled also; for damages include costs. *Str.* 1048.

Where costs are allowed, it is not necessary that the jury should give

give the costs, but they may leave it to the court to do it, who are best able to judge of what costs are fitting to be given. It is the course of the court of king's bench, to refer the taxation of the costs to the proper officer of the court, and not to make any special rules for such matters, except it be in extraordinary cases. 1 *Lill. Abr.* 338.

If costs are refused to be paid, an attachment lies. 1 *Nelf. Abr.* 550.

The matter of costs in *equity* is not held to be a point of right, but merely discretionary, according to the circumstances of the case, as they appear more or less favourable to the party vanquished. 3 *Black.* 451.

COIGARE, a kind of refuse wool, *cotted* or clung together, so as it is difficult to rend it asunder.

COTTAGE (Sax. *cote*), is a little house for habitation, without any land belonging to it. By statute 31 *Eliz. c. 7.* cottages were prohibited to be built for habitation, without laying at least four acres of land to the same, and divers other restrictions were thereby enjoined; but the same was repealed by 15 *G. 3. c. 32.* setting forth, that the said statute of 31 *El.* had laid the industrious poor under great difficulties to procure habitations, and tended very much to lessen population, and in divers other respects was inconvenient to the labouring part of the nation in general.

COVENABLE, Fr. *convenient* or *suitable*.

A **COVENANT**, is the consent and agreement of two or more persons, to do or not to do some act or thing contracted between them. *Wood. b. 2. c. 3.*

The words of covenanting are, "do covenant, grant, promise, and agree:" though there needs no great exactness in the words to make a covenant. For if words of *condition*, and words of *covenant*, are coupled together in the same sentence, as *provided always*, and *it is covenanted*—in such case the words may be construed to make a *condition* and a *covenant* also. *Id.* 1 *Inst.* 203.

A covenant is generally either *in fact* or *in law*. In *fact*, is that which is expressly agreed between the parties, and inserted in the deed. In *law*, is that covenant which the law intends and implies, though it be not expressed in words, as if a lessor demise and grant to his lessee an house or lands for a certain term, the law will intend a covenant on the lessor's part, that the lessee shall, during the term, quietly enjoy the same against all incumbrances. 1 *Inst.* 384.

There is also a covenant *real*, and covenant *personal*: A *real* covenant is that, whereby a man binds himself to pass a thing real, as lands or tenements, or to levy a fine of lands; and covenant *personal* is, where the same is annexed to the person, and merely *personal*, as if a man covenant with another by deed to build him an

anhouse, or to be his servant for such a time, or the like. *F. N. B.*

If the covenantor covenants for himself and his heirs, it is then a covenant *real*, and descends upon his heirs, who are bound to perform it, provided they have assets by descent, but not otherwise: if he covenants also for his *executors* and *administrators*, his *personal* assets, as well as his *real*, are likewise pledged for the performance of the covenant, which makes such covenants a better security than any warranty, and it has therefore in modern practice totally superseded the other. *2 Black. 304.*

If a man binds himself by express covenant *in deed*, to repair an house, and it is burned down by lightning, or any other accident, yet he ought to repair it; for it was in his power to have provided against it by contract: But he is not so bound by covenant *in law*, for where houses are blown down by tempest, or the like, the law excuses the lessee in an action of waste. *1 Lill. Abr. 349.*

If a covenant is unlawful in the substance thereof, or impossible, it is void. *Wood. b. 2. c. 3.*

A covenant for the lessee to enjoy against all men, extends not to wrongful acts and entries, for which the lessee hath his proper remedy against the aggressors: but if it be to save harmless against a certain person, there the covenantor must save the covenantee harmless against the entry of that person, be it by wrong or rightful title. *Cro. Eliz. 213.*

A covenant is to be taken most strongly against the covenantor, and most to the advantage of the covenantee. *Wood. ibid.*

A covenant to pay a rent-charge clear of all taxes, doth not extend to taxes that did not exist at the time of making the covenant; for these were not then in contemplation. *L. Raym. 319.*

If no time is covenanted for doing of a thing, it must be done in reasonable time. *Wood. ibid.*

The remedy for breach of covenant is by *writ of covenant*, which directs the sheriff to command the defendant generally to keep his covenant with the plaintiff (without specifying the nature of the covenant), or shew good cause to the contrary; and if he continues refractory, or the covenant is already so broken that it cannot now be specifically performed, then the subsequent proceedings set forth with precision the covenant, the breach, and the loss which hath happened thereby, whereupon the jury will give damages, in proportion to the injury sustained by the plaintiff, and occasioned by such breach of the defendant's contract. *3 Black. 155.*

If a man lease for years, reserving a rent, an action of covenant lies for non-payment of the rent; for this is an agreement
for

for payment of the rent, which will make a covenant. 1 *Roll's Abr.* 519.

On a covenant to pay money, at several days, after the first default an action of covenant lies; otherwise it is of debt upon a bond or obligation. 1 *Inst.* 292.

COVENANT TO STAND SEISED TO USES, is, when a man that hath a wife, children, brother, sister, or kindred, doth by covenant in writing under hand and seal agree, that for their or any of their provision or preferment, he and his heirs will stand seised of lands to their use, either in fee simple, fee tail, or for life. The use being created by the statute 27 *H. 8. c. 10.* which conveys the estate as the uses are directed, this covenant to stand seised is become a conveyance of the land since the said statute. The considerations of these deeds are, natural affection, or marriage. And the law allows these considerations to raise uses, as well as money or other valuable consideration. *Plowd.* 302. So much of the use, as the owner doth not dispose of, remains still in him. And where an use is raised by way of covenant, the covenantor continues in possession; and there the uses limited, if they are according to law, shall rise and draw the possession out of him: but if they are not, the possession shall remain in him, until a lawful use arise. 1 *Leon.* 197. 1 *Mod.* 159.

COVERT BARON, a wife so called, from her being under the cover or protection of her husband, *baron*, or lord.

COVERTURE, is applied particularly to the state and condition of a married woman, or *feme covert*.

COVIN, *covina*, cometh of the French word *convine*, and is a secret assent determined in the hearts of two or more, to the defrauding and prejudice of another. 1 *Inst.* 657.

It is commonly conversant in and about conveyances of lands to defeat purchasers, or of goods and chattels to defraud creditors. It may also be in suits of law, and judgment had therein; but wherever covin is, it shall never be intended, unless it appears and be particularly found: for covin and fraud, though proved, yet must be found by the jury, otherwise it shall pass for nothing. *Brownl.* 188. *Bridgm.* 112.

If goods are sold in market overt by covin, on purpose to bar him that hath right, this shall not bar him thereof. 2 *Inst.* 713.

COUNSEL FOR PRISONERS. By the common law, no counsel shall be allowed a prisoner, upon his trial upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated, it being understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular. But now the judges never scruple to allow a prisoner counsel to instruct him what questions to ask, or even to ask questions for him; with respect

to

to matters of fact, for as to matters of law, arising on the trial, they are *entitled* to the assistance of counsel. 4 *Black.* 355.

COUNSELLOR, is a person retained by a client to plead his cause in a court of judicature. A *counsellor at law* hath a privilege to enforce any thing which is informed him by his client, if pertinent to the matter, and is not to examine whether it be true or false; for it is at the peril of him who informs him. *Cro. Jac.* 90.

COUNT, was a person of eminence, so called anciently from his *accompanying* or attending upon the king. The *earls* or governors of the shires had for some time this appellation given them; hence the earl is in Latin styled *comes*, the sheriff *vice comes*; and the shire to this day retains the name of *county*.

Count signifies, in another sense, the original declaration of complaint in a real action. As *declaration* is applied to *personal*; so *count* is applicable to *real* causes. But *count* and *declaration* are oftentimes confounded, and made to signify the same thing. *F. N. B.* And in modern and common acceptance, every separate charge in a declaration or indictment is called a *count*; so that a declaration or indictment may, and very frequently does, contain several counts.

COUNTERFEIT. See **CHEAT**.

COUNTERPART. Heretofore, where there were several parties to an indenture, each party executed a separate deed; and that part or copy which is executed by the grantor is called the *original*, and the rest are *counterparts*. But of late, it is most frequent for all the parties to execute every part, and this makes them all originals. 2 *Black.* 296. If an original deed is in being, or may be had, the counterpart cannot be produced as evidence; otherwise, if the original cannot by any means be procured. *Wood. b. 4. c. 4.*

COUNTERPLEA, is, when the tenant in any real action, tenant by the curtesy, or tenant in dower, in his answer and plea, vouches any one to warrant his title, or prays in aid of another who hath a larger estate, as of him in remainder or reversion; or, where one that is a stranger to the action, comes and prays to be received to save his estate; then, that which the demandant alledgeth against it, why it should not be admitted, is called a *counterplea*. *T. L.*

COUNTIES PALATINE, are those of *Chester*, *Durham*, and *Lancaster*. The two former are such by prescription or immemorial custom; or at least as old as the Norman conquest: the other was created by king *Edward* the third, in favour of *Henry Plantagenet*, duke of *Lancaster*, whose heiress was married to *John of Gaunt*, the king's son. 1 *Black.* 116.

Counties palatine are so called a *palatio*, because the owners thereof, the earl of *Chester*, the bishop of *Durham*, and the duke of

of *Lancaster*, had in those counties *jura regalia*, as fully as the king hath in his *palace*. They might pardon treasons, murders, and felonies; they appointed all judges and justices of the peace; all writs and indictments ran in their names, as in other counties in the king's; and all offences were said to be done against their peace, and not, as in other places, against the peace of our lord the king. These palatine privileges were in all probability originally granted to these counties because they bordered upon the enemies countries, *Wales* and *Scotland*; in order that the owners, being encouraged by so large an authority, might be the more watchful in its defence; and that the inhabitants, having justice administered at home, might not be obliged to go out of the county, and leave it open to hostile incursions. And upon this account also, there were formerly two other counties palatine, *Pembrokeshire* and *Hexhamshire*. But these were abolished by parliament, in the reigns of king *Hen. 8.* and queen *Eliz.* And the powers of the owners of the other counties palatine much abridged; though still all writs are witnessed in their names, and all forfeitures for treason by the common law accrue to them. *Id.* 117.

Of these three, the county of *Durham* is now the only one remaining in the hands of a subject; for the earldom of *Chester* was united to the crown by king *Hen. 3.* and hath ever since given title to the king's eldest son. And the county palatine or duchy of *Lancaster*, in the reign of king *Ed. 4.* was by act of parliament vested in the king and his heirs kings of *England* for ever. *Id.* 118.

The isle of *Ely* is not a county palatine, though sometimes erroneously so called, but only a royal franchise; the bishop having, by grant of king *Hen. 1.* *jura regalia* within the isle of *Ely*, whereby he exerciseth a jurisdiction over all causes, as well criminal as civil. *Id.* 119.

In all these, the king's ordinary writs, issuing under the great seal out of chancery, do not run, that is, they are of no force. For, as originally all *jura regalia* were granted to the lords of these counties palatine, they had of course the sole administration of justice, by their own judges appointed by themselves, and not by the crown. It would, therefore, be incongruous for the king to send his writ to direct the judge of another's court in what manner to administer justice between the suitors. And the judges of assize, who sit within these franchises, do sit by virtue of a special commission from the owners of the several franchises, and under the seal thereof, and not by the usual commission under the great seal of *England.* 3 *Black.* 79.

In the county palatine of *Lancaster*, there is also another special jurisdiction, called the court of the duchy chamber of *Lancaster*, held before the chancellor of the duchy or his deputy concerning

concerning all matters of equity relating to lands holden of the king in right of the duchy of *Lancaster*; which is a thing very distinct from the county palatine (which hath also its separate chancery for sealing of writs, and the like), and comprises much territory which lies at a vast distance from it; as particularly a very large district surrounded by the city of *Westminster*. *Id.* 78.

A writ of error lies from all these jurisdictions to the court of king's bench. And all prerogative writs, as those of habeas corpus, prohibition, certiorari, and mandamus, may issue to all these exempt jurisdictions; because the privilege, that the king's writ runs not, must be intended between party and party, for there can be no such privilege against the king. *Id.* 79.

COUNTY, *comitatus*, is derived from *comes*, the *count*, who by the Saxons was called the *earl*, or *alderman*, of the shire, to whom the government of it was intrusted. This he usually exercised by his deputy, still called in Latin *vice-comes*, and in English the *sheriff*, or *shire-reeve*, signifying the officer of the shire; upon whom, by process of time, the civil administration of it is now totally devolved. In some counties there is an intermediate division, between the shire and the hundreds; as *lathe* in *Kent*, and *rapes* in *Suffex*, each of them containing about three or four hundreds a piece. These had formerly their *lathe-reeves*, and *rape-reeves*, acting in subordination to the *shire-reeve*. Where a county is divided into three of these intermediate jurisdictions, they are called *trithings*, which were anciently governed by a *trithing-reeve*. These trithings still subsist in the large county of *York*, where, by an easy corruption, they are denominated *ridings*. The number of counties in *England* and *Wales* hath been different at different times: at present there are forty in *England* and twelve in *Wales*. 1 *Bl ck* 116.

COUNTY COURT, is a court held every month or oftener by the sheriff, in what part of the county he pleases: but for the election of knights of the shire, it must be held at the most usual place. 1 *Black.* 178.

The jury in this court ought to be freeholders; but the *quantum* of their estate is not material.

This court is not a court of record; but it may hold plea of debt or damages under the value of 40*s.* It may also hold plea of many real actions, and of all personal actions to any amount, by virtue of a special writ called a *justicies*, which is a writ empowering the sheriff, for the sake of dispatch, to do the same justice in his county court, as might otherwise be had in the courts at *Westminster*. 3 *Black.* 35.

But it cannot hold plea of freehold; as where a defendant avoweth for damage feasant, and the plaintiff justifies by reason of common of pasture; in which case the cause must be removed. *Wood. l. 4. c. 1.*

After

After judgment given for the plaintiff, the defendant's goods may be taken, appraised, and sold, to satisfy the plaintiff; but if the defendant hath no goods, the plaintiff remains without remedy in this court; for being no court of record, no *copias* lies to arrest the body of the debtor. *Greenw.* 22.

This court was anciently a court of great dignity and splendor, the bishop and the earl, with the principal gentlemen of the shire, sitting therein to administer justice both in lay and ecclesiastical causes. But its dignity was much impaired, when the bishop was prohibited, and the earl neglected to attend it. And in modern times, as the proceedings are removeable from hence into the king's superior courts, by writ of *pone* or *recordare*, this hath occasioned the business of the county court in a great measure to decline.

COURT, is a place where justice is judicially administered. *1 Inst.* 58.

Of courts, some are *of record*, others *not of record*. A court *of record*, is that where the acts and judicial proceedings are inrolled in parchment, for a perpetual memorial and testimony; which rolls are called the *records* of the court, and are of such high and supereminent authority, that their truth is not to be called in question. For it is a settled rule, that nothing shall be averred against a record, nor shall any plea or even proof be admitted to the contrary. And if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any such record or no, else there would be no end to disputes. All courts of record are the king's courts, in right of his crown and royal dignity; and therefore no other court hath authority to fine and imprison; so that the very erection of a new jurisdiction, with power of fine and imprisonment, makes it instantly a court of record. *3 Black.* 24.

A court *not of record* is the court of a private person, whom the law will not intrust with any discretionary power over the fortune or liberty of his fellow subjects. Such are the courts baron incident to every manor, and other inferior jurisdictions; where the proceedings are not inrolled or recorded; but as well their existence as the truth of the matters therein contained shall, if disputed, be *tried* and determined by a jury. These courts can hold no plea of matters cognizable by the common law, unless under the value of 40s. nor of any forcible injury whatsoever, not having any process to arrest the person of the defendant. *Id.* 25.

COURT BARON, is a court which every lord of a manor (anciently called a *baron*) hath within the precinct of that manor; for redressing misdemeanors and nuisances within the manor, and for settling disputes of property among the tenants. This court is an inseparable ingredient of every manor; and if the number of suitors should so fail, as not to leave sufficient to make a jury

or homage, that is, two tenants at the least, the manor itself is lost. 2 *Black.* 90.

The court baron is of two natures; the one is a customary court, appertaining intirely to the copyholders or other customary tenants; and of this the lord or his steward is the judge; the other is a court of common law, and is before the freeholders who owe suit and service to the manor, the steward being rather register than judge. These courts, though in their nature distinct, are frequently confounded together, although one of them may be without the other.

This court must be holden on some part of the manor; for if it be holden out of the manor it is void: unless a lord, being seised of two or three manors, hath usually time out of mind kept at one of his manors courts for all the said manors; then by custom such courts are sufficient in law, although they be not holden within the several manors. 1 *Inst.* 58.

The copyholders or customary court is for grants and admittances upon surrenders and descents, on presentment of the homage or jury. The homage may inquire of the death of tenants after the last court, and who is the next heir; of fraudulent alienation of lands to defeat the lord of his profits; of rent or service withdrawn; of escheats and forfeitures; of cutting down trees without licence or consent; of suit not performed at the lord's mill; of waste by tenant for life; of furcharge of common; of trespass in corn, grafs, meadow, woods, hedges; of rescous and pound breach; of removing mere-stones or landmarks; of by-laws not observed; and such like. The method of punishment is by amerciamment: but the steward cannot amerce without three assurers sworn to assure or moderate the amercement, and then the lord may have an action of debt in his court baron for amercements assured; for the suitors are judges there, and not the lord. *Wood. b. 4. c. 1.*

The freeholders court was formerly holden every three weeks; and its most important business is to determine, by writ of right, all controversies relating to the right of lands within the manor. It may also hold plea of any personal actions, of debt, trespass on the case, or the like, where the debt or damages do not amount to 40s. *Id.*

Also a common recovery may be had in this court. *Id.*

But the proceeding on a writ of right may be removed into the county court by a precept from the sheriff called a *tolt* (because it takes, *tollit*, the cause out of the lord's court). And the proceedings in all other actions may be removed into the superior courts by the king's writs of *pone*, or *accedas ad curiam*, according to the nature of the suit. After judgment given, a writ also of *false judgment* lies to the courts at *Westminster* to rehear and review the

the cause and not a writ of error; for this is not a court of record. 3 *Black.* 33.

On recovery of debt in this court, they have not power to make execution, but are to distrain the defendant's goods, and retain them till satisfaction shall be made. *Wood. b. 4. c. 1.*

COURT CHRISTIAN, is an ecclesiastical judicature opposed to the civil court, or lay tribunal; and is so called, as handling matters especially concerning the laws of *Christ.* 2 *Inst.* 488.

COURT OF DELEGATES. See DELEGATES.

COURT LEET. See LEET. So also of the other courts; as of *Marshalsea, Star-chamber,* and many others. See the respective titles.

CRANAGE, is a tool for drawing merchandize out of vessels to the wharf, so called because the instrument is in the form of a crane. 8 *Co.* 46.

CRAVEN was a word of obloquy, where, in the ancient trial by battle, the victory was proclaimed, and the vanquished acknowledged his fault in the audience of the people, or pronounced the horrible word *craven*, in the name of recreantise, or cowardliness; after which, judgment was to be given, that after this the recreant should lose his *liberam legem*, that is, he should become infamous, and not be accounted in that respect *liber et legalis homo*; and therefore could not be of any jury, nor give testimony as a witness in any cause. The word, according to some, is derived of the Greek word *Κραυνη*, a vociferation; others derive it from *craving* and crying for mercy and forgiveness. 2 *Inst.* 247. 3 *Inst.* 221. In the case of an *appel*, if the *appellant* cries *craven*, he in like manner shall lose his *liberam legem*; but if the *appellee* cries *craven*, he shall have judgment to be hanged. 3 *Inst.* 221.

CREDITORS. By statute 30 *C. 2. c. 7.* creditors shall recover their debts against executors or administrators who have wasted or converted the goods to their own use, as they might have done against the testator or intestate if he had been living.

And by 3 *W. c. 14.* wills and devises of lands, as to creditors on bonds or other specialties, shall be void; and the creditors may have actions of debt against the heir at law and devisee.

But an heir that hath lands by descent, shall not be liable for the debt of his ancestor, further than to the value of the lands descended. *Str.* 665.

And if an heir is sued upon a bond debt of his ancestor, and he pays the money, the executor shall reimburse him as far as there are personal assets of the testator come to the hands of the executor. 1 *Cha. Ca.* 74.

A creditor by mortgage may come either upon the mortgaged land or upon the personal estate; for a mortgage is a charge upon the personal estate as well as upon the land; and the personal

sonal estate is primarily liable ; for a mortgage is a general debt, and the land is only as a security. 1 *Atk.* 487.

And the general rule is, that the personalty shall be first charged with payment of debts, and the testator cannot exempt it from being liable, as against creditors ; but as between heir and executor, he may charge them upon any other fund which is not primarily liable, and thereby discharge the personal estate. 1 *Wilson*, 24.

CROSIER, the pastoral staff, or ensign of the episcopal office ; so denominated from its resembling the form of a *cross*. So *crosses* were pilgrims that wore the sign of the cross upon their garments.

CROSS BILL, is when the defendant in chancery hath any relief to pray against the plaintiff ; in which case he must do it by an original bill of his own, which is called a *cross bill* ; unto which the plaintiff will be required to put in his answer.

CROWN OFFICE. The court of king's bench is divided into the *plea* side, and the *crown* side. In the *plea* side, it takes cognizance of *civil* causes, in the *crown* side it takes cognizance of *criminal* causes, and is thereupon called the *crown office*. In the crown office are exhibited informations in the name of the king, of which there are two kinds : 1. Those which are truly and properly the king's own suits, and filed *ex officio* by his own immediate officer, the attorney general. 2. Those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer ; and these are filed by the king's coroner and attorney, usually called the master of the crown office.

The objects of the king's own prosecutions, filed *ex officio* by the attorney-general, are properly such enormities as peculiarly tend to disturb or indanger his government, or to molest him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention whereof a moment's delay might be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal. The objects of the other species of informations, filed by the master of the crown office upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the attorney-general), but which on account of their magnitude or pernicious example, deserve the most public animadversion.

And when an information is filed either thus, or *ex officio*, it must be tried by a petty jury of the county where the offence

offence arises; after which, if the defendant be found guilty, he must resort to the court for his punishment. 4 *Black.* 308.

CUCKING STOOL (called in ancient time a *tumbrel*, and sometimes a *trebucket*), signifies, in *Saxon*, the scolding stool; and is an engine of correction for a scolding woman after conviction upon an indictment for such offence, in which she is placed and plunged in the water: From whence it is also called the *ducking stool*, which perhaps is the original word, being more expressive of the thing signified.

CUI IN VITA, is a writ of entry, which a widow hath against him to whom her husband alienated her lands or tenements in his life time; which must contain in it, that during his life (*cui in vita*) she could not withstand it. *F. N. B.*

CULPRIT, is not (as is vulgarly imagined) an opprobrious name given to the prisoner before he is found guilty, but it is the reply of the clerk of arraigns to the prisoner after he hath pleaded not guilty; which plea was anciently entered upon the minutes in an abbreviated form, *non cul'*; upon which, the clerk of arraigns, on behalf of the crown, replies that the prisoner is guilty, and that he is ready to prove him so; which is done by a like kind of abbreviation, *cul'prit*, signifying that the king is ready to prove him guilty (from *cul'*, that is, *culpabilis*, guilty; & *prit*, *præsto sum*, I am ready to verify it). 4 *Black.* 339.

CURATE. Of curates there are three kinds: 1. Such as are employed under the spiritual rector or vicar, either as assistant to him in the same church, or executing the office in his absence in his parish church. 2. Such as officiate in chapels of ease under the mother church. 3. Perpetual curates; which are, where there is in a parish neither spiritual rector nor vicar, but a clerk is employed to officiate there by the impropiator.

CURFEU (from the Fr. *couvre*, to cover, and *feu*, fire), was an institution of *William* the Conqueror, who required, by ringing of a bell at eight of the clock every evening, that all companies should immediately disperse, and fire and candle be extinguished. It is remarkable that this ringing of the bell at that hour still continues in many places, though the original institution hath been long since forgotten.

CURRIER. By the 24 G. 3. c. 41. every currier or dresser of hides in oil, shall take out a licence annually from the commissioners or officers of excise.

CURTESY, *tenant by*.

TENANT BY THE CURTESY OF ENGLAND, is, *where a man taketh a wife seized in fee simple, or in fee tail general, or seized as heir in special tail, and hath issue by the same wife, male or female, born alive, albeit the issue afterwards dieth or liveth, yet if the*
wife

wife dies, the husband shall hold the land during his life, by the curtesy of England. *Litt. sect. 35.*

By the curtesy of England. Littleton says, it is so called, because it is used within the realm of England only. But it appears to have been the law of Scotland also, wherein it was called *curialitas*; so that probably our word *curtesy* was understood to signify, that the husband during his life, should be inrolled and do suit and service in the lord's court, for the lands of which his wife died seised, rather than to denote any peculiar favour belonging to this island. *2 Black. 126.* And indeed there seems to be no great *courtesy* in the matter, that the legislators, who were all, or most of them, married men (especially during the times that the law of wardship and marriage existed), should make a law for their own advantage, to disinherit the heir of the wife's estate, during the life-time of her surviving husband. This curtesy of England is in the Latin called *lex Anglia*, the law of England.

Taketh a wife seised. There is a seisin in deed, where one hath made entry, and is in actual possession; and a seisin in law, where a person hath right, but hath not actually made entry. It is the former of these that is here intended, namely a seisin in deed, if it may be attained unto. *1 Inst. 29.*

As if a man dieth seised of lands in fee simple, or fee tail general, and these lands descend to his daughter, and she taketh a husband and hath issue, and dieth before any entry, the husband shall not be tenant by the curtesy; and yet in this case she had a seisin in law; but if she or her husband had during her life entered, he would have been tenant by the curtesy. *1 Inst. 29.*

But if a man seised of an advowson, or rent in fee, hath issue a daughter, who is married, and hath issue, and dieth seised, and the wife before the rent became due or the church became void dieth; she had but a seisin in law, yet her husband shall be tenant by the curtesy, because he could by no industry attain to any other seisin. *Ibid.*

So in the case where lands, on which there were leases for years existing, and a rent incurred, descended on a wife as tenant in tail general, who survived three months after the rent day incurred; though she made no entry, nor received any rent, during her life, yet this was such a possession in the wife, as made the husband tenant by the curtesy: for the possession of the lessee was the possession of the wife, and there could be no other without making the husband a trespassor. *3 Atk. 469.*

But a man shall not be tenant by the curtesy of a bare right, title, use, or of a reversion or remainder expectant upon any estate or freehold, unless the particular estate be determined or ended during the coverture. *1 Inst. 29.*

In fee simple, or in fee tail general, or seised as heir in special tail. That is, of any estate of inheritance. *2 Black. 126.*

If

If a woman seised in fee of a freehold estate, mortgages it, and afterwards marries, and dies leaving a son, the mortgage having not been redeemed during the coverture, this is such a seisin in the wife, as intitles the husband to be tenant by the curtesy of the mortgaged premises; for, in equity, the land is considered only as a pledge or security for the money, and doth not alter the possession of the mortgagor. 1 *Atk.* 603.

An equity of redemption hath been always considered as an estate in the land; for it may be devised, granted, or intailed, with remainders: and the person intitled to the equity of redemption is considered as the owner of the land, and is such an estate whereof there may be a seisin. 1 *Atk.* 605.

In the case of a trust estate for payment of debts, a husband may be tenant by the curtesy. 1 *Atk.* 609.

But where a devise was to trustees, and they to apply the rents and profits to the devisor's daughter and heir, who was a feme covert, for her own separate use, and to suffer her to dispose of the estate by will, notwithstanding her coverture; in this case it was held, that the whole legal estate was in the trustees; and although a husband may be tenant by the curtesy of a trust, yet, in order to make a tenant by the curtesy, the wife must have the inheritance, and there must be likewise a seisin in deed in the wife during the coverture; and although in this case the wife had the inheritance, because it descended till the execution of the power, yet the father, whose estate it was, made the daughter a feme sole in this respect, and gave the profits to her separate use; therefore the husband could have no seisin during the coverture; he could neither come at the possession, nor the profits. 3 *Atk.* 716.

Where the wife hath an estate for life only, there the husband shall not be tenant by the curtesy. 1 *Atk.* 607.

There is no tenancy by the curtesy of copyhold lands, except it be by the special custom of the manor. *Plowd.* 263.

And bath issue, male or female. If lands be given in tail to a woman and to the heirs male of her body, and she taketh a husband, and hath issue a daughter, and dieth; in this case, the husband shall not be tenant by the curtesy; because the daughter by no possibility could inherit the the mother's estate in the land; and therefore where it is said, issue by his wife male or female, it is to be understood, which by possibility may inherit as heir to her mother of such estate. 1 *Inst.* 29.

If a man, seised of lands in fee, hath issue a daughter, who taketh husband, and hath issue to her said husband, the father dieth, and the husband entereth; he shall be tenant by the curtesy, although the issue was had before the wife was seised: And so it is, although the issue had died in the life time of her
 P father

father before any descent of the land, yet shall he be tenant by the curtesy. *Ibid.*

For the time when the issue is born is immaterial, provided it were during the coverture ; for, whether it were born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy. The husband, by the birth of the child, becomes tenant by the curtesy initiate, and may do many acts to charge the lands ; but his estate is not consummate till the death of the wife. 2 *Black.* 127. 13

Born alive. If a woman seised of lands in fee taketh husband, and by him is big with child, and in her travail dieth, and afterward the child is ripped out of her body alive ; yet he shall not be tenant by the curtesy, because the child was not born during the marriage, nor in the life-time of the wife, but in the mean time the land descended ; and in pleading he must allege, that he had issue during the marriage. 1 *Inst.* 29.

If the child be born alive, it is sufficient though it be not heard to cry ; for though crying is the strongest evidence of its being born alive, yet it is not the only evidence. *Ibid.*

The husband shall hold the lands during his life. Subject to the same incidents as other life estates. He shall have reasonable estovers of housebote, ploughbote, and haybote ; but shall not cut down timber, or commit other waste. And if he sows the land, and dies before harvest, his executors shall have the crop. 2 *Black.* 122.

If there is a mortgage upon the estate, the heir at law may oblige the tenant by curtesy to keep down the interest ; and if the principal shall be discharged, the tenant by curtesy shall contribute one third, and the heir at law two thirds. 1 *Atk.* 606. 3 *Atk.* 201.

CURTILAGE (from the Saxon, *court*, and *leagh*, locus), a court yard, backside, or piece of ground, lying near and belonging to an house.

CUSTOM time out of mind is, where no person living hath heard or known any proof to the contrary.

There is a difference between *custom* and *prescription* ; *custom*, is properly *local* usage, and not annexed to any *person* ; such as a custom in a manor, that lands shall descend to the youngest son : *prescription*, is merely a *personal* usage ; as, that such a one and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege ; as to have common of pasture in such a close, or the like ; for this is an usage annexed to the *person* of the owner of the estate. 2 *Black.* 263.

To make a custom good, the following are necessary requisites :

1. That it have been used so long, that the memory of man runneth not to the contrary. So that if any one can shew the beginning

thing of it, it is no good custom. For which reason, no custom can prevail against an act of parliament; since the act itself is a proof of a time when such a custom did not exist. 1 *Black.* 76.

2. It must have been continued. Any interruption would cause a temporary ceasing; the revival gives it a new beginning, which will be what the law calls within time of memory: Now time of memory hath been long ago ascertained by the law, to commence from the reign of King *Richard* the first; and any custom may be destroyed by evidence of its non-existence in any part of that long period from his days to the present. 2 *Black.* 31.

3. It must have been peaceable, and acquiesced in; not subject to contention and dispute. For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting. 1 *Black.* 77.

4. It must not be unreasonable. Thus a custom in a parish that no man shall put his beasts into the common till such a day, is good; but a custom that no cattle shall be put in till the lord of the manor hath first put in his, is bad, because unreasonable: for possibly the lord may never put in his, and thereby the tenants will lose all the profits. *Id.*

5. It must be certain. A custom that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. *Id.* 78.

6. Customs must be consistent with each other; for one custom cannot be set up in opposition to another. So if one man prescribes that by custom he hath a right to have windows looking into another's garden, the other cannot claim a right by custom to stop up or obstruct those windows; for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom. *Id.*

7. Customs, in derogation of the common law, must be construed strictly. Thus by the custom of gavelkind, an infant of fifteen years may by a deed of feoffment convey his lands in fee simple or for ever: but this custom doth not empower him to use any other conveyance, or even to lease them for a term of years; for the custom must be strictly pursued. 1 *Black.* 79.

A jury shall try whether there is a particular custom or no, and not the judges; unless the custom in question is of record in the same court.

If witnesses can depose that they heard their fathers say it was a custom all their time, and that their fathers had heard their grandfathers say it was so also in their time, this is evidence of a custom: but proof of a time when this custom did not exist, destroys all this kind of evidence.

CUSTOMS, are the duties, toll, or tribute, payable on merchandize exported or imported.

The word *customs* seems to be derived from the *French* word *coutum*, which signifies toll or tribute, and owes its own etymology to the word *coust*, which signifies price, damage, or, as we have adopted it in English, *cost*. 1 *Black.* 314.

The ancient duties on wool, skins, and leather, were styled the *staple* commodities of the kingdom, because they were obliged to be brought to those parts where the king's staple was established, in order to be there first rated, and then exported. And they were called *customa antiqua sive magna*; and were payable by every merchant as well native as stranger; with this difference, that merchant strangers paid an additional toll, namely, half as much again as was paid by natives. *Id.*

The *customa parva et nova*, was an impost of 3*d.* in the pound, due from merchant strangers only, for all commodities as well imported as exported; which was usually called the aliens duty. *Id.*

Tonnage is a duty on wines imported, at so much a *tun*; *poundage*, a duty *ad valorem*, on all other merchandize at so much a pound. *Id.* 315.

CUSTOS ROTULORUM, is he that hath the custody of the rolls or records of the sessions of the peace. He is the principal justice of the peace within his county, and is usually some person of fortune or quality. He is appointed by the king under his sign manual, and hath power to appoint the clerk of the peace.

CYDER AND PERRY. By the 27 *G. 3. c. 13.* certain excise duties are imposed on all cyder and perry made and sold in *Great Britain*, according to a schedule annexed to the act.

And by the annual malt act, a further duty is to be paid for all cyder and perry made in *Great Britain*, and sold by retail, the amount of both which duties is ascertained and limited by 29 *G. 3. c. 10.*

D A M

DAMAGE FEASANT (doing damage), is where the beasts of another come upon a man's land, and do there feed, tread, or spoil, his corn or grafs there growing; in which case, the owner of the ground may distrain and impound them till satisfaction be made. *Wood. b. 4. c. 4.*

But the owner may tender amends before the cattle are impounded; and then the detainer is unlawful. Also if, when impounded,

pounded, the pound door is unlocked, the owner may take them out. *Wood. b. 2. c. 2.*

If ten head of cattle be doing damage, a man cannot take one of them and keep it till he is satisfied for the whole damage. 12 *Mod. 600.*

If a man come to distrain, and see the beasts in his ground, and the owner chase them out, of purpose, before the distress taken: yet the owner of the soil cannot distrain them, and if he doth, the owner of the cattle may rescue them; for the beasts must be damage feasant at the time of the distress. 1 *Inst. 161.*

For distress damage feasant is the strictest distress that is; and the thing distrained must be taken in the very act; for if the goods are once off, though on fresh pursuit, the owner of the ground cannot take them. 12 *Mod. 661.*

For a rent or service, a man cannot distrain but in the day time; but for damage feasant, one may distrain in the night; otherwise the beasts may be gone before he can take them. 1 *Inst. 142.*

DAMAGES are the recompence that is given to a man, by a jury, as a satisfaction for some injury sustained; as for a battery, imprisonment, slander, or trespass. 2 *Black. 438.*

In actions upon the case, the jury may find less damages than the plaintiff lays in his declaration, though they cannot find more; but costs may be increased beyond the sum mentioned in the declaration for damages; for costs are given in respect of the plaintiff's suit to recover his damages, which may be sometimes greater than the damage. 10 *Co. 115.*

When a statute doth increase damages to the double or treble value, where damages were given before, there the plaintiff shall recover those damages only, and no costs. For example, in an action upon the statute of forcible entry, 8. *Hen. 6.* which gives treble damages; in this case, the plaintiff shall recover his damages and his costs to the treble, because he should have recovered single damages at the common law, and the statute increases them to treble: but upon the statute of 1 & 2 *P. & M.* for charging distresses out of the hundred, whereby treble damages are given, the plaintiff shall recover no costs, because this action and penalty are newly given, and were not at the common law. 2 *Inst. 289.* 10. *Co. 115.*

So in an action upon the case, on the 2 *W. Jeff. 1. c. 5.* for a rescous of distress, the plaintiff shall recover treble costs as well as treble damages; for the damages are not given by the statute, but increased, an action upon the case lying for a rescous at common law. 1 *Salk. 205.*

Sometimes, in order to save charges, the defendant suffers judgment to go against him by default; and in this case, unless he will confess the whole damages laid in the declaration, a jury must be called in to assess them. Whereupon the sheriff is commanded to

summon a jury to inquire of the said damages, and return their inquisition when taken into court. This process is called a *writ of inquiry*, in the execution whereof the sheriff presides as judge, and tries by the jury, in like manner as a trial at nisi prius, what damages the plaintiff hath really sustained. And when this is returned with the inquisition, judgment is thereupon entered. 3 *Black.* 397.

DANEGELT, a tax or tribute imposed when the *Danes* got footing in this land. Some say it was imposed by the *Danes* in support of their authority; others say, that it was a tax levied to keep them out: and perhaps, at different times, it might be levied in both those respects,

DANE-LAGE, the *Danish law*, was brought into *England* upon the eruption of the *Danes*, and prevailed in those parts where the *Danes* had obtained a settlement, especially in several of the midland counties, and on the eastern coast, being that part which was most exposed to the visits of that piratical people. 1 *Black.* 65.

DAPIFER (from *dapes ferendo*), a purveyor, or steward, of the household.

DARREIN PRESENTMENT (the *last presentment*), is a writ which lies, where a man or his ancestor hath presented a clerk to a church, and afterwards (the church becoming void by the death of the said clerk or otherwise) a stranger presenteth his clerk to the same church, in disturbance of him who had last, or whose ancestor had last, presented. *T. L.*

But now this kind of writ is totally disused; the remedy by *quare impedit* being much more effectual, for a *darrein presentment* lies only where a man hath an advowson by descent from his ancestors; but the writ of *quare impedit* is equally remedial whether a man claims title by descent or by purchase. 3 *Black.* 246.

DATE (*datum*), of a deed, denotes the time of the deed being given or executed, either expressly, or by reference to some day and year mentioned in the deed before. 2 *Black.* 304.

Yet a deed is good, although it mention no date, or hath a false date, or even if it hath an impossible date, as the 30th of *February*, provided the real day of its being dated or given, that is, delivered, can be proved. *Id.*

Every deed shall be intended to be delivered on the same day that it bears date, unless the contrary be proved. 2 *Inst.* 674.

If a lease be made by indenture, bearing date the 26th of *May*, to have and to hold for 21 years from the date, or from the day of the date, it shall begin on the 27th. 1 *Inst.* 46.

If the lease bear date the 26th of *May*, to have and to hold from the making thereof, or from thenceforth, it shall begin on the day on which it is delivered, for until delivery it hath no effect; but

but if it be *from the day of the making thereof*, then it shall begin on the next day after the delivery. *Id.*

If in the date of a deed the year of our Lord is right, though the year of the king's reign be mistaken, this shall not vitiate the deed.

Cro. Ja. 261.

On an action of covenant, the plaintiff declared on a deed bearing date the 30th of *March in the year of our Lord 1701*, and in the 13th year of the reign of the king; whereas, on producing the deed, it appeared to be only dated thus, *the 30th of March 1701* (wanting the words *in the year of our Lord*); and likewise, *in the 13th year of the king* (wanting the words *of the reign*): On demurrer, the court held this to be no variance, for that it was in the deed implicitly. *2 Salk.* 658.

If a deed is dated at four o'clock in the afternoon of such a day, the whole day is to be taken in: for the law in this computation rejects all fractions and divisions of a day, for the uncertainty. *5 Co.* 1.

DAY, is either *natural*, or artificial. The *natural* day consists of 24 hours, and contains the day solar, and the night, being that space in which the sun is supposed to go from east to west, and from the west again to the east. The *artificial* or solar day begins at sunrising and ends at the sunsetting.

In order to avoid disputes, the law generally rejects all fractions of a day. Therefore if I am bound to pay money on any certain day, I discharge the obligation if I pay it before 12 o'clock at night; after which the following day commences. *2 Black.* 141.

If an offence be committed in the night, the indictment must set forth that it was done in the night of the same day.

Day in legal proceedings is the day of appearance of the parties, or continuance of a suit, where a day is given. And when the party is finally dismissed the court, he is said to be put without day.

In case of notice to be given such a determinate number of days beforehand, as for instance 14 days, the usual way of computing is not to include nor exclude both the first and last of those days, but one of them only: so in the case of returns to writs of *mandamus* and *scire facias*, where the rule is, that there must be 15 days between the teste and return, these in practice are only 14, one of the first or last being always included. *Burr. Mansf.* 2525.

But the courts vary a little in practice; for all days wherein rules to plead, reply, &c. are given, are exclusive in the *king's bench*, and inclusive in the *common pleas*, unless by order of court or judge.

DAYS IN BANK, are days of appearance in the court of common pleas, called usually *bancum*, or *commune bancum*, to distinguish

distinguish it from *bancum regis* or the court of king's bench. 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. 3 *Black.* 277.

DAYWERE of land, perhaps by mistake for *daywere* (day's work), as much arable land as can be ploughed up in one day's work, or one *journey* (as the farmers still call it). Hence an artificer, who assists a master workmen in daily labour, is called a *journeyman*.

DEACON. By the canons of the church, none shall be ordained deacon unless he is twenty-three years of age. Anciently, his office was to officiate under the minister in making responses, and repeating the confession, the creed, and the Lord's prayer after him, and such other duties as now properly belong to our parish clerks: but now it seemeth that he may perform any of the divine offices which a priest may do, except only pronouncing the absolution and consecrating the sacrament of the Lord's supper.

DEADLY FEUD, in *Scotland*, is a combination of kindred to revenge injuries or affronts done or offered to any of their blood, till a person is revenged even by the death of his adversary.

DEAN, is an ecclesiastical governor secular over the prebendaries and canons in the cathedral church, who were originally the council of the bishop, to assist him with their advice in affairs of religion; and also in the temporal concerns of his see. When the rest of the clergy were settled in the several parishes of each diocese, these were reserved for the celebration of divine service in the bishop's own cathedral; and the chief of them, who presided over the rest, obtained the name of *decanus* or *dean*, being probably at first appointed to superintend ten canons or prebendaries. 1 *Black.* 352.

The deans of the old foundation (which are those that were established before the reign of king *Henry* the eighth) are elected by the chapter, by *conge d'essire* of the king, and letters missive of recommendation, in the same manner as bishops: but deans of the new foundation, that is, in those chapters which were founded by king *Henry* the eighth out of the spoils of the dissolved monasteries, the deanry is donative, and the installation merely by the king's letters patent. The *chapter*, consisting of canons or prebendaries, are in some places appointed by the king, in others by the bishop; and in some places they are elected by each other. *Id.*

Besides the cathedral deans, who preside at the head of the chapter, there are three other sorts of deans: First, a dean *without a chapter*, and yet he is *presentative*, and hath cure of souls; he hath a peculiar, and a court wherein he holds ecclesiastical jurisdiction;

jurisdiction; and is not subject to the visitation of the ordinary; such is the deanry of *Battel* in *Suffex*, which deanry was founded by *William* the conqueror in memory of his conquest. Secondly, a dean, not presentative, but *donative*, and who hath not the cure of souls; he also hath a court and a peculiar, which often extends over many parishes; such is the dean of the *Arches*, the dean of *Bocking* in *Effex*, and many more. Thirdly, the *dean rural*; having no absolute judicial power in himself, but he is to order the ecclesiastical affairs within his deanry and precinct, by direction of the bishop or archdeacon: but this office is now almost totally laid aside.

DEATH OF PERSONS. There is a *natural* death of a man, and a *civil* death; natural, when nature itself expires and extinguishes; and civil, is where a man is not actually dead, but is adjudged so by law; as where he enters into religion, &c. If any person for whose life any estate hath been granted, remain beyond sea, or is otherwise absent *seven* years, and no proof made of his being alive, such person shall be accounted naturally dead; though if, afterwards proved to be living at the time of eviction of any person, then the tenant, &c. may re-enter, and recover the profits. 19 C. 2. c. 6.

DEATH'S PART, or *deadman's part*, is that portion of his personal estate which remained after his wife and children had received thereout their respective reasonable parts: which was, if he had both a wife and a child, or children, one third part; if a wife and no child, or a child or children and no wife, one half; if neither wife nor child, he had the whole to dispose of by his last will and testament; and if he made no will, the same was to go to his administrator. And within the city of *London*, and throughout the province of *York*, at this day, in case of intestacy, the wife and children are intitled to their said reasonable parts, and the residue only is distributable by the statute of distribution.

DE BENE ESSE. To take or do any thing *de bene esse* is in law signification to accept or allow it as *well* done for the present; as where witnesses are aged, or sick, or going beyond sea, whereby the party thinks he is in danger of losing their testimony, a court of equity, upon motion, will order them to be examined *de bene esse*; so as to be valid if the party hath not an opportunity of examining them afterwards: but if they are alive, and well, or return, these depositions are not to be of force, but the witnesses must be examined again. 3 *Black.* 383.

So also at common law, the judges frequently take bail, and declarations are frequently delivered *de bene esse* (or conditionally); for which see the books of practice.

DEBET ET DETINET: In an action of debt, the form of the writ is sometimes in the *debet* and *detinet*, and sometimes in the *detinet* only; that is, the writ states, either that the defendant

owes,

owes, and unjustly *detains*, the debt or thing in question, or only that he unjustly *detains* it. It is brought in the *debet* as well as *detinet*, when sued by one of the original contracting parties who personally gave the credit, against the other who personally incurred the debt; as by the obligee against the obligor, the landlord against the tenant, or the like. But if it be brought by or against an executor for a duty to or from the testator, this, not being his own debt, shall be sued for in the *detinet* only. So also if the action be for goods, for corn, or an horse, the writ shall be in the *detinet* only; for it cannot properly be said that the defendant *owes* to the plaintiff an horse, but only that he *detains* him. 3 *Black.* 155.

DEBET ET SOLET are formal words made use of in writs, sometimes one only, and sometimes both. Thus if a man sues to recover any right, whereof his ancestor was disseised by the defendant or his ancestor, there he useth the word *debet* alone in his writ, because his ancestor only was disseised, and the estate discontinued: but if he sue for any thing that is now first of all denied him, then he useth *debet et solet*, by reason that his ancestor before him, and he himself, usually enjoyed the thing sued for, until the present refusal of the defendant. So the writ of suit to a mill, is a writ of right in the *debet* and *solet*. F. N. B.

DEBT, *action of*, in a legal acceptation, is a sum of money due by certain and express agreement. As by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease: where the quantity is fixed and unalterable, and doth not depend upon any after calculation to settle it. 3 *Black.* 153.

The non-payment of these is an injury, for which the proper remedy is by *action of debt*, to compel the performance of the contract, and recover the special sum due. *Id.*

And this is the shortest and surest remedy; particularly where the debt arises upon a specialty; that is, upon a deed, or instrument under seal. So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me; for this is also a determinate contract; but if I agree for no settled price, I am not liable to an action of debt, but a special action on the case, according to the nature of the contract. 3 *Black.* 154.

And, indeed, actions of debt are now seldom brought but upon special contracts under seal; wherein the sum due is clearly and precisely expressed: for in case of such an action upon a simple contract, the plaintiff labours under two difficulties; first, the defendant has here the same advantage as in an action of detinue, that of waging his law, namely, purging himself of the debt by oath, if he thinks proper; secondly, in an action of debt, the plaintiff must recover the whole debt he claims, or
nothing

nothing at all. For the debt is one single cause of action, fixed and determined; but in an action upon the case, on what is called an *indolent assumpsit*, which not is brought to compel a specific performance of the contract, but to recover damages for its non-performance; these damages are in their nature indeterminate, and will therefore adapt and proportion themselves to the truth of the case, which shall be proved, without being confined to the precise demand stated in the declaration. *Id.*

DEBTS, priority of. See PRIORITY.

DECEM TALES, is when a full jury doth not appear on a trial at bar, then a writ goes to the sheriff to return *ten such* as the other jurors; out of whom to supply the number wanted.

DECENNARY (from *decem*, ten), was originally a district of ten men with their families. King *Alfred*, for the better preservation of the peace, divided the kingdom into counties, the counties into hundreds, and the hundreds into tythings or decennaries; the inhabitants whereof, living together, were sureties or pledges for each other's good behaviour. One of the principal of which number presided over the rest, and was called the chief pledge, borsholder, borow's elder, or tythingman; all which appellations in process of time were changed into that of constable.

DECLARATION, is a setting forth in writing the demand or complaint of the demandant or plaintiff against the tenant or defendant, who is supposed to have done the wrong. The original writ, according to its name *breve*, is brief and short; but the *declaration*, or count, which the demandant or plaintiff maketh, is more narrative, spacious, and certain, both in matter and in circumstance of time and place, to the end the defendant may be compelled to make a more direct answer. 1 *Inst.* 17.

It is usual in actions upon the case to set forth several cases, by different counts in the same declaration; so that if the plaintiff fails in the proof of one, he may succeed in another. As in an action upon an *assumpsit* for goods sold and delivered, the plaintiff usually counts or declares, first, upon a settled and agreed price between him and the defendant, as that they bargained for 20*l.*; and lest he should fail in the proof of this, he counts likewise upon a *quantum valebant*, that the defendant bought other goods, and agreed to pay him so much as they were reasonably worth, and then avers that they were worth other 20*l.*; and so on, in three or four different shapes; and at last concludes with declaring that the defendant had refused to fulfil any of these agreements; whereby he is endamaged to such a value. And if he proves the case laid in any one of his counts, though he fail in the rest, he shall recover proportionable damages. 3 *Black.* 295.

DECREE, is the judgment of a court of equity, on any bill preferred.

preferred. It is either *interlocutory*, or *final*. It seldom happens that the first decree can be final; for if any matter of fact arise which is strongly controverted, the court usually directs the same to be tried at law by a jury, as in case of the validity of a will, or the existence of a modus in lieu of tithes. So if a question of law arises, as whether by the words of a will an estate for life or in tail is created, it is usual to refer this to the opinion of the judges of the court of king's bench or common pleas. So likewise there are often long accounts to be settled, incumbrances and debts to be inquired into, and many other facts to be cleared up, before a final decree can be made; and these are usually referred to be settled by a master in chancery. After all which, then the cause is again brought to hearing upon the matter of equity reserved, whereupon a *final* decree is then pronounced. 3 *Black.* 452.

DEDIMUS POTESTATEM, is a writ to commission private persons to do some act in the place of a judge; as to administer the oath of office to a justice of the peace, to take a personal answer to a bill in chancery, to examine witnesses, to levy a fine, to take a recovery, and such like. *F. N. B.*

A DEED, is an instrument in writing, comprehending a bargain or contract between party and party. 1 *Inst.* 171.

The writing must be on *paper* or *parchment*; and not upon wood, leather, cloth, or the like; because upon these it is more liable to be altered or corrupted. 1 *Inst.* 35.

If it be made by more parties than one, there ought to be regularly as many copies of it as there are parties; and each should be cut and indented, to tally and correspond with the other; which deed, so made, is called an *indenture*. 2 *Blackst.* 295.

A deed made by one party only is not indented, but polled or shaved quite even; and is therefore called a *deed poll*, or single deed. *ibid.*

A deed *indented* is executed by, and binds the several parties; a *deed poll* is executed by one party, and only binds him who made it. *Litt. sect.* 370.

If a deed beginneth, *This indenture*, and in truth the parchment or paper is not indented, this is no indenture; because words cannot make it indented: but if the deed be actually indented, and there be no words of indenture in the deed, yet it is an indenture in law; for it may be an indenture without words, but not by words without indenting. 1 *Inst.* 229.

In every deed there must be a *consideration*. For a deed or other grant, made without any consideration, is construed to enure only to the use of the grantor himself. 2 *Blackst.* 296.

Consideration may be either a *good*, or a *valuable*, consideration; a *good* consideration is such as that of blood or natural affection: when a man grants an estate to a near kinsman: 2 *valuable* con-
sideration

sideration is such as money, marriage, or the like ; which the law deems an equivalent given for the grant. *Ibid.*

Where any consideration is mentioned in a deed, as of *love and affection* only, if it is not also for other considerations, a man cannot enter into the proof of any other : the reason is, because it would be contrary to the deed ; for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is negative of any other. 1 *Vez.* 128.

The *habendum* in a deed is to express the certainty of the estate which the party is to have, for what time, and to what use. It cannot lessen the estate granted in the premises, but may enlarge it ; as if a man grant lands to one and his heirs, to have and to hold to him and the heirs of his body, the habendum is void ; for the larger and more beneficial estate is vested in him, before the habendum comes. 2 *Black.* 298.

The *tenendum* is now of little use, and is only kept in by custom. It was sometimes formerly used to signify the tenure, by which the estate granted was to be holden, as to hold by knight's service, in burgage, in free socage, and the like. But all these being now reduced to free and common socage, the tenure is never specified. Before the statute of *quia emptores terrarum*, it was sometimes used to denote the lord of whom the land should be holden ; but that statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the tenendum hath also been antiquated ; though for a long time after, we find it mentioned in ancient charters, that the tenements shall be holden of the chief lords of the fee ; but as this expressed nothing more than the statute had already provided for, it gradually grew out of use. *Ibid.*

The *reddendum*, or render, in a deed, is a reservation whereby the grantor doth create or reserve something to himself, out of what he had before granted. But if it be of ancient services, or the like, annexed to the land, then the reservation may be to the lord of the fee. 2 *Black.* 299.

When a feoffor conveys away all his estate in the land absolutely, and is not bound to warrant the land, or defend the title, but the feoffee is to defend the land at his peril ; the feoffee shall have all the *title deeds* and evidences as incident to the land, although they be not granted by express words ; for the feoffor cannot reap any benefit by them ; but if the feoffor warrants the land, there, without express grant, the feoffee shall not have any deeds which do comprehend warranty, but the feoffor shall have all the evidences which are requisite to defend the title of the land ; and the feoffee must trust to his warranty. But otherwise it is, where there is an express grant of the deeds and evidences. 1 *Co.* 1, 2. 1 *Inst.* 6.

A deed is void by *rafure*, or *interlining*, in any material part,
unlets

unless a memorandum be made thereof at the time of execution and attestation; and anciently, the judges determined this upon their own view; but of later time, they have left that to the jurors, to try whether the raising or interlining were before delivery. 1 *Inst.* 225. 2 *Black.* 308.

Our Saxon ancestors, as many of them as could write, signed their names; and whether they could write or not, affixed the sign of the cross. The Normans that succeeded, few of whom could write, used the practice of *sealing* only, without writing their names. And this practice of *sealing*, without *signing*, continued very long, and was held sufficient to authenticate a deed; and so the common form of attesting deeds "sealed and delivered" continues to this day; although the statute of 29 C. 2. c. 3. expressly requires *signing* in all grants of lands and many other species of deeds; in which therefore now *signing* seems as necessary as *sealing*. 2 *Black.* 306.

But on an issue directed out of chancery, whether there was a devise or not, *Raymond* chief justice ruled, that *sealing* a will is a *signing* within the statute. *Str.* 764. *B. E. L.* 522.

The date of a deed was of ancient time frequently omitted; and the reason was, for that the limitation of prescription, or time of memory, did often in process of time vary: and the law was then holden, that a deed, bearing date before the limited time of prescription, was not pleadable, and therefore they made their deeds without date, to the end they might allege them within the time of prescription. And the date of the deeds was commonly added in the reign of *Ed.* 2. & *Ed.* 3. and so ever since. 1 *Inst.* 6.

But a deed is good although it mention no date, or hath a false date, or even if it hath an impossible date, as the 30th of February; provided the real date of its being dated or given, that is, *delivered*, can be proved. 2 *Black.* 304.

For the day of the *delivery* of a deed is the day of the date, though there be no date set forth: and if a deed bears date one day, and is delivered on another day, the day of delivery is the day of the date. 1 *Salk.* 76.

The words "from the day of the date" exclude the day of the date; but "from the date" is from the act done; and so commences the same day that it is dated or delivered. *L. Raym.* 480.

A deed *lost* may be proved by circumstances; first shewing that it once existed; and next, that it was lost, or cannot be come at. 1 *Vez.* 389.

The loss of a deed is not always a ground to go into a court of equity for relief; for courts of law admit evidence of the loss of a deed, proving the existence of it, and the contents, just as a court of equity does. Otherwise it is of a *bond*; for

of that, a profert must be made in court. 1 *Vez.* 392. 3 *Atk.* 214.

DEED-POLL, is a deed *polled* or shaved quite even, in contradistinction from an *indenture*, which is cut unevenly, and answerable to another writing that comprehends the same words. A *deed-poll* is properly single, and but of one part, and is intended for the use of the feoffee, grantee, or lessee; an *indenture* always consists of two or more parts and parties. Every deed that is pleaded shall be intended to be a *deed-poll*, unless it is alleged to be indented. It commonly begins thus: *To all people to whom these presents shall come: or, Know all men by these presents.* 1 *Inst.* 229.

DEEMSTERS (*Sax. deem, doom, judgment*), is the name for judges in the Isle of Man.

DEER. By the 16 *G.* 3. *c.* 30. hunting or attempting to hunt, any deer incurs a forfeiture of 20*l.* and actually killing the same incurs the forfeiture of 30*l.*; and in either case, the penalty for a second offence is transportation for seven years. But by the *Black Act*, 9 *G.* *c.* 22. deer-stealing, in certain cases, is made felony without benefit of clergy.

DEER HAY, an engine or great net made of strong cords, wherein to take deer.

DE FACTO, signifies a thing actually done. A king *de facto* is understood to be one that is in actual possession of the crown, and hath no lawful title to it; in which sense it is opposed to a king *de jure*, who hath right to the crown, but is out of possession. 3 *Inst.* 7.

DEFAMATION. See **SLANDER.**

DEFAULT, is commonly taken for non-appearance in court at a day assigned; though it extends to any omission of that which we ought to do. 1 *Inst.* 259.

Where the defendant makes default at *nisi prius*, he is out of court to all purposes but this, *viz.* that judgment may be given against him; therefore no repleader can be awarded. 1 *Salk.* 216.

In an action of debt upon bond; if the defendant pleads a release, and issue is thereupon joined, if at the trial the defendant makes default, the plaintiff may pray judgment by default; because by the plea the duty is confessed, and therefore no inquest need be taken by default: but if the defendant plead *non est factum*, by that plea the duty is denied; and therefore if he makes default, inquest must be taken by default. *Id.*

Before a verdict is taken by default the crier of the court calls the defendant three times, to shew if he hath any challenge to the jurors; and if he doth not appear upon the crier's calling, then the *capiatur* by default is indorsed on the back of the panel. 1 *Lill. Abr.* 425.

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In criminal cases, if an offender being indicted appears at the *capias*, and pleads to issue, and is let to bail to attend his trial, and then makes default; here the inquest in case of felony, shall never be taken by default, but a *capias ad audiendam juratam* shall issue; and if the party is not taken, an *exigent*. And if he appeared on that writ, and then made default, a new *exigent* may be granted.

If jurors make default in their appearance for trying of causes, they shall forfeit their issues, unless reasonable cause be proved to the satisfaction of the court.

DEFEAZANCE, from the French *defaire*, to undo, or defeat, is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which, the estate then created may be defeated or totally undone. And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeazance, whereby the feoffment was rendered void, on repayment of the money at a certain day. 2 *Black.* 327.

In like manner there is a defeazance of a bond, or recognizance, or judgment recovered; which is a condition that, when performed, defeats or undoes it, in the same manner as a defeazance of an estate. *Id.* 342.

The difference between a condition and a defeazance is, that the condition is inserted in the deed, and a defeazance is usually a deed by itself, relating to another deed. *Wood. b. 2. c. 3.*

There is a diversity between inheritances *executed*, and inheritances *executory*; as lands *executed* by livery cannot by indenture of defeazance be defeated afterwards; and so if a disseisor release a disseisor, it cannot be defeated by indentures of defeazance made afterwards: but at the time of the release or feoffment, the same may be defeated by indentures of defeazance. But rents, annuities, conditions, warranties, and such like, that are inheritances *executory*, may be defeated by defeazances made either at that time, or at any time after: and so the law is, of statutes, recognizances, obligations, and other things *executory*. 1 *Inst.* 236.

DEFENCE, in legal understanding, doth not signify a justification, protection, or guard, which is its popular signification, but merely an *opposing* or *denial* (from the French verb *defender*) of the truth or validity of the declaration. It is the *contestatio litis* of the civilians; a general assertion that the plaintiff hath no ground of action; which assertion is afterwards extended and maintained in his plea. The courts were formerly very nice and curious with respect to the nature of the defence; so that if no defence was made, though a sufficient plea was pleaded, the plaintiff should recover judgment. And to every kind of count they had a several kind of defence. For a general defence
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or denial was not prudent in every situation, since thereby the propriety of the writ, the competency of the plaintiff, and the cognizance of the court, were allowed. By defending the force and injury, the defendant waved all pleas of misnomer; by defending the damages, all exceptions to the person of the plaintiff; and by defending either one or the other *when and where* it should behove him, he acknowledged the jurisdiction of the court. But of late years these niceties have been very deservedly discountenanced; though they still seem to be law, if insisted on. 3 *Black.* 296.

DEFENDANT, is the party that is sued in a *personal* action; *as tenant* is he that is sued in an action *real*.

DEFENDER OF THE FAITH, a title given by the pope to king *Henry* the eighth, for writing against *Luther*; which title our kings have retained ever since.

DEFENSA, *defensum*, was anciently an inclosed parcel of land, set apart for the *defence* and separate feeding of deer or other cattle, as also for the security of hay or corn growing, or of springs of wood. 3 *Dudg. Mon.* 306.

So that *fence-month* in forests, is the month in which the deer fawn; during which time they are to be *defended* from disturbance.

DEFORCEMENT, is the withholding lands or tenements from the right owner; in which case, the entry of the right owner is taken away, and he is thereby driven to his action. Anciently, it was only said to be deforcement when the land was withheld by violence and force; but now it is extended generally to all kind of wrongful withholding of lands or tenements from the lawful owner. *Deforciant* is he who so withholds such lands or tenements, 1 *Inst.* 331. and in fines the cognizor or party levying or acknowledging the fine is styled the deforciant.

DEGRADATION, is an ecclesiastical censure, whereby a clergyman is deprived of his holy orders, which formerly he had, as of priest or deacon. And this, by the canon law, might be done two ways, either summarily, as by word only; or solemnly, by divesting the party degraded of those ornaments which were the ensigns of his order or degree; which was done in this manner: The offender was brought in having on his sacred robes and having in his hands a book, vessel, or other instrument or ornament appertaining to his order, as if he were about to officiate in his function: then the bishop publicly took away from him *one* by one, the said instruments and ornaments, saying to this effect, "This and this we take from thee, and do deprive thee of the honour of priesthood;" and, finally, in taking away the last sacerdotal vestment, saying thus, "By the authority of God Almighty, the Father, the Son, and the Holy Ghost, and of us, we do take from thee the clerical habit, and do depose, and degrade,

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degrade, despoil, and deprive thee of all order, benefit, and privilege of the clergy." *Gibf.* 1066.

There was a like ceremony in temporal matters, as in the degradation of a knight; he was stripped of his robes and ensigns of knighthood, his sword broken over his head, and his gilt spurs hacked off from his heels.

DEHORS (Fr.), without; a word used in ancient pleading, when a thing is *without* the point in question, foreign to the matter in hand, and not appearing upon the face of the record.

DELEGATES, court of, is so called, because the judges thereof are *delegated* by the king's commission under the great seal, to hear and determine appeals in the three following cases: 1. When a sentence is given in any ecclesiastical cause by the archbishop or his official. 2. When any sentence is given in any ecclesiastical cause in places exempt. 3. When a sentence is given in the admiral's court, in suits civil and marine, by the order of the civil law. This commission is usually filled with lords spiritual and temporal, judges of the courts at *Westminster*, and doctors of the civil law. 4 *Inst.* 339.

The manner of obtaining a commission of delegates is thus: The proctor of the appellant draws a petition to the lord chancellor, setting forth the cause, and what his client insisted on, and what the judge decreed; and that thereupon his client, thinking himself aggrieved, hath appealed from the said decree to the king's majesty in his high court of chancery; wherefore his client humbly requests of the lord chancellor, that a commission of appeal be made out and issued under the great seal, directed to certain judges delegate to be named at his pleasure, to hear and determine the said cause. Whereupon the lord chancellor sets down the names of such persons as he thinks proper; and afterwards a commission is drawn and executed in due form, by virtue whereof the commissioners proceed to hear and determine the matter of the appeal. 1 *Oughton*, 437.

DELIVERY, of a deed, is an essential requisite to the completion of it. For although it be signed and sealed, yet it is of no force if it is not delivered by the party himself or his special attorney, to the party to whom it is made, or to some other to his use. And it takes effect only from the delivery; for if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing, and by a parity of reason the signing also, and makes them both his own. 2 *Black.* 306.

A delivery may be either *absolute*, that is, to the party or grantee himself; or *conditional*, to a third person, to hold till some conditions be performed on the part of the grantee; in which

which last case, it is not delivered as a deed, but as an *escrow*, that is, as a *scrowl*, or writing, which is not to take effect as a deed till the conditions be performed, and then it is a deed absolute. *Id.*

When a deed is delivered, words are not necessary, for then a dumb man could not deliver a deed: and as it may be delivered without words, so may it be delivered by words without any act of delivery; as if the writing lies upon the table, and the feoffor saith to the feoffee, "Take that as my deed," it is a sufficient delivery. So the deed of a corporation needs no delivery, the common seal being sufficient without it.

Wood. b. 2. c. 3.

DEMAND, is a word of art; and in the understanding of the common law is of so large an extent, as no other word in the law is, unless it be the word *claim*. 1 *Inst.* 291.

There are two kinds of demand; a demand in *deed*, and a demand in *law*; or, an *express* and an *implied* demand. *Id.*

In a real action, he that bringeth his action maketh his *demand*, and therefore is properly called a *demandant*; and he that defendeth is called *tenant*, because he is tenant of the freehold of the land. *Id.*

If a man release to another all manner of demands, this is the best release to him to whom it is made, that he can have, and shall enure most to his advantage. *Litt. sect. 508.*

A release of *suits* is more large and beneficial than a release of *quarrels* or of *actions*; but a release of *demands* is more large and beneficial than either of them; for this is a release of all that the other are releases of, and more: for by a release of all *demands*, all freeholds and inheritances executory are released, as rents and the like; so also all executions, actions, entries, and seizures. So by a release of all demands to a disseisor, the right of entry to the land is released. 8 *Co.* 154.

If a man leases land by indenture for years, reserving a rent payable at certain days, and the lessee covenants to pay the said rent at the days limited, the lessor is intitled to his rent, without demand; for the lessee is obliged to pay it at the days by force of his covenant. 2 *Danv. A. r.* 101.

But if a lessor makes a lease rendering rent, and the lessee covenants to pay the rent, *being lawfully demanded*, the lessee is not bound to pay the rent without a demand. *Id.* 102.

But a distress for rent is a demand in itself. 1 *Roll's A. r.* 426. 428.

In an action of debt upon a bill of 70*l.* to be paid upon demand, it was insisted that a demand was requisite, so that a demand in law by bringing the action will not serve the turn: but adjudged well

well enough; for it is a duty presently, and so needs no demand.
Cro. Eliz. 548. 548

DEMANDANT, is he who claims or *demands* his right in an action respecting the *realty*, as a *plaintiff* is he who *complains* of the injury in an action respecting the *personalty*. So there is *tenant*, who *holds* the land in an action *real*, and *defendant*, who *defends* the cause in an action *personal* or *mixed*. 1 *Inst.* 127.

DEMESNE, *domain*, *dominicium*, is that part of the lands of a manor, which the lord hath not granted out in tenancy, but which is reserved for his own use and occupation.

DEMISE, *dimissio*, is applied to the conveyance of an estate, either in fee, or for term of life, or years. 2 *Inst.* 483.

A DEMURRER, cometh of the Latin word *demorari* to abide; and therefore he which demurreth in law is said to be one that abideth in law, *moratur*, or *demoratur in lege*. Whensoever the counsel of the party is of opinion, that the declaration or the plea of the adverse party is insufficient in law, then he demurreth or abideth upon the point in question, and referreth the same to the judgment of the court. 1 *Inst.* 71

But if the plea be sufficient in *law*, and the matter of *fact* be false, then the adverse party taketh issue thereupon, and that is tried by a jury; for matters in law are decided by the judges, and matters of fact by juries. *Id.*

He that demurreth in law confesses the facts to be true, as stated by the opposite party, but denies that by the law arising upon those facts any injury is done to the plaintiff, or that the defendant has made out a lawful excuse. As if the matter of the plaintiff's declaration be insufficient in law, then the defendant demurs to the declaration; if, on the other hand, the defendant's excuse or plea be invalid, the plaintiff demurs in law to the plea; and so in every other part of the proceedings, where either side perceives any material objection in point of law, upon which he may rest his case. 3 *Black.* 314.

The form of such demurrer is by averring the declaration or plea, the replication or rejoinder, to be insufficient in law to maintain the action or the defence; and therefore praying judgment for want of sufficient *matter* alleged. *Id.*

Sometimes demurrers are merely for want of sufficient *form* in the writ or declaration. But in case of exceptions to the form or manner of pleading, the party demurring must set forth the causes of his demurrer, or wherein he apprehends the deficiency to consist. *Id.*

And upon either a *general*, or such a *special*, demurrer, the opposite party avers it to be sufficient, which is called a *joinder in demurrer*, and then the parties are at issue in point of law: which issue in law, or demurrer, is argued by counsel on both sides; and if the points be difficult, then it is argued openly by
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the judges of the court, and if they, or the greater part, concur in opinion, accordingly judgment is given: but if the court be equally divided, or conceive great doubt of the case, then may they adjourn it into the exchequer chamber, where the case shall be argued by all the judges. 1 *Inst.* 71

And the court shall give judgment according to the very right of the cause, and matter of law, that shall appear, without regarding any want of form in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding, except those only which the party demurring shall specially and particularly set down and express in his demurrer. *Id.*

And as there is a demurrer upon *pleading*, so there is a demurrer upon evidence; as if the plaintiff shew in evidence any matter of record, or deeds, or writings, or other matter of evidence by testimony of witnesses, whereupon doubt in law arises, and the defendant offer to demur in law thereupon, the plaintiff cannot refuse to join in demurrer, no more than in a demurrer upon a declaration, replication, or the like. And so, on the contrary, may the plaintiff demur in law upon the evidence of the defendant. 1 *Inst.* 72.

A demurrer in *equity* is nearly of the same nature as a demurrer in law, being an appeal to the judgment of the court, whether the defendant shall be bound to answer the plaintiff's bill; as, for want of sufficient matter of equity therein contained; or where the plaintiff, on his own shewing, appears to have no right; or where the bill seeks a discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal misbehaviour: for any of these causes, a defendant may demur to the bill. And if, on demurrer, the defendant prevails, the plaintiff's bill shall be dismissed; if the demurrer is over-ruled, the defendant is ordered to answer. 3 *Black.* 446.

DENIZEN (Fr. *donaison*), is an alien enfranchised by the king's letters patent, and is called *donaison*, because his legitimati- on proceeds *ex donatione regis*. He is in a kind of middle state, between an alien and a natural born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not, but cannot take by inheritance; for his parent, through whom he must claim, being an alien, had no inheritable blood, and therefore could convey none to the son. And upon a like defect of hereditary blood, the issue of a denizen, born *before* denization, cannot inherit to him; but his issue born *after*, may. And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands from the crown. 1 *Black.* 374.

DEODAND, is where any moveable thing inanimate, or beast animate, doth move to or cause the untimely death of any rea- sonable

sonable creature, by mischance, without the will or fault of himself, or of any person. 3 *Inst.* 57.

This, although it be not properly homicide, nor punishable as a crime, yet is taken notice of by the law, as far as the nature of the thing will bear, in order to raise an abhorrence of murder; and the unhappy instrument or occasion of such death is called a deodand (*Deo dandum*, to be given to God), and was anciently paid into the hands of the king's almoner, to be applied to pious uses for the soul of the deceased. Also all such weapons, whereby one man kills another, are forfeited. And therefore, in all indictments for homicide, the instrument of death, and the value, are presented and found by the grand jury (as, that the stroke was given by a certain penknife, value sixpence), that the king or his grantee may claim the deodand; for it is no deodand, unless it be presented as such by a jury of 12 men. 3 *Inst.* 57. 1 *Haw.* 66.

It was heretofore holden, that things fixed to the freehold, as the wheel of a mill, or a bell hanging in the steeple, may be deodands; but by the later resolutions they cannot, unless they were severed before the accident happened. 1 *Haw.* 66.

Where a thing, not in motion, is the occasion of a man's death, that part only which is the immediate cause is forfeited; as if a man be climbing up the wheel of a cart, and is killed by falling from it, the wheel alone is a deodand: but wherever the thing is in motion, not only that part which immediately gives the wound (as the wheel, which runs over his body), but all things which move with it and help to make the wound more dangerous (as the cart and loading, which increase the pressure of the wheel) are forfeited. *Id.*

After all, as this forfeiture seemeth to have been originally founded, rather in the superstition of an age of ignorance, than in the principles of sound reason and policy, it hath not of late years met with much countenance in *Westminster-hall*. And when juries have taken upon them to use a judgment of discretion, not strictly within their province, for reducing the quantum of the forfeiture, the court of king's bench hath generally refused to interfere on behalf of the lord of the franchise, to assist so odious a claim. *Fost.* 266.

DEPARTURE, is a word in our law properly applicable to a *defendant*, who first pleading one thing in bar of an action, and being replied unto, doth in his rejoinder quit that, and shew another matter, contrary to or not pursuing his first plea, which is called a *departure* from his plea. Also where a *plaintiff* in his declaration sets forth one thing, and after the defendant hath pleaded, the plaintiff in his replication shews new matter different from his declaration, this is a departure. This departure the law will not allow of, because it would occasion endless alteration.

caution. Therefore the replication must support the declaration, and the rejoinder must support the plea, without departing out of it. As in the case of pleading, no award made in consequence of a bond of arbitration, to which the plaintiff replies setting forth an actual award; now the defendant cannot rejoin that he hath performed this award, for such rejoinder would be an entire departure from his original plea, which alleged that no such award was made; therefore he hath now no other choice, but to traverse the fact of the replication, or else to demur upon the law of it.

3 *Black.* 310.

DEPOPULATION, is a wasting or destruction; a desolation or *unpeopling* of any place by pestilence, fire, sword, or other violence. 12 *Co.* 30.

DEPOPULATORES AGRORUM, were great offenders by the ancient common law; so called, because, by prostrating and ruining of houses of habitation of the king's people, they, as it were, depopulated towns and villages, leaving them without inhabitants. 3 *Inst.* 204.

DEPOSITION, is the testimony of a witness, otherwise called a *deponent*, put down in writing by way of answer to interrogatories exhibited for that purpose.

Depositions of witnesses may be read when the witness is dead, but not when the witness is living; for whilst the witness is living, they are not the best evidence the nature of the thing is capable of. *Theory of Evid.* 30.

Yet they may be read when a witness is sought and cannot be found; for then he is in the same circumstances, as to the party that is to use him, as if he were dead. *Id.*

So if it is proved that a witness was subpoenaed, and fell sick by the way; for in this case likewise, the deposition is the best evidence that can be had; and that answers what the law requires. *Id.*

But a deposition cannot be given in evidence against any person that was not party to the suit; and the reason is, because he had not liberty to cross-examine the witness; and it is against natural justice, that a man should be concluded by proofs in a cause to which he was not a party. For this reason, depositions in chancery shall not be read for or against the defendant upon an information or indictment, for the king was no way party to the suit. *Id.*

Yet this rule admits of some exceptions; as, particularly, in all cases where hearsay and reputation are evidence; for undoubtedly what a witness, who is dead, hath sworn in a court of justice, is of more credit than what another person swears he heard him say. So a deposition taken in a cause between other parties will be admitted to be read, to contradict what the same witness swears at a trial. *Id.* 30, 31.

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It is a general rule, that depositions taken in a court not of record, shall not be allowed in evidence elsewhere. So it hath been holden with regard to depositions in the ecclesiastical court, though the witnesses were dead: So where there cannot be a cross-examination, as depositions taken before commissioners of bankrupts, they shall not be read in evidence. *Id.* 33, 34.

But the examination of an informer taken upon oath, and subscribed by him, either before a coroner upon an inquisition of death, or before justices of the peace in pursuance of the statutes of *Pb. & M.* upon a bailment or commitment for any felony, may be given in evidence at the trial, if it be made out by oath to the satisfaction of the court, that such informer is dead, or unable to travel, or kept away by the means or procurement of the prisoner, and that the examination offered in evidence is the very same that was sworn to before the coroner or justice, without any alteration whatsoever. 2 *Haw.* 429.

Where witnesses in a cause are going to sea, or on a long journey, the court will give leave to examine them on interrogatories, at a judge's chamber, in the presence of the attornies on both sides; which depositions in such case will be admitted as evidence. *Pract. Att.* 234.

DEPRIVATION, is an ecclesiastical censure, whereby a clergyman is deprived of his parsonage, vicarage, or other ecclesiastical promotion or dignity.

In all causes of deprivation, these things must concur: 1. A monition or citation of the party to appear. 2. A charge given him, to which he is to answer, called a libel. 3. A competent time assigned for the proofs and answers. 4. A liberty for counsel to defend his cause, and to except against the proofs and witnesses. 5. A solemn sentence, after hearing all the proofs and answers. If these be not observed, the party hath cause of appeal, and may have remedy by a superior court. 1 *Still.* 323.

But besides deprivation by canonical censures, there are divers penal statutes which for some crime or neglect declare the benefice to be void, without a formal sentence of deprivation; as, for simony, for maintaining any doctrine in derogation of the king's supremacy, or of the thirty-nine articles, or of the book of common prayer; for neglecting, after institution, to read the liturgy and articles in the church, or to make the declarations against popery, or to take the oath of abjuration; in all which, and other like cases, the benefice is *ipso facto* void, without any formal declaratory sentence. 1 *Black.* 393.

DEPUTY, is one that exerciseth an office in another man's right, whose forfeiture or misdemeanor shall cause him, whose deputy he is, to lose his office. The common law takes notice of deputies in many cases, but not of under deputies; for a deputy

puty is generally but a person authorised who cannot authorise another. 1 *Lill. Abr.* 446.

There is a difference between a *deputy* and an *assignee* of an office. For an assignee hath an estate or interest in the office itself; and doth all things in his own name; for whom the grantor of the office shall not answer, except in special cases. And when an officer hath power to make an assignee, he may of course make a deputy. Also when an office descendeth to an infant, idiot, or the like, he may of course make a deputy. But the superior officers must answer for their deputies in civil actions, if they are not sufficient to answer damages: in criminal cases, deputies must answer for themselves. *Wood. b. 2. c. 2.*

A *sheriff* may make a deputy, except in some particular things which are to be done by the sheriff himself; as if a writ saith, that the sheriff shall go *in person*. The sheriff, and not the king, hath power to appoint this deputy, although there is no particular power given in his patent to make a deputy; for it is an incident to the sheriff's office, and it would be inconvenient, if the sheriff should be responsible for his deputy that is chosen by another. 9 *Co. 49.*

A *coroner* cannot make a deputy, for he is a judicial officer, and therefore ought to execute his office in person. *Wood. b. 1. c. 7.*

But a *constable*, inasmuch as his office is wholly ministerial, and not judicial, may make a deputy. *Bur. Mansf.* 1259.

DERAIGN (Fr.), *difrationare*; to confound and disorder, or to turn out of course, or displace.

DERELICT, is any thing forsaken or left. Derelict lands, left by the sea, belong to the king; but if the sea shrinks back by degrees below the usual water mark, the land gained shall go to the owner of the land adjoining. 2 *Black.* 262.

DESCENDER. Writ of *formedon in descender* lies where a gift in tail is made, and the tenant in tail aliens the lands intailed, or is disseised of them, and dies; the heir in tail, in order to recover the same, shall have this writ against him who is then the actual tenant of the freehold. 3 *Black.* 192.

DESCENT, or hereditary succession, is the title by which a man, on the death of his ancestor, acquires his estate by right of representation, as his heir at law. And an estate so descending to the heir, is in law called the inheritance. 2 *Black.* 201.

Descent is of three kinds; by *common law*, by *custom*, or by *statute*. By *common law*, as where one hath land of inheritance in fee simple, and dieth without disposing thereof in his life-time, and the land goes to the eldest son and heir of course, being cast upon him by the law. Descent of fee simple by *custom*, is sometimes to all the sons, or to all the brothers (where one brother dieth without issue), as in gavel-kind; sometimes to the youngest son, as in Borough English; and sometimes to the eldest daughter,

ter, or the youngest, according to the customs of particular places. Descent by *statute* is of fee tail, as directed by the statute of *Westm. 2. de donis*.

Descent at common law is either *lineal* or *collateral* : *lineal* is a descent downwards in a right line, from the grandfather to the father, the father to the son, the son to the grandson : *collateral* is a descent which springs out from the *side* of the whole, as another branch thereof ; such as a grandfather's brother, the father's brother, and so downward.

Inheritances shall lineally descend to the issue of the person last actually seised, *in infinitum* ; but shall never lineally ascend. 3 *Black.* 208.

The male issue shall be admitted before the female ; and where there are two or more males in equal degree, the eldest only shall inherit (except where there are particular local customs to the contrary) : but the females shall inherit all together, except in case of succession to the crown which is invisible ; and of succession to dignities and titles of honour : yet where a man holds an earldom to him and the heirs of his body, and dies, his eldest daughter shall not succeed of course to the title of countess, but the dignity is in suspense or abeyance till the king shall declare which of the daughters shall have that title. 2 *Black.* 216.

If lands come by descent from the mother, the heir on the part of the father shall never inherit ; nor, if the lands come by descent from the father, shall the heirs on the part of the mother inherit : but if it be not known from what side the inheritance descended, or where the person from whom the land is claimed by descent was himself the first purchaser ; there the heir on the part of the father, however distant, shall be admitted ; and if no heir on the part of the father can be found, then the heir on the part of the mother shall be admitted. 2 *Black.* 222.

But if a man seised of land as heir on the part of his mother, makes a feoffment, and takes back an estate to him and his heirs ; this, as a purchase, alters the descent, and if he die without issue, the heir on the part of the father shall inherit it. 1 *Ioff.* 12.

If a man die without issue, the inheritance shall descend to his next collateral kinsman of the *whole blood*, either personally or by representation ; but the *half blood* can never inherit. 2 *Black.* 227. But in descent of estates tail, half blood is no hindrance, because the issue are in *per formam doni*.

If one die seised of lands, in which another hath a right to enter, and it descends to his heir, such descent shall take away the other's right of entry, and put him to his action for recovery thereof.

DESCRIPTION, *descriptio*. In deeds and grants there must be a *certain* description of the lands granted, the *places* where the lands lie, and of the *persons* to whom granted, &c. to make them good.

good. But wills are more favoured than grants as to those descriptions; a wrong description of the person will not make a devise void, if there be otherwise a sufficient certainty what person was intended by the testator. 1 *Nels. Abr.* 647.

DETINUE, is a writ which lieth where any man comes to goods either by delivery, or by finding. It is called a *detinendo*, because *detinet* is the principal word in the writ; and it lies only for the *detaining*, when the taking was lawful. 1 *Inst.* 286.

So if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining, and not in the original taking; and the regular method for me to recover possession is by this action of detinue. 3 *Black.* 151.

In this writ, the plaintiff shall recover the thing detained; and therefore it must be so certain, as that it may be specifically known. Therefore it cannot be brought for money, corn, or the like, for that cannot be known from other money or corn, unless it be in a bag or a sack, for then it may be distinguishably marked. *Id.*

In order therefore to ground an action of detinue, which is only for the detaining, these points are necessary: 1. That the defendant came lawfully by the goods, as either by delivery to him, or finding them. 2. That the plaintiff have a property. 3. That the goods themselves be of some value. And, 4. That they be ascertained in point of identity. Upon this, the jury, if they find for the plaintiff, assess the respective values of the several parcels detained, and also damages for the detention. And the judgment is conditional, that the plaintiff recover the said goods, or (if they cannot be had) their respective values, and also the damages for detaining them. *Id.*

But there is one disadvantage which attends this action; namely, that the defendant is herein permitted to wage his law; that is, to exculpate himself by oath, and thereby defeat the plaintiff of his remedy. For which reason this action is of late much disused, and hath given place to the action of trover. *Id.*

A man may have an action of *detinue of charters* which concern the inheritance of his land, if he know the certainty of them, and what land they concern; or if they be in a bag sealed, or chest locked, though he knows not the certainty of them; and it is good policy (if possibly he can) in that case to declare of one charter in special, and then the defendant shall not wage his law. 1 *Inst.* 286.

DEVASTAVIT, is a writ that lies against executors or administrators, for paying debts upon simple contract before debts on bonds and specialties, or the like; for in this case they are as liable to action as if they had squandered away the goods of the deceased, or converted them to their own use; and are compellable

lable to pay such debts by specialty out of their own goods, to the value of what they so paid illegally. *Dyer*, 232.

But if an executor pays debts upon simple contract, before he hath any notice of bonds, it is not a *devastavit*; otherwise it might be in the power of the obligee to ruin the executor, by keeping up his bond, until the executor shall have paid away all the assets in discharging simple contract debts. But of debts upon record, the executor ought to take notice at his peril. *2 Bac. Abr.* 434.

Where an executor pays legacies before debts, and hath not sufficient to pay both, it is a *devastavit*. Also where an executor sells the testator's goods at an under value, it is a *devastavit*; but this is to be understood where the sale is fraudulent, for if more money could not be had, it is not a *devastavit*. *Kelw.* 59. *1 Nels. Abr.* 649.

DEVISE, is the disposition of lands and tenements by will; as *testame t* is the disposition in like manner of goods and chattels: but the words are often used promiscuously the one for the other. See WILL.

DICE. By several statutes, duties are imposed upon every pair of dice made in *Great Britain*, which are to be under the management of the commissioners of the stamp duties.

DIEM CLAUSIT EXTREMUM, is a writ so called from those special words in the writ, issued to the escheator of the county, upon the death of any of the king's tenants *in capite*, to take the lands into the king's hands, and to inquire by a jury how much land such tenant held of the king *in capite*, what was the yearly value thereof, who was his heir, and of what age. And the heir, if of age, or when he came of age, was to have the lands delivered back to him, which was called *livery* of the lands; the tenant having first paid to the king his relief or fine for the same.

DIES DATUS, is a day or time of respite given by the court to the defendant in a suit.

DIEU ET MON DROIT, *God and my right*; the motto of the royal arms; intimating that the king of *England* holds his empire of none but *God*. It was first assumed by king *Richard* the first.

DIGNITY, signifies honour and authority. It may be divided into superior and inferior; as the titles of duke, earl, baron, are of the higher sort of dignities; so baronet, knight, esquire, are of the lower order. And there are ecclesiastical dignities, as those of bishop, dean, archdeacon, prebendary; and the possessor of those dignities is called *dignitary*.

DILAPIDATION, is a kind of ecclesiastical waste, either voluntary, by pulling down, or permissive, by suffering the chancel, parsonage-house, and other buildings, or fences, to decay for want of necessary reparation. In which case an action lies either

either in the spiritual court by the canon law, or in the courts of common law : and may be brought by the successor against the predecessor, if living, or, if dead, against his executors. It is also said to be good cause of deprivation, if a bishop, parson, vicar, or other ecclesiastical person, dilapidates the buildings, or cuts down timber growing on the patrimony of the church, unless for necessary repairs; and that a writ of prohibition will also lie against him in the courts of common law. By the statute 13 *Eliz. c. 10.* if any spiritual person makes over or alienates his goods with intent to defeat his successors of their remedy for dilapidations, the successor shall have such remedy against the alienee, in the ecclesiastical court, as if he were the executor of his predecessor. And by 14 *Eliz. c. 11.* all money recovered for dilapidations shall, within two years, be employed upon the buildings, in respect whereof it was recovered, on pain of forfeiting double value to the crown. 3 *Black. 91.*

DILATORY pleas are of three kinds : 1. To the *jurisdiction* of the court, alleging, that it ought not to hold plea of the matter in hand, as belonging to some other court. 2. To the *disability* of the plaintiff, by reason whereof he is incapable to commence or continue the suit, as that he is outlawed, attainted, an infant, or the like. 3. In *abatement*, as for some defect in the writ, as a misnomer of the defendant, or other want of form in any material respect. These pleas were formerly used as merely dilatory, without any foundation of truth, and calculated only for delay; but now by the statute 4 & 5 *An. c. 16.* no dilatory plea shall be admitted, without affidavit made of the truth thereof, or some probable matter shewn to the court, to induce them to believe it true. 3 *Black. 301.*

DIMISSORY LETTERS, are such as are used where a candidate for holy orders hath a title in one diocese, and is to be ordained in another; the proper diocesan sends his letters dimissory directed to some other ordaining bishop, giving leave that the bearer may be ordained, and have such a cure within his district.

DIOCESE (from the Greek *διοικισω, seorsim habito*), signifies the circuit of a bishop's jurisdiction. For this realm hath two sorts of divisions, one into shires or counties in respect of the temporal state, and another into provinces in regard to the ecclesiastical state. Which provinces are subdivided into dioceses. The provinces are two; those of *Canterbury* and *York*, whereof *Canterbury* includes twenty-one dioceses or sees of suffragan bishops; and *York* three, besides the bishoprick of the *Isle of Man*, which was annexed to the province of *York* by king *Henry* the eighth. 1 *Inst. 94.*

DISABILITY is, where a man is disabled, or made incapable to inherit any lands, or take that benefit which otherwise he might

might have done. Which may happen four ways; by the act of an ancestor; or of the party himself; by the act of God; or of the law. 1. Disability by the act of the *ancestor*; this is, where the ancestor is attainted of treason or felony, which corrupts the blood of his children, so that they may not inherit his estate. 2. Disability by the act of the *party*; which is, where a man binds himself by obligation, that upon surrender of a lease, he will grant a new estate to the lessee, and afterwards he grants over the reversion to another, which puts it out of his power to perform it. 3. Disability by the act of *God*: where a person is of *non-sane* memory, whereby he is incapable to make any grant; so that if he passeth any estate out of him, it may after his death be made void; but it is a maxim in law, that a man of full age shall not be received to disable his own person. 4. Disability by act of the *law*; this is where a man by the sole act of the law, without any thing by him done, is rendered incapable of the benefit of the law; as an alien born, or the like. *Terms of the Law.*

There are also other disabilities by statute in many cases; as papists are disabled to present to church benefices; officers not taking the oaths are disabled to hold their offices; foreigners, though naturalized, to bear offices in the government; and many other such like.

DISCLAIMER is, where a tenant, who holds of the lord of the fee, neglects to render him the due services, and, upon an action brought to recover them, *disclaims* to hold of his lord; which disclaimer of tenure in any court of record is a forfeiture of the lands to the lord. And so likewise if, in any court of record, the tenant doth any act which amounts to a virtual disclaimer; if he claims any greater estate than was granted him at the first infeudation, or takes upon himself those rights which belong only to tenants of a superior class; if he affirms the reversion to be in a stranger, by accepting his fine, attorning as his tenant, collusive pleading, and the like; such behaviour amounts to a forfeiture of his estate. 2 *Black.* 275.

DISCONTINUANCE, *of an action*, is where the plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from time to time; in which case he must begin again, and usually pays costs to the defendant. 3 *Black.* 296.

Discontinuance of an estate is, when he who hath an estate tail, makes a larger estate of the land than by law he is intitled to do: in which case the estate is good so far as his power extends, but no farther: as if tenant in tail makes a feoffment in fee simple, or for the life of the feoffee, or in tail, all which are beyond his power to make; for that, by the common law, extends no farther than to make a lease for his own life; here the entry of the feoffee is lawful during the life of the feoffor: but if he retains

retains the possession after the death of the feoffor, it is an injury, which is termed a discontinuance of the estate, by which he who hath right is driven to his action. 3 *Black.* 171.

DISCRETION, *discretio*, when a thing is left to any person to be done according to his *discretion*, the law intends it must be done with sound *discretion*, and according to law : and the court of king's bench hath a power to redress things that are otherwise done, notwithstanding they are left to the *discretion* of those that do them. 1 *Lill. Abr.* 477.

DISFRANCHISEMENT, is the taking away a man's freedom or privilege. Corporations generally have power by their charter or prescription to disfranchise a member for doing any thing against the duty of his office as citizen or burghers, and to the prejudice of the weal public of the city or borough, and against his oath which he took when he was sworn a freeman of the city or borough. But words of contempt, or against good manners, although they may be caused to bind him to the good behaviour, yet they are not a sufficient cause to disfranchise him. So if he intend or endeavour of himself, or conspire with others, to do a thing against the duty or trust of his freedom, and to the prejudice of the corporation, but doth not execute that thing, it may be cause to punish him for the same, but not to disfranchise him. For when a man is a freeman of a city or borough, he hath a freehold for life in his freedom, and with others in their politic capacity hath inheritance in the lands of the corporation, and interest in their goods, and perhaps it concerns his trade and means of living ; and therefore the matter which shall be cause of his disfranchisement ought to be an act or deed, and not an endeavour or enterprize whereof he may repent before the execution thereof, and whereof no prejudice doth ensue. 11 *Co.* 98.

DISMES, *decima*. See **TITHES**.

DISPENSATION. Notwithstanding the statute of provisors, and divers other statutes against the papal incroachments upon the ecclesiastical jurisdiction in this realm, the pope's power still prevailed against all these statutes ; and particularly in the matter of dispensations, which was one great branch of the revenue of the apostolic see. But by the statute of 25 *H. 8. c. 21.* this power was taken from the pope, and vested in the archbishop of *Canterbury*, so far forth as such dispensations may be lawfully granted without offending the laws of *God*, and that in all greater matters the king's consent in chancery be obtained.

DISPENSING POWER OF THE CROWN, by a *non-obstante* to an act of parliament, was carried so far in the reign of king *James* the second, as to render the execution of the laws intirely dependant on the pleasure of the king ; therefore by the 1 *W. Jess.* 2. c. 2. it is declared and enacted, that the pretended power

power of suspending laws, or the execution or laws, by regal authority, without consent of parliament, is illegal.

DISSEISIN, is a wrongful putting out of him that is seized of the freehold. Which may be effected either in *corporeal* inheritances, or *incorporeal*. Disseisin of things *corporeal*, as of houses and lands, must be by entry and actual dispossession of the freehold; as if a man enters either by force or fraud into the house of another, and turns, or at least keeps him and his servants out of possession. Disseisin of *incorporeal* hereditaments cannot be an actual dispossession; for the subject itself is neither capable of actual bodily possession or dispossession; but it depends on their respective natures and various kinds; being in general nothing more than a disturbance of the owner in the means of coming at or enjoying them. But the disseisin of *incorporeal* hereditaments is only at the election and choice of the party injured, if, for the sake of more easily trying the right, he is pleased to suppose himself disseised. And so also even in *corporeal* hereditaments, a man may frequently suppose himself to be disseised, when he is not so in fact, for the sake of intitling himself to the more easy and commodious remedy of an assize of *novel disseisin*, instead of being driven to the more tedious process of a writ of *entry*. 3 *Black.* 169.

DISSENTERS. By the 1 *W. st.* 1. *c.* 18. commonly called the act of toleration, it is enacted, that none of the acts made against persons dissenting from the church of *England* (except the test acts 25 *C.* 2. *c.* 2. and 30 *C.* 2. *st.* 2. *c.* 1.) shall extend to any dissenters, other than papists, and such as deny the Trinity: provided, 1. That they take the oaths of allegiance and supremacy (or, being quakers, make an affirmation to the like purpose) and subscribe the declaration against popery. 2. That they repair to some congregation certified to and registered in the court of the bishop or of the quarter sessions. 3. That the doors of such meeting-house shall not be locked, barred, or bolted. Dissenting teachers also, by the 19 *G.* 3. *c.* 44. shall subscribe a declaration that they are christians and protestants, and as such, believe the scriptures of the old and new testament. And if any person shall wilfully disturb any congregation assembled in any dissenting meeting-house, or misuse any teacher or preacher there, he shall be bound over to the sessions of the peace, and on conviction there shall forfeit 20*l.*

By the 1 *G.* *st.* 2. *c.* 5. if any persons, riotously and tumultuously assembled, shall demolish or pull down, or begin to demolish or pull down, any building for religious worship, duly registered and certified according to the said act 1 *W.* they shall be adjudged guilty of felony without benefit of clergy.

If a dissenter be chosen constable, churchwarden, overseer of the poor, or to any parochial or ward office, he may execute the same

same by a sufficient deputy ; and dissenting teachers and preachers shall be exempted from the said offices, and also from serving upon juries. 1 *W. ft. 1. c. 18.* (And from serving in the militia. 19 *G. 3. c. 44.*)

DISTRESS, is the taking of a personal chattel out of the possession of the wrong-doer, into the custody of the party injured, to procure a satisfaction for the wrong committed ; and is of two kinds, either for cattle trespassing and doing damage, or for non-payment of rent or other duties.

Distress for rent must be for rent in arrear ; therefore it may not be made on the same day on which the rent becomes due, as on the last day of the term of the lease. And therefore some use to reserve the last half year's rent at some time before the lease expires, so as if the rent be not then paid, he may distrain before the lease expires. 1 *Inst. 47.*

Generally, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to the tenant or a stranger, are distrainable by him for rent : otherwise a door would be open to infinite frauds. 3 *Black. 8.*

Distress for rent must be of a thing whereof a valuable property is in somebody ; and therefore those things which are *ferre natura* cannot be distrained. 1 *Inst. 47.*

Whatever is in the personal use or occupation of a man, is for the time privileged from distress ; as an ax with which a man is cutting wood, or a horse whilst a man is riding upon him. *Id.*

So things for maintenance of trades ; as a horse in a smith's shop, materials in a weaver's shop for making of cloth, sacks of corn in a mill, and such like. *Id.*

On a verbal lease, where the *quantum* of the rent appears, the landlord may distrain ; but if there is no proof of the *quantum*, the landlord can only recover a *quantum meruit* by action on the case.

Distress must be in the day time ; except for damage-tenant, which may be in the night ; otherwise the goods may be gone before he can take them. 1 *Inst. 142.*

Generally, distress must be made on the premises : but if the goods be fraudulently carried off, they may within thirty days be distrained at any other place. 11 *G. 2. c. 19.*

Doors, gates, or inclosures, may not be broken open for making distress, unless where the goods are clandestinely removed ; in which case, upon a warrant from a justice of the peace, they may be broken open. *Id.*

Distress may be impounded on any part of the premises. *Id.*

And no distress shall be driven out of the hundred, unless to an open pound in the same shire, and within three miles of the place where the distress was taken. 1 & 2 *P. & M.*

c. 12. Note, a pound is said to be either *overt*, or *open*; as in a pinfold made for such purposes, or in a man's own close, or in the close of another by his consent; and it is therefore called open, because the owner may give his cattle meat and drink, without trespass to any other; and then the cattle must be sustained at the peril of the owner: or it is a pound *covert*, or close; as to impound the cattle in some part of his house; and then the cattle must be sustained at the peril of him that distraineth, and he shall not have any satisfaction for the same. But if the distress be of utensils of household, or such like dead goods, which may take harm by wet or weather, or be stolen away; there he must impound them in a house or other pound covert; for if he impound them in a pound overt, he must answer for them. 1 *Iust.* 47.

Cattle distrained may not be worked or used, much less abused or hurt. *Cro. Ja.* 148.

If a man break the pound, he is by the common law indictable for the same, as an offence against the peace: or by the statute 2 *W. c.* 5. the distrainor may, upon an action on the case, recover treble damages and costs.

In case of distress for rent, if the tenant do not, within five days after the distress taken, and notice of the cause thereof given to him, replevy the goods, the distrainor, with the sheriff or constable, shall cause the same to be appraised by two sworn appraisers, and sell the same towards satisfaction of the debt and charges, rendering the overplus, if any, to the owner.

In case of distress by warrant of a justice of the peace for a penalty or forfeiture, the justice shall order the distress to be sold within a certain time limited in the warrant, so as such time be not less than four days, nor more than eight. 27 *G. 2. c.* 20.

DISTRESS INFINITE, is a process commanding the sheriff to distrain a person from time to time, and continually afterwards, by taking his goods by way of pledge, to enforce the performance of something due from the party distrained upon. Generally, it is provided that distresses shall be reasonable and moderate; but in case of distress for suit of court, or for defect of appearance, in several cases, where this is the only method of enforcing compliance, no distress can be immoderate; because, be it of what value it will, it cannot be sold, but shall be immediately restored on satisfaction made. 3 *Black.* 231.

DISTRIBUTION of intestate's effects, after payment of the debts of the deceased, is to be made according to the statute of 22 & 23 *C. 2. c.* 10. in manner following. One third shall go to the widow of the intestate, and the residue in equal proportions to his children; or, if dead, to their representatives;

sentatives; that is, their lineal descendants: if there are no children, or legal representatives, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree, or their representatives: if no widow, the whole shall go to the children: if neither widow nor child, the whole shall be distributed amongst the next of kindred in equal degree, and their representatives: but no representatives are admitted among collaterals, farther than the children of the intestate's brothers and sisters. The father succeeds to the whole personal effects of his children, if they die intestate and without issue; but if the father be dead, and the mother survives, she shall only come in for a share equally with each of the remaining children.

There are some local customs excepted out of the act, in which the proportions of the distribution vary in different places.

DISTRINGAS, is a writ directed to the sheriff, commanding him to *distrain* one by his goods and chattels, to enforce his compliance with what is required of him, as for his appearance in court on such a day. *F. N. B.*

DISTURBANCE, is usually a wrong done to some incorporeal hereditament, by hindering or disquieting the owners in their regular and lawful enjoyment of it. Of this there are divers kinds: As, 1. Disturbance of *franchises*; which is, when a man has the franchise of holding a court leet, of keeping a fair or market, of free warren, of taking toll, of seizing waifs or estrays, or the like, and he is disturbed or incommoded in the lawful exercise thereof. 2. Disturbance of *common*; as where one who has no right of common puts his cattle into the land; or who, having a right of common, surcharges the common, by putting in more cattle than he hath a right to do, or puts in any cattle that are not commonable. 3. Disturbance of *ways*; as where a man, who hath right to a way over another man's ground, is obstructed by inclosures or other obstacles. 4. Disturbance of *patronage*; which is an hindrance or obstruction of a patron to present his clerk to a benefice. 3 *Black.* 236.

DIVORCE, is a separation of a man and a woman who have been *de facto* married together: and it is of two kinds; the one, that dissolveth the marriage, *a vinculo matrimonii*; and the other, *a mensâ et thoro*, which dissolveth not the marriage, for that the offence is after a just and lawful marriage. 3 *Inst.* 88.

Causes for separation *a vinculo*, are consanguinity or affinity within the degrees prohibited, also impuberty or frigidity, where the marriage itself was merely void *ab initio*, and the sentence of divorce only declaratory of its being so. And the effects of this original voidance and nullity are, that the wife is barred of dower, and the issue are illegitimate, and that the persons so divorced may marry any others. *Gibf.* 446.

But if either of the parties be dead before sentence given, the spiritual court cannot proceed to declare the marriage void, and bastardize the issue. *Id.*

Divorce *a mensâ et thoro* is, when the use of matrimony, as the cohabitation of the married persons, or their mutual conversation, is prohibited for a time, or without limitation of time; in which the marriage, having been originally good, is not dissolved, nor affected as to the *vinculum* or bond. Nor doth this bar the wife of dower, nor bastardize the issue; but intitles her to alimony, which the ecclesiastical court assigns, in proportion to the circumstances and condition of the husband. *Id.* 335.

DOCKET or DOGGET. By statute 4 & 5 *W. c.* 20. the proper officers respectively in the courts at *Westminster* shall enter and put into an alphabetical dogget by the defendants names, a particular of all judgments for debt entered in the respective courts. And no judgment not doggetted and entered as aforesaid shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators.

DOCTORS COMMONS, is the college of civilians in *London*, which was purchased by Dr. *Harvey*, dean of the arches, for the professors of the civil law. Here commonly reside the dean of the arches, the judge of the admiralty, the judge of the prerogative court of *Canterbury*, with divers other eminent civilians; who there living (for diet and lodging) in a collegiate manner, and commoning together, it is known by the name of *doctors commons*. It was burned down in the fire of *London*, and rebuilt at the charge of the profession. *Chamb. present State.*

DOG, not being an animal fit for food, the law doth not set such an intrinsic value on it, as to make the stealing thereof to be felony; but the owner may maintain an action for the loss of it. And by statute 10 *G. 3. c.* 18. if any person shall steal any dog, or keep any dog knowing the same to be stolen, or shall knowingly have in his house the skin of any dog stolen, he shall forfeit for the first offence not exceeding 30*l.* nor less than 20*l.* for the second offence not exceeding 50*l.* nor less than 30*l.*

A mastiff going at large in the street unmuzzled, from the ferocity of his nature being dangerous and cause of terror to his majesty's subjects, seems to be a common nuisance, and consequently the owner may be indicted for suffering him to go at large.

If a man hath a dog that kills sheep, this is not a public nuisance, but the owner of the dog (knowing thereof) is liable to an action; but if he is ignorant of such quality, he shall not be

be punished for this killing: and in an action upon the case for such killing, the plaintiff shall be required to prove in evidence that the dog had used to kill sheep. *Dyer*, 25. *Het.* 171.

And in order to maintain an action for *biting* by the defendant's dog, it must be proved also that he knew his dog to have this property; but one instance is sufficient in that case. 12 *Mod.* 555.

DOIT, *doitkin*, was a base coin of small value, prohibited by the statute 3 *H. 5. c.* 1. We still retain the word in common speech, when (in order to undervalue a man) we say that he is not worth a *doit*.

DOM-BEC (*Sax. doom-book, liber judicialis*), was a book wherein *Aifred* the Great, after his uniting of the Saxon heptarchy, collected the various customs that he found dispersed throughout the kingdom, and reduced and digested them into one uniform system and code of laws. 4 *Black.* 411.

DOMESDAY (*liber judicialis vel censualis Angliæ*), is an ancient record made in the time of *William* the Conqueror, which is still fair and legible; consisting of two volumes, a greater and a less: the greater containing a survey of all the lands in *England*, except the counties of *Northumberland, Cum'erland, Westmorland, Durham*, and part of *Lancaster*, which it is said, were never surveyed; and, excepting *Essex, Suffolk, and Norfolk*, which three last are comprehended in the lesser volume. There is also a third book, which differs from the others in form more than matter, made by the command of the same king. And there is a fourth book kept in the exchequer, which is called *domesday*; and though a very large volume, is only an abridgment of the others. Likewise, a fifth book is kept in the remembrancer's office in the exchequer, which has the name of *domesday*, and is the same with the fourth before mentioned.

Our ancestors had many *domesday* books. King *Alfred* had a roll which he called *domesday*, which referred to the time of king *Ethelred*; as that made by *William* the Conqueror did refer to the time of *Edward* the Confessor.

It is generally known, that the question whether lands are ancient demesne or not is to be decided by the *domesday* book of *William* the Conqueror; from whence there is no appeal. And it is a book of that authority, that even the Conqueror himself submitted some cases wherein he was concerned to be determined by it.

The addition of *day* to this *doom* book was not made with any allusion to the final day of judgment, as many persons have conceived; but was to strengthen and confirm it, and signifies the judicial decisive record or book of dooming judgment and justice. *Hammond's Annot.*

The dean and chapter of *York* have a register styled *domesday*;

fo has the bishop of *Worcester*; and there is an ancient roll in *Chester* castle called *domesday* roll. *Blount*.

DONATIO CAUSA MORTIS, or a gift in prospect of death, is, when a person in his last sickness delivers, or causes to be delivered, to another the possession of any personal goods (under which have been included bonds, and bills drawn by the deceased upon his banker), to be his in case the giver die; but if he lives, he is to have it again. But this is not good against creditors.

DONATIVE, is a spiritual preferment, be it church, chapel, or vicarage, which is in the free gift or collation of the patron, without making any presentation to the bishop; and without admission, institution, or induction, by any mandate from the bishop or other; but the donee may, by the patron, or by any other authorized by the patron, be put into possession. *Degge, Part 1. c. 13.*

If the patron of a donative do not nominate a clerk, there can be no lapse thereof; but the bishop may compel him to do it by spiritual censures. *1 Inst. 344.*

But if it hath been augmented by the governors of queen *Anne's* bounty, it will lapse in like manner as presentative livings.

A donative is free from the visitation of the ordinary; but the patron must visit the same by commissioners to be appointed by him. *1 Inst. 344.*

But although the ordinary hath not power as to the place, so as to regulate seats in that church, or the like; yet he hath power as to the parson, if he commits any misdemeanor, to proceed against him by spiritual censures. *L. Raym. 1205.*

So in the case of churchwardens, if they refuse to take upon them the office, or the like; the ordinary may compel them: for although there is a difference as to the incumbent, yet as to the parish officers there is none; for they are the officers of the parish, and not of the patron of the donative. *Str. 715.*

DOUBLE PLEA, is where the defendant allegeth for himself two several matters in bar of the plaintiff's action, when one of them is sufficient, which shall not be admitted; as if a man plead several things, the one not depending on the other, the plea is accounted double: but if they mutually depend on each other, and the party may not have the last plea without the first, then it shall be received. *Kitch. 223.* Also by statute 4 & 5 *Ann. c. 16.* a man with leave of the court may plead two or more distinct matters or single pleas; as in an action of assault and battery, he may plead these three, not guilty, son assault demesne, and the statute of limitations. *3 Black. 308.*

DOUBLE QUARREL (*duplex querela*, double *querela* or complaint, called improperly *double quarrel*), is a complaint made by any clerk or other to the archbishop against any inferior ordinary,

ary, for delaying justice in any cause ecclesiastical, as to give sentence, to institute a clerk presented, or the like. The effect of which is, that the archbishop, taking knowledge of such delay directs his letters under his authentical seal, to all and singular clerks of his province, thereby commanding them to admonish the said ordinary within a certain time to do the justice required; or otherwise to cite him to appear before the said archbishop or his official at a day in the said letters prefixed, and there to allege the cause of his delay; and, lastly, to intimate to the said ordinary, that if he performs not the thing enjoined, nor appears at the day assigned, he will proceed to do justice in the premises. And it seems to be called a *double querelle*, because it is most commonly made both against the judge, and against the party at whose request justice is delayed by the said judge. *Clarke's Prax.* tit. 84, 5, 6.

DOWER:

TENANT *in dower*, is, where a man is seised of certain lands or tenements in fee simple, fee tail general, or as heir in special tail, and taketh a wife, and dieth; the wife, after the decease of her husband, shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture; to hold to the same wife in severalty by metes and bounds. *Litt. sect.* 36.

Seised. This word *seised* extendeth as well to a seisin *in law*, as to a seisin *in deed*; as where lands descend to the husband, before entry he hath but a seisin *in law* and yet the wife shall be endowed, although it be not reduced to an actual possession; for it lieth not in the power of the wife to bring it to be an actual seisin, as the husband may do of his wife's land, when he is to be tenant by curtesy. *1 Inst.* 31.

And yet of every seisin *in law*, or actual seisin, of lands or tenements, a woman may not be endowed. For example, if there be grandfather, father, and son; and the grandfather is seised of three acres of land in fee, and taketh wife, and dieth, whereupon the wife becomes endowed of one of those acres; the inheritance descends to the father, who dieth either before or after entry, in this case the wife of the father shall be endowed only of the two acres residue; for the dower of the grandmother is paramount the title of the wife of the father; and the seisin of the father which descended to him (be it *in law* or *in deed*), is defeated; and upon the matter the father had but a reversion expectant upon a freehold, and in that case dower ought not to be demanded of dower, although the wife of the grandfather dieth, living the father's wife. *1 Inst.* 31.

Of certain lands or tenements. Copyhold lands are not liable to dower, being only estates at the will of the lord; unless by especial custom of the manor: in which case it is usually called the widow's free bench. *2 Black.* 132.

It

It is now settled, that of a *trust* estate a wife is now dowable. 2 *Att.* 526.

Of lands which the husband holdeth *jointly* with another, the wife shall not be endowed; but where he holdeth in common, it is otherwise. *Litt. sect.* 45.

In the case of *Broughton* and *Randal*, *T.* 38 *Eliz.* the father and son were joint-tenants, to hold to them and the heirs of the son: they were both hanged out of the same cart at the same time; but because the son (as was deposed by witnesses) survived, as appeared by some tokens; namely, his shaking his legs; his widow thereupon demanded dower, and it was adjudged to her. *Cro. Eliz.* 503.

Of *common certain*, a wife shall be endowed; but of a common *without number* in gross, she shall not be endowed; for as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly charged. 1 *Inst.* 32.

The wife after the decease of her husband shall be endowed. By the statute of *magna charta*, c. 7. the widow shall remain in her husband's capital mansion-house for forty days after his death, during which time her dower shall be assigned. These forty days are called the widow's quarantine.

But where the certainty appeareth what lands or tenements the wife shall have for her dower, as was heretofore the case of dower *ad ostium ecclesie*, which was assigned to the woman at the church door at the time of her marriage; there the wife may enter after the death of her husband, without assignment of any. But where the certainty appears not, as to be endowed of the third part to have in severalty, or the moiety according to custom to hold in severalty; in such cases, the particular lands to be held in dower must be assigned by the heir of the husband, or his guardian; not only for the sake of notoriety, but also to intitle the lord of the fee to demand his services of the heir, in respect of the lands so held. If the heir, or his guardian, do not assign her dower within the term of quarantine, or do assign it unfairly, she hath her remedy at law, and the sheriff is appointed to assign it. 2 *Black.* 136.

This great disadvantage the wife hath, that she cannot enter into her dower by the common law, but is driven to her writ of dower to recover the same; wherein sometimes great delays are used; and therefore the well advised friends of the wife will provide for a jointure to be made to her. 1 *Inst.* 32.

Upon which account, on preconcerted marriages, and in estates of considerable consequence, tenancy in dower now very seldom happens; for the claim of the wife to her dower at the common law, diffusing itself so extensively, it became a great clog to alienations, and was otherwise inconvenient to families. Wherefore,

fore, since the difufe of dower *ad ofcium ecclefie*, jointures have commonly been introduced in their ftead, as a bar to the claim at common law. 2 *Black.* 136.

Of fuch lands or tenements as were her husband's at any time during the coverture. Unto dower three things do belong; viz. marriage, feifin, and the death of the husband. Concerning the feifin, it is not neceffary that the fame fhould continue during the coverture; for although the husband alieneth the lands, yet his widow fhall be endowed. But it is neceffary that the marriage do continue, for if it be diffolved, the dower ceafeth: but this is to be understood where the husband and wife are divorced *a vinculo matrimonii*, as for confanguinity or affinity; and not *a menfã et ſboro*, as for adultery. 1 *Inf.* 32.

If the wife elope from her husband, and goeth away, and tarrieth with her adulterer, ſhe ſhall loſe her dower, unleſs the husband be recouiled to her, and permit her to cohabit with him. *Ibid.*

The feifin of the husband for a tranſitory inſtant only, when the ſame act which gives him the eſtate conveys it alſo out of him again, (as where by a fine land is granted to a man, and he immediately renders it back by the ſame fine,) ſuch a feifin will not intitule the wife to dower; for the land was merely *in tranſitu*, and never reſted in the husband: but if the land abides in him for a ſingle moment, it ſeems that the wife ſhall be endowed thereof. 2 *Black.* 131.

As to *exchanges*, the wife ſhall not be endowed both of the land given in exchange, and of the land taken in exchange, although the husband was feifed of both; but ſhe may have her election to be endowed of which ſhe will. 1 *Inf.* 31.

To hold to the wife in ſeveralty by metes and bounds. But of inheritances that are intire, and of which no diſiſion can be made, ſhe ſhall be endowed in a ſpecial manner. As of a mill, ſhe ſhall not be endowed by metes and bounds, nor in common with the heir; but ſhe may be endowed of the third toll diſh, or of the mill, every third month. So ſhe ſhall be endowed of the third part of the profit of ſtallage, of the third part of the profits of a fair, of an office, of a dove cote, of a fiſhery, that is, every third fiſh, or every third caſt of the net; ſo of the third preſentation to an advowſon; of the third part of the profits of courts, fines, heriots, and other ſervices; ſo alſo of tithes; and the ſureſt endowment of tithes is of the third ſheaf; for what land ſhall be ſown is uncertain. 1 *Inf.* 32.

And to her eſtate in dower there are the like incidents as to other life eſtates. She ſhall have eſtovers of houſebote, ploughbote, and haybote; but ſhall not be allowed to commit waſte. If ſhe ſows the land, and dies before harveſt, her executor ſhall have the crop. But if ſhe determine the eſtate by her own act,

as by marrying again, she shall not be intitled to receive the crop. But if she leases the estate to an under-tenant, who sows the land, and she marries before the corn is out, this shall not deprive the under-tenant of the crop, because it was not in his power to prevent her marrying. 2 *Black.* 123.

DRAWLATCHES, thieves, drawing the *latch* of the door; that is, entering privately to rob the house.

DRENGAGE, was a servile tenure, and not freehold (as supposed by Sir *H. Spelman*); for in *Westmorland*, in the reign of king *Hen. 2.* Sir *Hugh Morvil* changed the service from *dren-gage* to free service; which implies that it was not free before. In some parts of the said county, the tenants gave one half of their lands, to have the other half made free from that service. It seems to have been pure villenage. *Drenges* where the tenants who held by that service.

DROIT, right, is the highest writ of all other real writs whatsoever, and has the greatest respect, and the most assured and final judgment; and therefore, is called a writ of right; and in the old books *droit*. 1 *Inst.* 158. *Droit, droit*, are words that signify a double right; both of property, and of possession. *Id.* 266.

DRUNKENNESS. By several statutes in the reign of king *James* the first, every person convicted of drunkenness shall forfeit 5*s.* and for want of distress, shall be committed to the stocks for six hours: if he shall be again convicted of the like offence, he shall be bound in a recognizance of 10*l.* with condition, to be from thenceforth of good behaviour. And an alehouse-keeper, convicted of drunkenness, shall, besides the other penalties, be disabled to keep any such alehouse for three years.

Drunkenness excuseth no crime; but he who is guilty of any crime whatever, through his voluntary drunkenness, shall be punished for it as much as if he had been sober; for the law, considering how easy it is to counterfeit his excuse, and how weak an excuse it is, (though real,) will not suffer any man thus to privilege one crime by another. 1 *How.* 2. 4 *Black.* 26.

DUCES TECUM, is a writ out of chancery, commanding a person to appear at a certain day in court, and to bring with him some writings, evidences, or other things, to be inspected and examined in court. *Regist.*

DUCKING STOOL. See **CUCKING STOOL**.

DUELLING, or single combat, between any of the king's subjects, of their own heads, and for private malice or displeasure, is prohibited by the laws of this realm; for in a settled state, governed by law, no man, for any injury whatsoever, ought to use private revenge. 3 *Inst.* 157.

It is also against the law of nature, and of nations, for a man

to be judge in his own cause; especially, where fury, wrath, malice, and revenge, are the rulers of the judgment. *Id.*

And although upon the single combat no death ensue, nor blood be drawn, yet the very combat for revenge is an affray, and a great breach of the king's peace; an affright and terror to the king's subjects; and is to be punished by fine and imprisonment, and to find sureties for the good behaviour; for it is with force and arms, and against the peace of our lord the king; and in respect of incroachment upon royal authority for revenge, it is against his crown and dignity. *Id.* 158.

And where one party kills the other, it comes within the notion of murder, as being committed by malice afore-thought; where the parties meet avowedly with an intent to murder, thinking it their duty, as gentlemen, and claiming it as their right, to wanton with their own lives, and the lives of others, without any warrant for it, either human or divine; and therefore the law hath justly fixed on them the crime and punishment of murder. 4 *Black.* 199.

But if two persons fall out upon a sudden occasion, and agree to fight in such a field, and each of them goeth to fetch his weapon, and they go into the field, and therein fight, and the one killeth the other, this is no malice prepensed; for the fetching of the weapon, and going into the field, is but a continuance of the sudden falling out, and the blood was never cooled: but if there were deliberation, as that they meet the next day, nay, though it were the same day, if there were such a competent distance of time, that in common presumption they had time of deliberation, then it is murder. 3 *Inst.* 51. 1 *Hale's Hist.* 453.

And the law so far abhors all duelling in cold blood, that not only the principal, who actually kills the other, but also his seconds, are guilty of murder, whether they fought or not. And it is holden, that the seconds of the party slain are likewise guilty as accessaries. 1 *Huw.* 82.

DUKE, is a name of dignity, and takes place next after the royal family. Among the *Saxons*, the name of *dukes* (*duces*) was frequent, and signified, as among the *Romans*, the *leaders* or commanders of their armies: but after the *Norman* conquest, our kings themselves continuing for many generations *dukes* of *Normandy*, they would not honour any subjects with that title, till the time of *Edward* the third; who, claiming to be king of *France*, and thereby losing the ducal in the regal dignity, created his son *Edward* the Black Prince, duke of *Cornwall*; and many, of the royal family especially, were afterwards raised to the same honour. In the reign of queen *Elizabeth*, the whole order became extinct; but it was revived by her successor king *James* the first, in the person of *George Villiers*, duke of *Buckingham*; and in

in the succeeding reigns, many of the nobility have been advanced to that dignity. 1 *Black.* 397.

DUM FUKT INFRA ÆTATEM, is a writ which lies for a person of full age, after having, when under age, aliened his lands.

DUM FUIT NON COMPOS MENTIS, is a writ which lies for one who hath recovered his understanding, after having, when *non compos*, aliened his lands; or for the heir of such alienor.

DUN, *down*, which termination had varied into *don*, signifying a mountain, or high open place. So that the names of those towns which end in *don*, were either built on hills, or near them, in open places.

DUPLEX QUERELA, an ecclesiastical process. See **DOUBLE QUARREL**.

DUPPLICITY, in pleading. See **DOUBLE PLEA**.

DURESS, is where one is wrongfully imprisoned, or restrained of his liberty contrary to law, till he executes a bond or other deed to another; or is threatened to be killed or maimed, if he do it not: and a deed so obtained is void in law. It is called *durefs*, from the Latin *durities*; of which there are two sorts, *durefs* of *imprisonment*, where a man actually loses his liberty; and *durefs per minas*, where the hardship is only *threatened* and impending. *Durefs per minas*, or by threatening, is either for fear of the loss of life, or else for fear of mayhem, or loss of limb; and this fear must be upon sufficient reason, and such as may fall upon a constant man. A fear of battery, or being beaten, is not *durefs*; neither is the fear of having one's house burned, or one's goods taken away, or destroyed; because, in these cases, a man may have satisfaction in damages; but no suitable atonement can be made for the loss of life or limb. 1 *Black.* 130.

DYRGE, or *dirge*, a mournful song over the dead; from the Teutonic *dyrke*, *laudare*, to praise and extol; whence it is a laudatory song. *Cowel.*

DYTENUM, a *ditty* or song; as, *venire cum pleno dyteno*, was to sing harvest home. *Ken. Par. Ant.* 320.

E A, *Sax.* the water or river. Hence this appellation is joined to the proper names of places, as *Eaton*, *Winchelsea*, *Swansea*, and other such like. And in some parts of the North, the mouth of a river on the shore, between the high and low water mark, still is called the *ea*.

EALDERMAN,

EALDERMAN, *elder*, was a man chosen to a place of superiority, on account of his age and experience: as the *senators* were among the *Romans*. Hence the word *alderman* in corporations; and hence the word *earl*, which is only a contraction of *ealderman*.

EARL, is a title of nobility, above a viscount, and next below a marquis. He was anciently called *shireman*, because the earls had each of them the civil government of a several division or shire.

In *Latin* they are called *comites* (a title first used in the empire), because they *accompanied* or attended the king. And after the *Norman* conquest, they were for some time called *counts*, from whence the shires are stiled *counties* to this day.

It is now become a mere title, they having nothing to do with the government of the county; which is now intirely devolved on the sheriff, the earl's deputy, or *vice-comes*.

Anciently, there was no earl but who had a shire or county for his earldom. But of later times, the number of earls greatly increasing, they have sometimes for their title some particular part of a county, town, village, or place of residence. Also, besides these *local* earls, there are some personal and *honorary*, as *earl marshal of England*; and others *nominal*, who derive their titles from the names of their families.

In writs, and commissions, and other formal instruments, the king, when he mentions any peer, of the degree of an earl, usually stiles him *trusty and well beloved cousin*; an appellation as ancient as the reign of *Hen. 4.* who being either by his wife, his mother, or his sisters, actually related or allied to every earl in the kingdom, artfully and constantly acknowledged that connexion in all his letters, and other public acts; from whence the usage has descended to his successors, though the reason has long ago ceased. 1 *Black.* 398.

EARNEST, called by the civilians *arraha*, is part of the price paid down on a contract made. If neither the money be paid, nor the goods delivered, nor tender made, it is no contract, and the owner may dispose of the goods as he pleases; but if any part of the price be paid down, or any portion of the goods be delivered by way of earnest, the property of the goods is bound by it. 2 *Black.* 30.

EASEMENT, is defined to be a service or convenience which one neighbour hath of another, by charter or prescription, without profit; as a way through his land, a sink, a watercourse, a washing place, or such like. *Kitch.* 105. But a multitude of persons cannot *prescribe* for an easement, but for this they may plead *custom*. *Cro. Ja.* 170.

EAVES-DROPPERS, are persons that listen under windows, or eves or droppings of houses, to listen after discourse, and thereupon

thereupon frame slanderous and mischievous tales. They are a common nuisance, and presentable at the court leet; or are indictable at the sessions, and punishable by fine, and finding sureties for their good behaviour. 4 *Black.* 168.

ECCLESIASTICAL COURT, is that which is holden by the king's authority as supreme governor of the church, in matters which chiefly concern religion. *Wood. b. 4. c. 1.*

The jurisdiction of the ecclesiastical court is either *voluntary* or *contentious*. 1. *Voluntary* is, where there is no opposition, which consists in visiting churches, the clergy, and churchwardens of the several parishes and districts; in granting sequestrations, institution and induction to vacant benefices, licences, dispensations, probates of wills, administrations of intestates effects, and the like. 2. *Contentious*; which is, where there is plaintiff and defendant, in causes of various kinds; as, profanation of the Lord's day, neglect of duty in ministers, disturbance of divine service, providing books and ornaments for the church, jactitation of marriage, divorce, alimony, defamation, payment of tithes, mortuaries, synodals, procurations, dilapidations, reparation of churches, seats in churches, church rates, wills and administrations when contested, and many other such like. *Id.*

The proceedings in the ecclesiastical court are regulated according to the practice of the civil and canon laws, or rather according to a mixture of both, corrected and new modelled by their own particular usages, and the interposition of the courts of common law. For if the proceedings in the spiritual court be ever so regularly consonant to the rules of the *Roman* law, yet if they be manifestly repugnant to the fundamental maxims of the municipal law of this realm; as (for instance) if they require two witnesses to prove a fact where one will suffice at common law, in such cases a prohibition will be awarded against them. 3 *Black.* 100.

Their ordinary course of proceeding is, first, by *citation*, to call the party injuring before them. Then by *libel*, or, articles drawn out in a formal allegation, to set forth the plaintiff's ground of complaint. To this succeeds the defendant's *answer* upon oath. If he denies or extenuates the charge, then they proceed to *proofs* by witnesses examined, and their depositions taken down in writing, by an officer of the court. If the defendant hath any circumstances to offer in his defence, he must also propound them in what is called his *defensive allegation*, to which he is intitled in his turn to the *plaintiff's answer* upon oath, and may from thence proceed to *proofs* as well as his antagonist. But a man is not obliged to answer upon oath to any matter which may charge himself with a criminal offence. When all the pleadings and proofs are concluded, they are referred to the consideration, not of a jury, but of the judge, who takes information
by

by hearing advocates on both sides, and thereupon forms his *interlocutory decree*, or *definitive sentence*, at his own discretion; from which there generally lies an *appeal*, in the several stages and gradations, from the archdeacon to the bishop, from the bishop to the archbishop, and from the archbishop to the delegates. But by the statute 25 *Hen. 8. c. 19.* if the decree be not appealed from in fifteen days, it is final. *Id.*

EGYPTIANS. See GYPSIES.

AN EJECTMENT, properly speaking, lieth, where lands or tenements are let for a term of years, and afterwards the lessor, reversioner, remainder man, or any stranger, doth eject or oust the lessee of his term: in this case, he shall have this writ of ejectment, to call the defendant to answer for entering on the lands so demised to the plaintiff for a term that is not yet expired, and ejecting him. And by this writ the plaintiff shall recover back his term, or the remainder of it, with damages. 3 *Black. 199.*

Since the disuse of real actions, this manner of proceeding is become the common method of trying the title to lands or tenements. *Id. 200.*

In strictness, in order to maintain the action, the plaintiff must make out four points before the court, viz. *title, lease, entry, and ouster.* First, he must shew a good *title* in the lessor, which brings the matter of right intirely before the court; then, that the lessor, being seised by virtue of such title, did make him the *lease* for the present term; thirdly, that he, the lessee or plaintiff, did *enter* or take possession in consequence of such lease; and then, lastly, that the defendant *ousted* or ejected him. Whereupon he shall have judgment to recover his term and damages; and shall, in consequence, have a writ of possession, which the sheriff is to execute, by delivering him the undisturbed and peaceable possession of his term. *Id. 202.*

But as much trouble and formality were found to attend the actual making of the *lease, entry, and ouster*, a new and more easy method of trying titles by writ of ejectment was invented, which depends intirely upon a string of legal fictions; no actual *lease* is made, no actual *entry* by the plaintiff, no actual *ouster* by the defendant; but all are merely ideal, for the sole purpose of trying the title. *Id.*

To this end, on application to the court by the tenant in possession to be made defendant in the action, it is allowed to him upon this condition, that he enter into a rule to confess, at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action, viz. the *lease, entry, and ouster*; which requisites, as they are wholly fictitious, should the defendant put the plaintiff to prove, he must of course be nonsuited for want of evidence; but by such stipulated confession of lease, entry, and

and ouster, the trial will now stand upon the merits of the title only. *Id.* 203, 4.

The damages recovered in these actions, though formerly their only intent, are now usually (since the title has been considered as the principal question) very small and inadequate, amounting commonly to one shilling or some other trivial sum. In order therefore to complete the remedy, when the possession has been long detained from him that has right, an action of trespass also lies, after a recovery in ejectment, to recover the mesne profits which the tenant in possession hath wrongfully received; which action may be brought in the name of either the nominal plaintiff in the ejectment, or his lessor, against the tenant in possession, whether he be made party to the ejectment, or suffers judgment to go by default. *Id.* 205.

Such is the modern way, of obliquely bringing in question the title to lands and tenements, in order to try it in this collateral manner; a method which is now universally adopted in almost every case. It is founded on the same principle as the ancient writs of assize, being calculated to try the mere *possessory* title to an estate, and hath succeeded to those real actions, as being infinitely more convenient for attaining the end of justice; because, the form of the proceeding being intirely fictitious, it is wholly in the power of the court to direct the application of that fiction so as to prevent fraud and chicane, and to discover the real truth of the title: the writ of ejectment and its nominal parties are judicially to be considered as the fictitious form of an action really brought by the lessor of the plaintiff against the tenant in possession; invented, under the control and power of the court, for the advancement of justice in many respects; and to force the parties to go to trial on the merits, without being intangled in the nicety of pleadings on either side. 3 *Black.* 205. *Burr. Mansf.* 668.

But a writ of ejectment is not an adequate means to try the title of all estates. For where the entry is taken away by disseisin, descents, fines, and recoveries, and non-claim, no ejectment lies. So it doth not lie of an advowson, a rent, a common, or other incorporeal hereditament (except for tithes, by virtue of the statute of 32 *H. 8. c. 7.*); for on such things whereon an entry cannot in fact be made, no entry shall be supposed by any fiction of the parties. Nor will an ejectment lie, where the defendant has been twenty years in possession, by the statute of limitations. For an ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter. Therefore it is always necessary for the plaintiff to shew, that his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it, under some of the exceptions allowed by the statute. 'Twenty years adverse possession

on is a positive title to the defendant. It is not a bar only to the action or remedy of the plaintiff, but rather takes away his right of possession, and in that case the plaintiff will be driven to his writ of right. 3 *Black.* 206. *Burr. Mansf.* 119.

The usual course in practice is, to draw a declaration, and therein to feign a lease to a lessee, or to him that would try the title; and to feign a casual ejector or defendant in the said declaration; and then to deliver the declaration to the ejector named therein, who sends or delivers it to the tenant in possession, and gives him notice in writing at the bottom, or on the back thereof, to appear and defend his title; otherwise that he the feigned defendant will suffer judgment by default, whereby he the true tenant will be turned out of possession. To this declaration the true tenant may appear by his attorney, and consent to a rule to make him defendant in the place of the casual ejector or feigned defendant, and to confess a lease, entry, and ouster, and at the trial to stand upon the title only. *Wood. b. 4. c. 4.*

Where the person himself cannot be come at, leaving a copy at his house with some person there, or if no one can be met with, affixing a true copy of it on the door, shall be deemed a good service. *Burr. Mansf.* 1116. 1181.

EIGNE, Fr. *eldest*, or first-born; as *bastard eigne* and *mulier puisne*, are words used in our law, for the elder a bastard, and the younger legitimate.

EIRE, Fr. (*iter*,) was the court of justices itinerant, who were sent once in seven years with a general commission into divers counties, to hear and determine such causes as were termed pleas of the crown.

The *eire of the forest*, is the same as the court called the *justice seat*, which was held once in three years by the justices itinerant of the forest.

ELECTION, is when a man is left to his own free will to take or to do one thing or another, which he pleases.

In all cases, where several remedies are given, the law which gives the remedies to the party, gives him withal election to take which of the remedies he will. 1 *Inst.* 145.

If a man grant by his deed a rent-charge to another, and the rent is behind, the grantee may chuse whether he will sue a writ of annuity for this against the grantor, or distrain for the rent behind, but he cannot do both. *Litt. sect.* 219.

Where election is given to several persons, the first election made by any of them shall stand. 1 *Inst.* 145.

If a man grant a manor, except one close called *N.* and there are two closes called by that name, one containing nine acres, and the other only three acres, the grantee shall not in this case chuse which of the said closes he will have, but the grantor shall have election which close shall pass. 1 *Leon.* 268.

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But if one grants an acre of land out of a waste or common, and doth not say in what part, or how to be bounded, the grantee may make his election where he will. 1 *Leon.* 30.

If a man hath an election to do one of two things, and one of them becomes impossible, he must at his peril do the other. 1 *Lill. Abr.* 506.

A person who hath brought a civil action for an injury, shall not be suffered to proceed criminally by way of information at the same time, but shall make his election in which method he will proceed, before the court will enter into the criminal complaint. *Burr. Mansf.* 720.

If a bill in equity be brought, whilst an action at law is carrying on upon the same account, the lord chancellor will oblige the plaintiff to make his election in which way he will proceed. 2 *Atk.* 166.

But where a creditor sues an executor at law, and at the same time files his bill against him in equity, the court will not require him to make his election, in case the executor is attempting to prefer other creditors before him, by confessing judgments to them. *Barn. Cha. Ca.* 278.

ELEGIT, is a writ of execution, which is given by the statute 13 *Ed. 1. c.* 18. either upon a judgment for debt or damages, or upon the forfeiture of a recognizance taken in the king's court. 1 *Inst.* 289.

By the common law, a man could only have satisfaction of goods, chattels, and the present profits of lands, by the writs of *feri facias* or *levari facias*; but not the possession of the lands themselves: so that if the defendant aliened his lands, the plaintiff was ousted of his remedy. The statute therefore granted this writ, which is called an *elegit*, because it is in the *election* of the plaintiff whether he will sue out this writ or one of the former. 3 *Black.* 418.

By this writ the sheriff shall deliver to the plaintiff all the goods and chattels of the debtor (except oxen and beasts of the plough), and a moiety of his lands: and this must be done by an inquest to be taken by the sheriff. 1 *Inst.* 289.

The other moiety of the lands was originally reserved for the lord to distrain for his services. And hence it is, that to this day copyhold and other like customary lands are not liable to be taken in execution upon a judgment. 3 *Black.* 418, 9.

This execution, or seising, of lands by *elegit*, is of so high a nature, that after it the body of the defendant cannot be taken. But if execution can only be had of the goods, because there are no lands, and such goods are not sufficient to pay the debt, a writ may be had to take the body of the defendant. *Id.* 419.

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During the time that the plaintiff holds the lands so delivered to him, he is called tenant by *elegit*. Yet he hath only a chattel interest therein; and therefore it shall not go to his heir, but to his executor, who is intitled to the debt, for the payment whereof this land is a remedy or security. 2 *Black.* 161.

ELISORS (*electors*), are two persons appointed by the court to return a jury, when the sheriff and the coroners have been challenged as incompetent. In this case, the elisors return the writ of *venire* directed to them, with a panel of the jurors names. And their return is final, no challenge being allowed to their array. 3 *Black.* 354.

ELOIGNE (Fr. *espoigne, elongata*), is when the sheriff, to a writ of replevy, returns that the goods are *elongata*, carried a long way off, to places to him unknown; in which case, the party replevying shall have a writ of *capias in withernam*, a term which signifies another or reciprocal distress of the goods of the distrainer, in lieu of the distress formerly taken by him, and eloigned or withheld from the owner: so that here is now distress against distress, one being taken to answer the other, by way of reprisal, and as a punishment for the illegal behaviour of the original distrainer. For which reason, goods taken in *withernam* cannot be replevied, till the original distress is forthcoming. 3 *Black.* 148.

ELOPEMENT, is where a married woman, of her own accord, goes away and departs from her husband, and lives with an adulterer. A woman thus leaving her husband is said to *elope*; and in this case her husband is not obliged to allow her any alimony out of his estate, nor shall he be chargeable for necessaries for her; and, where the same is notorious, whoever gives her credit doth it at his peril.

EMBARGO, is a prohibition upon shipping not to go out of any port. This the king can enjoin in time of war by virtue of his prerogative; but, in time of peace, this may not be done without an act of parliament. 1 *Black.* 271.

EMBLEMETS, signify properly the profit of land sown; but the word is sometimes used more largely, for any products that arise naturally from the ground, as corn, fruit, and the like.

If the lessee, being tenant *at will*, sow the land, and the lessor after it is sown, and before the corn is ripe, put him out; yet the lessee shall have the corn, because he knew not at what time the lessor would enter upon him. Otherwise it is, if tenant *for years*, who knows the end of his term, sows the land, and his term ends before the corn is ripe; in this case the lessor or he in reversion shall have the corn, because the lessee knew the certainty of his term, and when it would end.

Litt. 68.

And the reason why the tenant at will shall have the corn is, because his estate is uncertain; and therefore, lest the ground should be unmanured, which would be hurtful to the public, he shall reap the crop which he sowed in peace, although the lessor determine his will before it be ripe. And so it is if he set roots, or sow hemp, or flax, or any other annual profit; if, after the same be planted, the lessor oust the lessee, or if the lessee die, yet he or his executors shall have that year's crop. But if he plant young fruit trees, or young oaks, ashes, elms, or the like, or sow the ground with acorns, there the lessor may put him out notwithstanding, because they will yield no annual profit.

So if tenant *for life* sows the ground, and dies, his executors shall have the corn, because his estate was uncertain, and determined by the act of *God*.

But if a woman that holds land *during her widowhood* sows the ground and taketh husband, the lessor shall have the corn, because the determination of her estate grew by her own act.

If a man seised of lands in fee hath issue a daughter, and dieth, leaving his wife ensient with a son, the daughter sows the ground, the son is born, yet the daughter shall have the corn, because her estate was lawful, and defeated by the act of *God*.

Where there is a right to emblements, ingress, egress, and regress, are allowed by law to enter, cut, and carry them away, when the estate is determined. 1 *Inst.* 55. 2 *Inst.* 81. 1 *Roll's Abr.* 727.

EMBRACERY, is an attempt to corrupt or influence a jury, or any way incline them to be more favourable to the one side than the other, by money, promises, letters, threats, or persuasions; whether the juror on whom such attempt is made give any verdict or not, or whether the verdict given be true or false. 1 *Haw.* 259.

The punishment of an embraceor is by fine and imprisonment; and for the juror so embraced, if it be by taking money, the punishment is (by divers statutes) perpetual infamy, imprisonment for a year, and forfeiture of tenfold the value. 4 *Black.* 140.

EMBRING DAYS (from *embers*, ashes), are certain extraordinary days of fasting, wherein, by way of greater humiliation, the people sate in ashes; who being at the same time habited in the coarser kind of cloth, are represented as repenting in sackcloth and ashes.

ENDOWMENT (Lat. *dos*, *dower*), is the widow's portion; being a third part of all the freehold lands and tenements of which her husband was seised at any time during the coverture. Of lands, not freehold, her portion varies according to the custom in different places. Sometimes the word *endowment* is used metaphorically for an assignment of a provision for a clergyman
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on erecting a church or chapel; and more particularly it was a portion of tithes set out for a vicar towards his perpetual maintenance when the benefice was appropriated to some of the religious houses.

ENGLESCHIRE, was anciently an amercement on the murder of a *Dane* by an *Engliffman*. It was introduced by king *Canute*, to prevent his countrymen, the *Danes*, from being privately murdered by the *Engliff*; and was afterwards continued by *William* the Conqueror, for the like security to his *Normans*. And, therefore, if, upon inquisition had, it appeared that the person found slain was an *Engliffman*, the country was excused from this burden. But this was abolished by the statute 14 *Ed.* 3. c. 4. which enacts, that because many mischiefs have happened in divers counties, which had no knowledge of presentment of *Engleschire*, whereby the commons of the counties were often amerced before the justices in eyre; therefore no justice errant from henceforth shall put in any article of presentment of *Engleschire*, against the commons of the counties or any of them, but the *Engleschire* and presentment of the same be wholly out and void for ever, so that no person by this cause may be henceforth impeached.

According to some authors, *Engleschire* was the proof that the party slain was an *Engliffman*. *Bract. lib.* 3. *tr.* 2. c. 15. *Fleta*, l. 1. c. 30.

ENGLISH TONGUE. By the 4 *G.* 2. c. 26. & 6 *G.* 2. c. 14. all law proceedings (except technical words) shall be in the *Engliff* language, and written in a common legible hand and character, and not in any hand commonly called *court hand*, on pain of 5*l.* to him who shall sue for the same.

ENTRY into lands is, where the legal owner takes possession against another who hath entered without any right at all. In this case, the party intitled, without the formality of bringing his action, may enter peaceably upon the land, declaring that thereby he takes possession; or he may enter on any part of the land in the same county, declaring it to be in the name of the whole; but if it lie in different counties, he must make different entries. 3 *Black.* 174.

If the claimant be deterred from entering by menaces or bodily fear, he may make *claim* as near to the estate as he can, with the like forms and solemnities: which claim is in force for a year and a day only. And therefore this claim, if it be repeated once in the space of every year and day (which is called *continual claim*), has the same effect with, and in all respects amounts to, a legal entry. *Id.* 175.

But if the disseisor die, and the lands descend to his issue, this takes away the entry of the right owner, because the law casts the lands upon the issue by force of the descent: and therefore

as the issue comes to the lands by course of law, and not by his own act, the law so far protects his title, that it will not suffer his possession to be devested, till the claimant hath proved a better right. *Id.* 176.

ENTRY, writ of, is a writ directed to the sheriff, requiring him to *command* the tenant of the land, that he *render* to the demandant the premises in question, or appear in court on such a day, and shew why he hath not done it. And this is what is called, from the emphatical words in the writ *præcipe quod reddat*. Of this writ there are four kinds: 1. A writ of entry *sur disseisin*, that lieth for the disseisee against the disseisor, upon a disseisin done by himself; and this is called a writ of entry in the nature of an assize. 2. A writ of entry *sur disseisin in the per*, for the heir by descent, who is said to be in the *per*, as he comes in by his ancestor. 3. A writ of entry *sur disseisin in the per and cui*, where the feoffee of a disseisor maketh a feoffment over to another; and then the form of a writ is, that the tenant had no title to enter, but by a prior alienee, to whom the intruder demised it. 4. A writ of entry *sur disseisin in the post*, which lies when *after* a disseisin the land is removed from hand to hand in case of a more remote seisin, whereunto the other three degrees do not extend. 1 *Inst.* 238.

But all these writs are now entirely out of use; only the forms of them are preserved in the practice of common recoveries. But the title of lands is now usually tried upon actions of ejectment or trespass.

EQUES AURATUS, is a knight so called from the gilt spurs that he wore. Hence in ancient charters, by way of a quitrent, the tenant was bound to render to the lord yearly a pair of gilt spurs.

EQUITY, is a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischief or cause of making of the same, shall be within the same remedy that the statute provideth. And the reason hereof is, for that the law maker could not possibly set down all cases in express terms. 1 *Inst.* 24. For example: The statute of *Gloucester* gives action of waste against him that holds lands for life or years; and by the equity thereof a man shall have action of waste against a tenant that holds but for one year or half a year, which is without the words of the act, but within the meaning of it; and the words that enact the one do by equity enact the other. *T. L.* 303. In like manner, a case out of the mischief is out of the meaning of the law, though it be within the letter of it. 2 *Inst.* 106.

EQUITY OF REDEMPTION. In strictness of law, if money lent upon a mortgaged estate be not paid at the day, the estate becomes absolutely forfeited. But herein the courts of equity

equity have interposed : and if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to re-call or redeem his estate, paying to the mortgagee his principal, interest, and costs. Which advantage, allowed to mortgagees, is called the *equity of redemption*. But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of the money immediately, or else call upon the mortgagor to redeem his estate presently ; or in default thereof, to be for ever *foreclosed* from redeeming the same ; that is, to lose the equity of redemption without possibility of recall. Also, in some cases of fraudulent mortgages, the fraudulent mortgagor forfeits all equity of redemption whatsoever. 2 *Black.* 158, 9.

ERROR, writ of, lies for some supposed mistake in the proceedings of a court of record ; for to amend errors in an inferior court not of record, a writ of false judgment lies. A writ of error lies only upon matter of *law* arising upon the face of the proceedings, so that no *evidence* is required to substantiate or support it ; and there is no method of reversing an error in the determination of *facts*, but an *attaint* (which is now out of use), or by a *new trial*, which is now the common practice. This writ lies from the inferior courts of record in *England* into the king's bench, and from the king's bench in *Ireland* to the king's bench in *England*. It may likewise be brought from the common pleas at *Westminster* to the king's bench, and then from the king's bench the cause is removeable to the house of lords. From proceedings on the law side of the exchequer, a writ of error lies into the court of exchequer chamber before the lord chancellor, lord treasurer, and the judges of the courts of king's bench and common pleas, and from thence to the house of lords. From proceedings in the king's bench in debt, detinue, covenant, account, case, ejectment, or trespass, originally begun there by bill (except where the king is party), it lies to the exchequer chamber, before the justices of common pleas and barons of the exchequer, and from thence also to the house of lords : but where the proceedings in the king's bench do not first commence therein by bill, but by original writ sued out of chancery, the writ of error then lies, without any intermediate stage of appeal, directly to the house of lords, the final resort for the decision in every civil action. 3 *Black.* 406.

ESCAPE :

1. An *escape* is, where one that is arrested gaineth his liberty, before he is delivered by course of law. *T. L.*

2. Escapes are either in *civil* or *criminal* cases ; and in both respects, escapes may be distinguished into *voluntary* and *negligent* : *voluntary*, where it is with consent of the keeper ; *negligent*, where it is for want of due care in the keeper.

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3. In *civil* cases : After the prisoner hath been suffered voluntarily to escape, the sheriff can never after retake him, but the sheriff must answer for the debt : but the plaintiff may retake him at any time. In the case of a negligent escape, the sheriff, upon fresh pursuit, may retake the prisoner ; and the sheriff shall be excused, if he hath him again before any action brought against himself for the escape.

When a defendant is once in custody in execution, upon a *copias ad satisfaciendum*, he is to be kept in close and safe custody ; and if he be afterwards seen at large, it is an escape ; and the plaintiff may have an action thereupon for his whole debt : for though upon arrests, and what is called *mesne process*, being such as intervenes between the commencement and end of a suit, the sheriff, till the statute 8 & 9 *W. c.* 27. might have indulged the defendant as he pleased, so as he produced him in court to answer the plaintiff at the return of the writ ; yet upon a taking in execution, he could never give any indulgence ; for in that case confinement is the whole of the debtors punishment, and of the satisfaction made to the creditor. 3 *Black.* 415, 6.

A rescue of a prisoner in execution, either going to gaol or in gaol, or a breach of prison, will not excuse the sheriff from being guilty of and answering for the escape ; for he ought to have sufficient force to keep him, seeing he may command the power of the county. *Id.* 416.

4. In *criminal* cases : An escape of a person arrested, by eluding the vigilance of his keeper before he is put in hold, is an offence against public justice, and the party himself is punishable by fine and imprisonment : but the officer permitting such escape, either by negligence or connivance, is much more culpable than the prisoner, who has the natural desire of liberty to plead in his behalf. Officers therefore, who after arrest negligently permit a felon to escape, are also punishable by fine : but *voluntary* escapes amount to the same kind of offence, and are punishable in the same degree, as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass ; and this, whether he were actually committed to goal, or only under a bare arrest. But the officer cannot be thus punished, till the original delinquent is actually found guilty or convicted by verdict, confession, or outlawry, otherwise it might happen that the officer should be punished for treason or felony, and the party escaping, turn out to be an innocent man. But before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemeanor. 4 *Black.* 129.

By the statute 16 *G. 2. c.* 31. to convey to any person in custody for *treason* or *felony* any arms, instrument of escape, or disguise,

guise, without the knowledge of the gaoler, though no escape be attempted ; or any way to assist such prisoner to attempt an escape, though no escape be actually made, is felony and transportation for seven years : or if the prisoner be in custody for *petit larceny*, or other *inferior offence*, or charged with a debt of 100*l.* it is then a misdemeanor, punishable by fine and imprisonment

ESCAPE WARRANT, is where a person committed or charged in custody in the king's bench or Fleet prison, in execution, or on mesne process, goes at large ; then an oath thereof made before a judge of the court where the action was brought, a warrant shall be issued, directed to all the sheriffs and other officers throughout *England*, to retake the prisoner, and commit him to gaol where taken, there to remain till the debt shall be satisfied.

ESCHEAT, from the French *eschoir*, to happen, signifies chance or accident, and in our law denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency ; in which case, the land naturally reverts back, by a kind of reversion, to the original grantor, or lord of the fee. 2 *Bluck.* 244.

Escheat happens either for *want of heirs* of the person last seised, or by his *attainder* for a crime by him committed ; in which latter case, the blood is tainted, stained, or corrupted, and the inheritable quality of it is thereby extinguished.

Escheat whereby the descent is impeded for want of heirs is, where the tenant dies without any relations on the part of any of his ancestors, or where he dies without any relations of those ancestors, paternal or maternal, from whom his estate descended ; or where he dies without any relations of the whole blood. Bastards also are incapable of inheritance ; and therefore if there be no other claimant than such illegitimate children, the land shall escheat to the lord : and, as bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies ; and therefore if a bastard purchase lands, and dies seised thereof without issue and intestate, the land shall escheat to the lord of the fee. Aliens also, that is, persons born out of the king's allegiance, are incapable of taking by descent ; and, unless naturalized, are also incapable of taking by purchase ; and therefore, if there be no natural-born subject to claim, such lands in like manner shall escheat.

By attainder for treason or other felony, the blood of the person attainted is so far corrupted, as to be rendered no longer inheritable. But in this case a difference is to be noted, between *forfeiture* of lands to the king, and *escheat* to the lord of the fee. Before the introduction of feuds, part of the punishment for such offence was forfeiture of lands to the crown ; afterwards, escheats being

being introduced in consequence of the feudal tenure, they operated in subordination, as it were, to this more ancient and superior law of forfeiture.

The doctrine of escheat upon attainder is properly this; that the blood of the tenant, by the commission of any felony (under which denomination all treasons were formerly comprized), is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vafal on the implied condition of his well demeaning himself. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revert in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage; in case of treason, for ever; in case of other felony, for only a year and a day; after which time it goes to the lord in a regular course of escheat.

As a consequence of this doctrine of escheats, all lands of inheritance immediately reverting in the lord, the wife of the felon was liable to lose her dower, till the statute 1 Ed. 6. c. 12. enacted, that albeit any person be attainted of misprison of treason, murder, or felony, yet his wife shall enjoy her dower. But she has not this indulgence where the ancient law of forfeiture operates; for it is provided by the statute 5 & 6 Ed. 6. c. 11. that the wife of one attainted of high treason shall not be endowed at all. 2 Black. c. 15.

ESCHEATOR, was an officer appointed in every county, whose employment was, in case of the death of any of the king's tenants *in capite*, to take the lands into the king's hands, and to inquire by a jury, how much land such tenant held, what was the yearly value thereof, who was his heir, and of what age, that the king might be answered of the wardship and marriage of such tenant, if he or she were within the age appointed by law.

ESCROW, is a deed delivered, not to the grantee, but to a third person, to hold till some conditions be performed on the part of the grantee; in which case, it is not delivered as a deed, but as an escrow; that is, as a *scrowl* or *writing*, which is not to take effect as a deed, till the conditions be performed; and then it is a deed to all intents and purposes. 2 Black. 307.

ESCUAGE, *scutogium*, service of the shield, was where a man holding lands by knights service, was obliged to attend the king personally in his wars; and was afterwards changed into a pecuniary compensation. 1 ff. 68.

ESPLEES (*expletia*, from *expleo*), are the products which ground or land yield, as the hay of the meadow, the herbage of the pasture, corn of the arable, rents and services. So of an advowson, the taking of tithes in gross by the parson; of wood, the selling of wood; of an orchard, the fruits growing there; of a mill,

mill, the taking of toll: these, and such like issues are termed *esplees*. In a writ of right of land, of an advowson, or the like, the demandant ought to allege in his count, that he or his ancestor took the esplees of the thing in demand; otherwise the pleading will not be good. *T. L.*

ESQUIRE, *escuyer, scutarius*, called by the Saxons *schilt knaben* (*shield-knave*, the word *knave* having anciently signified *servant*), is a name of dignity, next above the common title of *gentleman*, and below a *knight*. Heretofore it signified one that was attendant, and had his employment as a servant, waiting on such as had the order of knighthood, bearing their shields, and helping them to horse, and such like. And this title is of that nature with us now, that to whomsoever either by blood, or place in the state, or other eminency, we conceive some higher attribute should be given than the sole title of gentleman, knowing yet that he hath no other honorary title legally fixed on him, we usually style him an esquire, in such passages as require legally that his degree or state be mentioned. *Seld. Tit. of Honour.*

Mr. Camden reckons up four species of esquires, particularly regarded by the heralds: 1. The eldest sons of knights, and their eldest sons, in perpetual succession. 2. The eldest sons of younger sons of peers, and their eldest sons, in like perpetual succession. Both of which species are esquires by *birth*. 3. Esquires created by the king's *letters patent*, or other investiture, and their eldest sons. 4. Esquires by virtue of their *office*, as justices of the peace, and others who bear any office of trust under the crown.

Those which were created by patent or investiture, were called *esquires of the king*, and wore a collar of SS. and had a pair of silver spurs (by way of distinction from the knights, who had gilt spurs), and they attended upon the king in war, and carried his shield before him.

Unto these may be added all *Irisb* and foreign peers, and also the eldest sons of peers of *Great Britain*; for all these are only esquires in our law, and must be so named in all legal proceedings. *1 Black. 406.*

ESSOIN, *essonium*, is derived of the French *essonier*, or *exonier*, which signifies to excuse; so as an *essoin*, in legal understanding, is an excuse of a default by reason of some impediment or disturbance, and is as well for the plaintiff as for the defendant, and is all one with that which the civilians call *excusatio*: It is a craving of further time. Of essoins there have been five kinds: 1. De servitio regis. 2. In terram sanctam. 3. Ultra mare. 4. De malo lecti. 5. De malo veniendi; and this is the common-essoin. *2 Inst. 125.* The essoin day in court is regularly the first day of the term, but the fourth day after is allowed of favour. *Wood. b. 4, c. 1.*

ESTATE,

ESTATE, in lands, tenements, and hereditaments, signifies such interest as the tenant has therein ; so that if a man grant *all his estate* to such an one and his heirs, every thing that he can possibly grant shall pass thereby. It is called in Latin *status*, signifying the condition or circumstance in which the owner stands with regard to his property. 2 *Black.* 103.

ESTOPPEL, is so called because thereby a man is *stopped* or concluded from saying any thing against his own act. Of estoppels there are three kinds ; by matter of record ; by matter in writing ; and by matter without writing. 1. By matter of record ; as by letters patent, fine, recovery, pleading, taking of continuance, confession, imparlance, warrant of attorney, admittance. 2. By matter in writing ; as by deed indented, by making of an acquittance by deed indented or deed poll, by defeasance by deed indented or deed poll. 3. By matter without writing ; as by livery, by entry, by acceptance of rent, by partition. 1 *Inst.* 352.

Every estoppel ought to be reciprocal ; that is, to bind both parties : and this is the reason that regularly a stranger shall neither take advantage nor be bound by estoppel. Privies in blood as the heir, privies in estate as the feoffee or lessee, privies in law as the lord by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come under by act in law, or in the post, shall be bound by and take advantage of estoppels. *Id.*

If a man is bound in an obligation by a wrong name, and afterwards is sued by that name on the obligation, he shall not be received to say in abatement that he is misnamed, but shall answer according to the obligation, though it be wrong : and forasmuch as he is the same person that was bound, he is estopped and forbidden in law to say contrary to his own deed ; otherwise he might take advantage of his own wrong, which the law will not suffer. *T. L.*

ESTOVERS, (from *estoffer*, to furnish), is a liberty of taking necessary wood for the use or furniture of a house or farm. And this any tenant may take from off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary. 2 *Black.* 35.

Also in a divorce between husband and wife, where the law allows unto her alimony out of her husband's estate, this is sometimes called her *estovers* : for which, if he refuses payment, there is (besides the ordinary process of excommunication) a writ at common law *de estoveriis habendis*, in order to recover it. 1 *Black.* 441.

ESTRAYS, are such goods as are found in any manor or lordship, and no man knows the owner of them ; in which case they belong

belong to the king, or to the lord of the manor by special grant from the crown. 1 *Black.* 297.

But in order to vest an absolute property in the king, or his grantee, they must be proclaimed in the church and two market towns next adjoining to the place where they are found; and then, if no man claim them within a year and day after such proclamation, the owner hath lost all further property therein: but if they be not proclaimed, the owner may take them again at any time. *Id.*

Any animal may be estray, that is by nature tame or reclaimable, and in which there is a valuable property, so as that the same may be a sufficient pledge for the expence of the lord of the franchise in keeping them the year and day. For he that takes an estray is bound, so long as he keeps it, to feed it and keep it from damage, and may not use it by way of labour, as to ride an horse or the like, but is liable to an action for so doing. Yet he may milk a cow, or do any thing which tends to the preservation, and is for the benefit of the animal. *Id.* 298.

An estray ought to be put in some several ground in some open place, and not in any covert of wood, that the owner may have a view of it; for if it be in covert, the property is not changed, though it be there a year and a day. *Kitch.* 23.

The owner, if it be within the year and day, may take it without telling any marks, or making proof of property; but this may be done upon the trial, if contested. 2 *Salk.* 686.

And the lord ought to make a demand of what the amends should be; and then if the owner thinks the demand unreasonable, he may tender sufficient amends; and if the lord shall not accept it, this shall be settled by the jury upon trial. But it is enough in this case to tender amends *generally*, without expressing any certain sum. For this differs from the tender of amends for trespasss, where, if a man pleads a tender, he must shew what he tendered, and the law puts this difficulty upon him, because he is the wrong doer: but the owner of the stray is no wrong doer; and he cannot know how long his beast hath been in the lord's custody, nor how much will make a proper satisfaction. *Id.*

If the estray within the year stray out of the manor, the lord may chase it back, unless it be seized by another lord who hath estrays; but if it be seized by such other lord, the first hath no possibility of recovering it, for until the year and day be past, he hath no property therein; and the second must proclaim it again. *Kitch.* 81.

ESTREAT, *extractum*, is used for a true copy or note of some original writing or record, and especially of fines and amerements imposed in the rolls of a court, and *extracted* or drawn out from thence, and certified into the court of exchequer; whereupon

upon process is awarded to the sheriff to levy the same. And all clerks of the peace and town-clerks shall, within twenty days after *Sept. 29*, yearly, deliver to the sheriff a true estreat of all fines and forfeitures in their respective courts; and shall, before the second *Monday* after the morrow of *All Souls*, yearly deliver into the exchequer a duplicate thereof, and shall then make oath of the truth of the same. 22 & 23 C. 2. c. 22. 4 & 5 W. c. 24.

ESTREPEMENT, is an old French word, and signifies waste or *extirpation*. It is a writ which lay at the common law to prevent the committing of waste; but now the most usual way of preventing waste is by injunction out of a court of equity. 3 *Black.* 227.

EVIDENCE :

1. **EVIDENCE**, *what*. Evidence, in legal understanding, doth not only contain matters of record, as letters patent, fines, recoveries, inrollments, and the like; and writings under seal, as charters and deeds; and other writings without seal, as court rolls, accounts, and such like; but in a larger sense it containeth also the testimony of witnesses, and other proofs to be produced and given for the finding of any issue joined between the parties. And it is called *evidence*, because thereby the point in issue is to be made evident to the jury. 1 *Inst.* 283.

2. *The best evidence is required*. One general rule that runs through the whole doctrine of evidence is this, that the best evidence that can be had shall be required. Thus, in order to prove a lease for years, nothing less shall be admitted but the very deed of lease itself, if in being; but if it be positively proved to be burned or destroyed (not relying on any loose negative, as that it cannot be found, or the like), then an attested copy may be produced, or parol evidence given of its contents. 3 *Black.* 368.

3. *Written evidence*. Evidence is of two kinds, written evidence, and the evidence of witnesses. Written evidence is various: such as *acts of parliament*; which, if public acts, are to be taken notice of by the court, without being proved; but private acts must be proved by copies thereof compared with the parliament roll. *Theory of Evid.* 2. 8.

Records of the king's courts prove themselves. But if copies of them are produced, they must be proved by witnesses to be true copies. 10 *Co.* 92. So also of public matters which are *not of record*, as the court rolls of a manor; for they are the public rolls by which the inheritance of every tenant is preserved. *Theory of Evid.* 22, 3.

Depositions of witnesses taken in a court of record may be read, when the witness is dead, but not when the witness is living; for then they are not the best evidence that the nature of the thing is capable of; unless it shall appear that the witness hath been sought, and cannot be found. *Id.* 30.

A *verdict* shall not be given in evidence, but between such who were

were parties or privies to it : neither shall it be admitted without producing a copy of the judgment founded upon it ; because it might be that the judgment was arrested. *Id.* 18, 19, 21.

A *decree* in equity may be given in evidence between the same parties or all claiming under them. *Id.* 36.

In cases where deeds have been *destroyed* by burning of houses by rebellion, by robbers ; or where the defendant himself has the deed which concerns the land in question, and will not produce it, a copy of it hath been admitted, or an abstract, or even parol evidence of the contents. *Id.* 54.

The *confession* of the defendant taken before justices of the peace is allowed to be given in evidence against the party confessing, but not against others. 2 *Haw.* 429.

A copy of the *probate of a will* is good evidence, where the will itself is of chattels ; for there the probate is an original taken by authority, and of a public nature : otherwise, where the will is of things in the reality ; because in such case the ecclesiastical courts have no authority to take probates ; therefore such probate is but a copy, and the copy of it is no more than the copy of a copy. 3 *Salk.* 154. So the copy of a *church register*, of *town books*, and the like, are good evidence. *L. Raym.* 154.

A *shop book* shall not be allowed in evidence on an action for money due for wares delivered above a year before the action brought. 7 *Ja. c.* 12.

A man's *book of accounts* is no evidence for the owner of the book, but for the adverse party ; for his book cannot be of better credit than his oath, which would not serve in his own case. *Tr. per Pais.* 348.

Similitude of hands is no evidence ; but saying that he was well acquainted with his writing, and knew it to be his writing, is evidence : and in some circumstances this is not necessary ; as where the handwriting to be proved is of a person residing abroad, one who hath frequently received letters from him in a course of correspondence, hath been admitted to prove it, though he had never seen him write. *Theory of Evid.* 25.

4. *Evidence of witnesses.* An *infant* of the age of fourteen years may be sworn, for that is by law limited to be the age of discretion. And in some cases an infant of tender years may be examined, which possibly, being fortified with concurrent evidences, may be of some weight ; especially in cases of rape, buggery, and such crimes as are practised upon children : but in no case shall an infant be admitted as evidence without oath. *Str.* 700. 1 *Atk.* 29.

If a *juror* is a witness in a cause, he ought to be sworn openly in court, where he may be cross-examined, and not report the matter privately to his companions. *Bac. Abr. Evid.*

An *attainder* of felony, perjury, or forgery, or a judgment for any

any heinous crime, are good causes of exception against a witness. But no such conviction or judgment can be made use of to this purpose, unless the record be produced in court. And it is a general rule, that a witness shall not be asked any question, the answering to which might oblige him to accuse himself of a crime; and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes, whereof he never was convicted. 2 *Haw.* 433.

It is an uncontested rule, that it is a good exception against a witness, that he is either to be a *gainer* or *loser* by the event of a cause, whether such advantage be direct and immediate, or consequential only. Except in criminal cases, where, from the necessity of the thing, interested persons are allowed as witnesses, otherwise in many cases it would be impossible to convict offenders; as particularly in the case of robbery. 1 *Haw.* 433.

A *trustee* may be a witness if he hath released his trust, but not if he hath conveyed it over. *Sid.* 315.

An *heir at law* may be a witness concerning the title to the land, but the *remainder man* cannot, for he hath a present interest, but the heirship is a mere contingency. 1 *Salk.* 283.

If a man hath been examined on interrogatories, being at that time disinterested, and *afterwards* becomes interested, his deposition may be given in evidence; because his evidence must be taken as it stood at the time of his examination. So if a witness to a bond becomes afterwards the representative of the obligee, his hand must be proved as if he were dead. 2 *Atk.* 615.

Ancient deeds of *thirty years* standing prove themselves; and need not witnesses to prove the handwriting. 3 *Black.* 307.

No evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any general customs, or matters of common tradition or repute) the courts admit of *hearsay* evidence, or an account of what persons deceased have declared in their life-time: but such evidence will not be received of any particular fact. *Id.* 368. For, generally, no evidence ought to be admitted but what is upon oath; and if the first speech was without oath, another oath that there was such speech makes it no more than a bare speaking, and so of no value in a court of justice; and besides, the adverse party had no opportunity of a cross-examination; and if the witness is living, what he has been heard to say is not the best evidence that the nature of the thing will admit. *Theory of Evid.* 111.

In the case of *Doe* on the several demises of *Church* and *Phillips v. Perkins* and others, T. 30 G. 3. it was adjudged, that a witness may refresh his memory by *any* book or paper, provided he can afterwards

afterwards swear to the fact from his own recollection; but if he cannot swear to the fact from recollection any further than as finding it entered in a book or paper, then the *original* book or paper must be produced, for he shall not be allowed to give evidence from a copy or extract from it. *Caf. by Durnf. and East. 3 V. 749.*

5. *Process to cause witnesses to appear.* Process to cause witnesses to appear (in civil cases) is by writ of *subpœna ad testificandum*: which commands them, laying aside all pretences and excuses, to appear at the trial, on pain of 100*l.* to be forfeited to the king; to which the statute 5 *El. c. 9.* hath added a penalty of 10*l.* to the party grieved, and damages equivalent to the loss sustained by want of his evidence. But no witness, unless his reasonable expences be tendered him, is bound to appear at all; nor, if he appears, is he bound to give evidence till such charges are actually paid him; unless it be within the bills of mortality. 3 *Black. 369.*

In criminal cases, if a witness hath been bound over, and do not appear, he shall forfeit his recognizance.

6. *Manner of giving evidence.* He who affirms the matter in issue, whether plaintiff or defendant, ought to begin to give evidence; for a negative regularly cannot be proved: And therefore it is sufficient to deny what is affirmed, until it be proved. But when the affirmative is proved, the other side may contest it with opposite proofs; for this is not properly proving a negative, but the proof of something totally inconsistent with what is affirmed: as if the defendant be charged with a trespass, he need only make a general denial of the fact, and if the fact be proved, then he may prove a proposition inconsistent with the charge, as, that he was at another place at the time. *Theo. of Evid. 116.*

The counsel of that party which begins to maintain the issue, ought to conclude. *Tr. per Pais. 220.*

EWAGE (from the French *eau*, water), is toll paid for water carriage.

EXACTION, is a wrong done by an officer, or one in pretended authority, by taking a reward or fee for that which the law allows not. And the difference between exaction and extortion, is this: Extortion is, where an officer extorts more than his due, when something is due to him: Exaction is, when he wrests a fee or reward where none is due. For which the offender may be indicted, fined, and imprisoned.

EXAMINATION. If a felony is committed, and one is brought before a justice upon suspicion thereof, and the justice finds, upon examination, that the prisoner is not guilty, yet the justice shall not discharge him, he must either be

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bailed

bailed or committed: for it is not fit that a man once arrested, and charged with felony, or suspicion thereof, should be delivered upon any man's discretion, without farther trial. In order to which, the examination and information of the parties must be taken; which must be certified to the next gaol delivery. But this examination of the person accused, ought not to be upon oath; but if, upon his examination, he shall voluntarily confess the matter, it may be proper that he set his hand to it; which being afterwards sworn to by the justice or his clerk, may be given in evidence against the party confessing, but not against others. *Dalt. c. 164.*

EXCEPTION, is a stop or stay to an action; and is divided into dilatory, and peremptory. In law proceedings, it is a denial of a matter alleged in bar to the action. And in chancery, it is what is alleged against the sufficiency of an answer, or the like. The counsel in a cause are to take all their exceptions to the record at one time, and before the court hath delivered any opinion therein. *1 Lill. Abr. 559.*

Exception in deeds and writings keeps the things from passing thereby, being a saving out of the deed, as if the same had not been granted; but it must be a particular thing out of a general one, as a room out of an house, a parcel of ground out of a manor, timber-trees out of land. There is a diversity between an *exception* (which is always part of the thing granted, and a thing *in esse*), and a *reservation*, which is always a thing not *in esse*, but newly created or reserved out of the land or tenement demised; as for instance, a rent to be paid to the lessor by the lessee. *1 Inst. 47.*

Exception to evidence. See BILL OF EXCEPTIONS.

AN EXCHANGE is a mutual grant of equal interests, the one in consideration of the other. *2 Black. 323.*

An exchange may be made of things that lie either in grant or in livery. But no livery of seisin, even in exchanges of freehold, is necessary to perfect the conveyance: for each party stands in the place of the other, and occupies his right, and each of them hath already had corporal possession of his own land. But entry must be made on both sides; for if either party die before the entry, exchange is void, for want of sufficient notoriety. *Ibid.*

Anciently, exchanges of lands lying in the same county, were good without deed; but if the lands were in several counties, or if it were of things that lie in grant, as advowsons, rents, commons, and the like, an exchange of them, although they were in one and the same county, was not good without deed. *1 Inst. 50.* But now, by the statute of frauds and perjuries, 29 C. 2. c. 3. a deed seemeth generally to be required, though the lands lie in the same county: For thereby it is enacted, that

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no estate or interest, either of freehold or term of years, or any uncertain interest, not being copyhold, or customary interest, of any lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed, or note in writing, signed by the party or his agent, lawfully authorised in writing, or by act and operation of law.

In exchanges, it behoveth, that the estate which both parties have in the lands exchanged, be equal; for if the one granteth that the other shall have his land in fee tail, for the land which he hath of the grant of the other in fee simple, although the other agree to this, yet this exchange is void, because the estates are not equal: In like manner it is, where it is agreed between them, that the one shall have in the one land fee tail, and the other in the other land but for term of life; or if the one shall have in the one land fee tail general, and the other in the other land fee tail special. So that always it behoveth, that in exchange the estates of both parties be equal; that is, if the one hath a fee simple in the one land, the other shall have like estate in the other land; and if the one hath fee tail in the one land, the other ought to have the like estate in the other land; and so of other estates. But it is not material in the exchange, that the lands be of equal value, but only that they be equal in kind and manner of the estate given and taken. 1 *Inst.* 51.

And there are two things further particularly necessary to the perfection of an exchange. First, that the word *exchange* be used; which is so essential, that it cannot be supplied by any other word, or described by any circumlocution. Secondly, that there be an execution by entry or claim in the life of the parties. 1 *Inst.* 51.

For the parties have no freehold in deed or in law in them, before they execute the same by entry; and therefore if one of the parties die before the exchange be executed by entry, the exchange is void. 1 *Inst.* 50.

So if two parsons, by consent of patron and ordinary, exchange their preferments; and the one is presented, instituted, and inducted, and the other is presented, and instituted, but dies before induction; the former shall not keep his new benefice, because the exchange was not completed; and therefore he shall return back to his own. 2 *Black.* 323.

So if, after an exchange of lands or other hereditaments, either party be evicted of those which were taken by him in exchange, through defect of the other's title; he shall return back to the possession of his own, by virtue of the implied warranty contained in all exchanges. *Ibid.*

If an *infant* exchange lands, and after his full age occupy the lands taken in exchange, the exchange is become perfect;

fect: for the exchange at first was not void but voidable. 1 *Inst.* 51.

As concerning *dower*; the wife shall not be endowed both of the land given in exchange, and of the land taken in exchange, although the husband was seised of both; but she may have her election to be endowed of which she will. *Ibid.*

EXCHEQUER, is an ancient court of record, set up by William the Conqueror, as part of the *aula regia*, though regulated and reduced to its present order by king Edward the first; and intended, principally, to order the revenues of the crown, and to recover the king's debts and duties. It is called the *exchequer*, *scaccharium*, from the chequed cloth, resembling a chess board, which covers the table there. 3 *Black.* 43.

It consists of two divisions: the receipt of the exchequer, which manages the royal revenue; and the court, or judicial part of it, which is again divided into a court of *equity*, and a court of *common law*. *Id.* 44.

The court of *equity* is held in the exchequer-chamber, before the lord treasurer, the chancellor of the exchequer, the chief baron, and the three inferior barons. The primary and original business of this court is to call the king's debtors to account, by bill filed by the attorney general; and to recover any lands, tenements, or hereditaments; any goods, chattels, or other profits or benefits, belonging to the crown. But by fiction of law, all kinds of personal actions may be now prosecuted in the court of exchequer. *Id.*

And this gives original to the *common law* part of their jurisdiction, which was at first established merely for the benefit of the king's accountants, and is exercised by the barons only of the exchequer, and not the treasurer, or chancellor. The writ upon which all proceedings here are grounded, is called a *quo minus*; in which the plaintiff suggests that he is the king's farmer, or debtor, and that the defendant hath done him the injury or damage complained of; *quo minus sufficiens existit*, by which he is the less able to pay to the king his debt or rent. The surmise of being debtor to the king, is become matter of form, and mere words of course; and the court is open to all the nation equally. And the same holds with regard to the *equity* side of the court: for there any person may file a bill against another, upon a bare suggestion that he is the king's accountant; but whether he is so or not, is never controverted. *Id.* 45.

An appeal from the *equity* side of this court lies immediately to the house of lords; but from the *common law* side, a writ of error must be first brought in the court of exchequer chamber,

chamber, and from thence a writ of error lies to the house of lords. *Id.* 46

EXCHEQUER CHAMBER, is a court which was first erected by the statute 31 *Ed.* 3. *c.* 12. to determine causes upon writs of error from the common law side of the court of exchequer. And to that end, it consists of the lord treasurer and lord chancellor, with the justices of the king's bench and common pleas. In imitation of which, a second court of exchequer chamber was erected by the statute 27 *El.* *c.* 8. consisting of the justices of the common pleas, and the barons of the exchequer; before whom, writs of error may be brought to reverse judgments in certain suits originally begun in the court of king's bench. Into the court also of exchequer chamber (which then consists of all the judges of the three superior courts, and now and then the lord chancellor also), are sometimes adjourned from the other courts, such causes as the judges, upon argument, find to be of great weight and difficulty; before any judgment is given upon them in the court below. From this court a writ of error lies to the house of lords, the last resort for the ultimate decision of every civil action. 3 *Black.* 55.

EXCISE. For the purpose of levying the revenue of excise, the kingdom of *England* and *Wales* (exclusive of the bills of mortality) is divided into forty-nine *collections*; some called by the names of particular counties; others by the names of great towns, where one county is divided into several collections, or where a collection comprehends the contiguous parts of several counties: every collection is subdivided into *districts*, within each of which there is a *supervisor*; and each district is parcelled into *out-rides*, and *foot-walks*, within each of which there is a *gager*, or surveying officer.

The commissioners and subcommissioners of excise shall constitute, under their hands and seals, such and so many *gagers* as they shall find needful.

In order to which, he who would be made a gager must procure a certificate that he is above 21, and under 30 years of age; that he understands the four first rules of arithmetic; that he is of the communion of the church of *England*; how he has been employed, or what business he hath followed; that he is not encumbered with debts; whether single or married; and if married, how many children he has; for if he has above two, he cannot (by the rules of the office) be admitted.

He must also nominate two persons to be his sureties, and it must be certified that they are of sufficient ability; and that the said certificate is of his own hand-writing: such certificate, written by him, must be signed by the supervisor where the party applying lives; and at the bottom of the certificate must be, his affidavit, that neither he, nor any else to his knowledge, hath

directly or indirectly given or promised to give any treat, fee, gratuity, or reward, for his obtaining, or endeavouring to obtain, an order for his being instructed.

When an order for instruction is granted, it is directed to an experienced officer, who receives such person as his pupil; and the like books as officers have, being delivered to such pupil, he goes with and attends the officer who instructs him, and takes surveys, and in his own books makes the like entries as if he was an officer, until the instructor certifies that he is fully instructed.

After he is thus certified for, and until he is employed, he is called an *expectant*, being to wait till a vacancy happens.

But no person shall be capable of intermeddling with any office relating to the excise, until he shall, before two justices in the county where his employment shall be, or before a baron of the exchequer, take the oaths of allegiance and supremacy, together with this oath following: *You shall swear, to execute the office of truly and faithfully, without favour or affection, and shall from time to time true account make and deliver to such person or persons as his majesty shall appoint to receive the same; and shall take no fee or reward for the execution of the said office, from any other person than from his majesty, or those whom his majesty shall appoint in that behalf.* And the justices shall certify the taking of such oath, to the next quarter sessions, there to be recorded: and the officer shall also enter a certificate thereof with the auditor of the excise.

And he shall, after his admission, receive the sacrament, and produce a certificate thereof, and take the oaths, and subscribe the declaration against transubstantiation, at the sessions of the peace, as other persons admitted to offices.

The general business of the *supervisor*, is to be continually surveying the houses and places of the persons within his district liable to duties; and to observe and see whether the officers duly make their surveys, and make due entries thereof in their books and in their specimen papers; and every supervisor is in his own book to enter what himself does, each day and part thereof; and also, set down the behaviour, good or bad, the diligence or negligence of the several officers of his district; and at the end of every six weeks, to draw out a diary of every day's business, and of the remarks made each day of the several officers in his district; and to transmit such diary at the end of every six weeks to the chief office.

And each commissioner takes and peruses a proportion of these diaries, and when he meets with any remarkable complaint against any officer, he communicates it to the rest; who thereupon come to an agreement, either to *admonish, reprimand, reduce, or discharge*. For small faults, officers are admonished; for great ones, reprimanded; for greater, reduced; but for the greatest they

they are discharged. The commissioner who peruses the diary, writes in the margin, admonish, reprimand, or as the case is.

These diaries, after having been thus written upon, are delivered to the clerk of the diaries, who in a book, called the reprimand book, places the admonitions, reprimands, and the like, to each officer's account, and writes every offender word thereof. Which reprimand book is resorted to, upon discovering new faults; and if it is there found, that the officer has before been admonished and reprimanded so often that there are no hopes of his amending, he is then discharged. The said book is likewise resorted to, when application is made for advancing or preferring an officer into a better post. Frequent admonitions or reprimands are a bar to preferment, unless they are of old standing; but if for three years last he stands pretty clear of admonitions and reprimands, those of elder date are not much regarded.

The *collector's* business is every six weeks to go his rounds; and in the intervals of rounds, he is to be assisting in prosecuting offenders before the justices; he is also to peruse the supervisors diaries, and where he finds an officer complained of, is to examine him and the supervisor, and having heard both, is in the margin to write his opinion of each fact; he is also to have an eye how the supervisors and officers of his collection perform their duties; and from the vouchers he transcribes into his book the charge on each particular person in his collection.

For faults, gagers are reduced, either to be only assistants, or from foot-walks to out-rides; supervisors are reduced to be again only gagers; and collectors are reduced to be supervisors.

In some instances, discharged officers, after having for a competent time been thereby kept out of pay, are again restored; but if twice discharged, are never again restored unless one of the discharges appears to have been occasioned by a misrepresentation of the case.

EXCLUSA, a sluice for carrying off water. So *exclusagium* is a payment to the lord for the benefit of such sluice.

EXCOMMUNICATION, is an ecclesiastical censure, whereby the person against whom it is pronounced, is for the time cast out of the communion of the church.

It is of two kinds: the *lesser*, and the *greater*. The *lesser* excommunication is, the depriving the offender of the use of the sacraments and divine worship; and this sentence is passed by judges ecclesiastical on such persons as are guilty of obstinacy or disobedience, in not appearing upon a citation, or not submitting to the injunctions of the court. The *greater* excommunication is, that whereby men are deprived not only of the sacraments and the benefit of the divine offices, but of the society and conversation of all christians.

In the ancient church, the sentences of the greater excommunication

nication were solemnly promulged four times in the year, with candles lighted, bells tolling, the cross, and other solemnities. And by latter canons, excommunicate persons shall be publicly denounced in the church every six months; and the churchwardens shall especially take care to keep excommunicate persons out of the church.

The law in many cases inflicts the censure of excommunication *ipso facto* upon offenders; which nevertheless is not intended so as to condemn any person without a lawful trial for his offence; but he must first be found guilty in the proper court, and then the law gives that judgment.

An excommunicate person may make a testament, unless he be excommunicated by the greater excommunication. *Swin.* 109.

But an excommunicate person is disabled to bring an action; and this, whether it be by the greater or lesser excommunication. *1 Inst.* 134.

So also he cannot serve upon juries, nor can be a witness in any court. And by the rubric in the book of common prayer, the burial office shall not be used for any that die excommunicate.

After a person hath remained forty days under sentence of excommunication, he may, on certificate of the diocesan to the court of chancery, be imprisoned by a writ of *excommunicatio capiendo*, until he submits and is absolved; which again being certified by the bishop, another writ, called an *excommunicatio deliberando*, issues to the sheriff to discharge him. *2 Inst.* 189.

But if after a person is excommunicate, there comes a general act of pardon, which pardons all contempts, it seems that the offence is taken away without any formal absolution. *2 Bac. Abr.* 326.

EXCOMMUNICATO CAPIENDO, is a writ to the sheriff for apprehending him who stands obstinately excommunicated forty days; for the contempt of such person being certified into the chancery, this writ issues for the imprisoning him without bail until he conforms. *F. N. B.*

EXCOMMUNICATO DELIBERANDO, is a writ to the sheriff for delivery of an excommunicate person out of prison, upon certificate from the bishop of his conformity to the jurisdiction ecclesiastical. *F. N. B.*

EXECUTION (in civil cases), signifies the obtaining of actual possession of any thing acquired by judgment of law. *1 Inst.* 154.

If the plaintiff recovers in an action wherein the seisin or possession of **LANDS** is awarded to him, a writ issues to the sheriff commanding him to give possession to the plaintiff of the land so recovered. And this writ is that which is called *habere facias seisinam*, if the land recovered is a freehold; or, if it is a chattel

chattel interest, and not a freehold, then the writ is entitled *habere facias possessionem*. In the execution whereof, the sheriff may take with him the power of the county, and may justify breaking open doors, if the possession be not quietly delivered: but if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of the door, in the name of seisin, is sufficient. 3 *Black.* 412.

In other actions, where the judgment is, that something in special be done or rendered by the defendant; then in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff, according to the nature of the case. 3 *Black.* 413.

Executions in actions where MONEY is recovered, as a debt or damages, are of five sorts: either against the *body* of the defendant; or against his *goods*; or against his *goods* and the *profits* of his lands; or against his *goods* and the *possession* of his lands; or against all three, his *body*, *lands*, and *goods*. *Id.* 414.

I.

THE first of these species of execution, is by a writ to take the *body* of the defendant, called a *capias ad satisfaciendum*: the intent whereof is, to imprison the body of the debtor, till satisfaction be made for the debt, costs, and damages. And this is an execution of the highest nature, inasmuch as it deprives a man of his liberty till he makes the satisfaction awarded; and therefore, when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods. 3 *Black.* 414, 5.

But if the defendant dies, whilst he is charged in execution upon this writ, the plaintiff may, after his decease, sue out new executions against his lands, goods, or chattels. *Id.* 415.

And this writ may be sued out, as may all other executory processes for *costs*, against a plaintiff as well as a defendant, when judgment is had against him. *Id.*

Upon this writ the sheriff may not break open any outer door to execute it, but must enter peaceably, and may then break open any inner door belonging to the defendant, in order to take the goods. *Id.* 417.

When a defendant is once in custody upon this process, he is to be kept in safe and close custody; and if he be afterwards seen at large, it is an escape; and the plaintiff may have an action thereupon against the sheriff for his whole debt: for although upon arrests, and what is called *mesne process*, being such as intervenes between the commencement and end of a suit, the sheriff, before the statute 8 & 9 *W. c.* 27. might have indulged the defendant as he pleased, so as he produced him in court to answer the plaintiff at the return of the writ; yet upon a taking in execution, he could

could never give any indulgence, for, in that case, confinement is the whole of the debtor's punishment, and of the satisfaction made to the creditor. *Id.* 415.

Even a rescue of a prisoner in execution, either going to gaol, or in gaol, or a breach of prison, will not excuse the sheriff from being guilty of and answering for the escape; for he ought to have sufficient force to keep him, seeing he may command the power of the county. *Id.* 416.

If the sheriff returns that the defendant cannot be found, the plaintiff may sue out a process against the bail (if any were given); in order to which, a writ of *scire facias* may be sued out against the bail, commanding them to shew cause why the plaintiff should not have execution against them for his debt and damages. And if they shew no sufficient cause, or the defendant doth not surrender himself, the plaintiff may have judgment against the bail, and take out a process of execution against them. *Id.*

II.

THE next species of execution is against the *goods and chattels* of the defendant, and is called a writ of *feri facias*, commanding the sheriff to *cause to be made* of the goods and chattels of the defendant the sum or debt recovered. In this case the law is the same about breaking open doors in order to come at the goods, as in the former case to come at the person. The sheriff may sell the goods and chattels (even an estate for years, which is a chattel real) of the defendant, till he hath raised enough to satisfy the judgment and costs; first paying to the landlord of the premises, upon which the goods are found, the arrears of rent then due, not exceeding one year's rent in the whole. If part only of the debt be levied, the plaintiff may have execution against the body for the residue. 3 *Black.* 417.

The old sheriff to whom the writ was delivered, is bound and compellable to proceed in the execution; for the same person that begins an execution shall end it. 1 *Salk.* 323.

If two writs of *feri facias* come to the sheriff in one day, he ought to execute that first which came to hand first; otherwise he makes himself liable, and must answer it to the party that brought the first writ, who may bring an action against him; but the execution nevertheless shall stand good. 1 *Salk.* 320.

If a man recovers jointly against two in an action of debt, the execution ought to be joint against both, and not against one only. 1 *Roll's Abr.* 888.

But if two become bail, and judgment is given against the bail; the execution may be against one of them, without naming the other; for every one of the bail is bound severally. *Id.*

If a man recover damages against a corporation, he shall not have

have execution of the goods of the particular persons in their natural capacity, but of the goods of the corporation. *Id.* 901.

If, after delivery of the writ, and before execution executed, the defendant becomes bankrupt; that will hinder the execution. 3 *Salk.* 159.

Nothing can be taken in execution that cannot be sold, as deeds and writings; so also, bank notes cannot be taken in execution, for though they are assignable over, yet notwithstanding they remain in some measure *choses in action*, and the sheriff or his bargainee cannot bring an action on them without assignment. *Caf. Hardw.* 53.

The goods of a stranger, in the possession of the defendant, cannot be taken in execution; for the sheriff, at his peril, must take notice whose goods they are: but if the sheriff inquires by a jury, where the property is lodged, and it is found that they are the defendant's goods, when they are not, this will indemnify the sheriff. *Dalt. Sber.* 60. *Wood. b. 4. c. 4.*

But if the beasts of a stranger be levant and couchant upon the land, they may be taken by the sheriff in execution, for a debt to the king; for they are the issues of the land, and the land is debtor: and if the law were otherwise, a man might defeat the king by agisting the land. 1 *Salk.* 395.

The sale of goods for a valuable consideration, after judgment, and before execution awarded, is good: and if judgment be given against a lessee for years, and afterwards he selleth the term before execution, the term assigned *bona fide*, is not liable. For till execution is lodged in the sheriff's hands, a man is owner of his goods, and may dispose of them as he thinks fit, and they are not bound by the judgment. *Prec. Cha.* 286.

But where a man generally keeps possession of his goods after sale, the sale will be void against others, by the statute of frauds. *Id.*

A seizure of part of the goods in an house, in the name of the whole, is a good seizure of all. *L. Raym.* 724.

If the sheriff sells the goods at an under rate, the sale is good, and the defendant can have no remedy: but where there appears any covin between the sheriff and the purchaser, the owner may have an action against the sheriff. *Kelw.* 64.

Where a *feri facias* is delivered to the sheriff to levy 20*l.*, and he takes an entire thing in execution, as an horse worth 30*l.*, and selleth it for so much, and returns that he levied the 20*l.*; he may retain the other 10*l.* till the defendant demands it, for the sheriff is not bound to seek him. 3 *Salk.* 159.

The sale shall take effect, though the judgment shall be afterwards reversed, otherwise none would purchase: but the value of the goods must be restored. *Wood. b. 4. c. 4.*

If part only of the debt be levied, the plaintiff may, on return
of

of the writ, have a writ of execution against the body of the defendant for the residue. 3 *Black.* 417.

The execution is not abated by the plaintiff's death; but the sheriff, notwithstanding that, shall proceed in it; for the sheriff hath nothing more to do with the plaintiff, for the writ commands him to levy the money, which the plaintiff's death doth no way hinder. 1 *Salk.* 322.

If on a *fieri facias* all the money is not levied, the writ must be returned before a second execution can be taken out; for that must be grounded on the first writ; and recite that all the money was not levied upon the first: but if upon the first all the money be levied, the writ need not to be returned, for no farther process is necessary. 1 *Salk.* 318.

III.

A THIRD species of execution, is by writ of *levari facias*; which affects a man's goods, and the profits of his lands, by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant; whereby the sheriff may seize all his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff. But little use is now made of this writ; the remedy by the writ of *elegit*, which takes possession of the lands themselves, being much more effectual.

But of this species is a writ of execution proper only to ecclesiastics; which is given, when the sheriff, upon a common writ of execution, returns that the defendant is a clerk beneficed, having no lay fee; in which case, a writ issues to the bishop, to levy the debt of his ecclesiastical goods; who thereupon issues a sequestration of the profits of the benefice, directed to the churchwardens, to gather up the same, and to pay them over to him that had the judgment, till the full sum be raised. 2 *Inst.* 472.

IV.

A FOURTH species of execution, is by the said writ of *elegit*; which was given by the statute of 13 *Ed. I. c. 18.* either upon a judgment for debt or damages, or upon the forfeiture of a recognizance taken in the king's court: by which statute it is enacted, that *when debt is recovered or acknowledged in the king's court, or damages awarded, it shall be in the election of him that sueth for such debt or damages, to have a writ that the sheriff levy the same of the lands and goods; or that the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen, and beasts of his plough, and the one half of his lands, until the debt be levied upon a reasonable price and extent.*

Before this statute, a man could only have satisfaction of goods, chattels, and the present profits of lands, as by the aforefaid writs of *fieri facias*, or *levari facias*, but not the possession of the lands themselves.

themselves. The statute therefore granted this writ (called an *elegit*, because it is in the choice or *election* of the plaintiff, whether he will sue out this writ, or one of the former); by which writ of *elegit*, the defendant's goods and chattels are not sold, but only appraised; and all of them (except oxen, and beasts of the plough) are delivered to the plaintiff, at such reasonable appraisement and price, in part of satisfaction of his debt. If the goods are not sufficient, then the moiety, or one half of his freehold lands whether held in his own name, or by any in trust for him, are also to be delivered to the plaintiff to hold, till, out of the rents and profits of the said moiety, the debt be levied, or till the defendant's interest be expired; as, till the death of the defendant, if he be tenant for life, or in tail. The other moiety of the lands was originally reserved, for the lord to distrain for his services. And hence it is, that, to this day, copyhold, and other like customary lands, are not liable to be taken in execution upon a judgment. 3 *Black.* 418, 9.

So, if a copyholder, with licence of the lord, makes a lease for years of the copyhold; the term is not liable to execution for his debt, because the copyhold lands themselves are not liable. 10 *Vin. Abr.* 547.

This execution, or seizing of lands by *elegit*, is of so high a nature, that after it the body of the defendant cannot be taken; but if execution can only be had of the goods, because there are no lands, and such goods are not sufficient to pay the debt, then execution may be taken against the body: so that body and goods may be taken in execution, or lands and goods; but not body and land too, upon any judgment between subject and subject, in the course of the common law. 3 *Black.* 418, 9.

It hath been held, that a person may have several *elegits* into several counties, for the intire sum recovered; or that he may divide his execution, and have it for part in one county, and part in another. *Mo.* 24.

If a man acknowledges a recognizance of 100*l.*, to be paid at five days; presently after the first day, he may sue an *elegit* for 20*l.*, and have the moiety of the land delivered to him; and, when the second day is past, he may have another *elegit* for that 20*l.*, and have the moiety of the remnant delivered to him; and so of the rest; for they are in effect in nature of several judgments in law. 2 *Inst.* 395.

If a person hath judgment given against him for debt or damages, or be bound in a recognizance, and dieth, and his heir is within age, no execution shall be sued of the lands during the minority. *Id.*

Upon an *elegit*, the appraisement of goods, and extent of lands, must be by inquest of twelve men, and so returned by the sheriff. *Id.* 396.

And

And the sheriff ought to deliver one half of all houses, lands, meadows, pastures, rents, reversions, and hereditaments, wherein the defendant had any estate in fee or for life; and if it be so that the defendant be jointenant, or tenant in common, then it ought to be so specially alleged and contained in the return. *Hutt.* 16.

He that recovers land by judgment, shall take it as it is at the time of the execution; that is, if it be sown with grain, and not severed, or grafs growing ready to be cut. *Br.* Judgment.

If there be an execution against tenant for years, without impeachment of waste, though such tenant may cut down and fell, yet the sheriff cannot; because the tenant in such case hath only a bare power without an interest. 1 *Salk.* 368.

But where the tenant has an interest as well as a power, as tenant for years hath in standing corn, in such case the sheriff may cut down and fell. *Id.*

During the time that the plaintiff holds the lands so delivered to him, he is called tenant by *elegit*. Yet he hath only a chattel interest therein, and therefore it shall not go to his heir, but to his executor, who is intitled to the debt; for the payment of which, this land is a remedy or security. 2 *Black.* 161.

If tenant by *elegit* shall commit waste, he shall, on a writ of account, be compelled to deduct the same out of the sum recovered. *T. L.*

Finally, whenever the defendant hath paid and satisfied the debt, he may enter upon his land. And so it is, when the tenant by *elegit* is satisfied by the ordinary extent or valuation, the tenant of the land may enter. 2 *Inst.* 396.

V.

UPON some prosecutions given by statute, as in the case of recognizances or debts acknowledged on statutes merchant and of the staple, the body, lands, and goods, may all be taken at once in execution, to compel the payment of the debt. The process hereon is usually called an *extent*; because the sheriff is to cause the lands and goods to be appraised to their full extended value before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied. 3 *Black.* 420.

Also the king is entitled by law to sue out execution against the body, lands, and goods, of his accountant or debtor: and his debt shall, in suing out execution, be preferred to that of every other creditor, who hath not obtained judgment before the king commenced his suit. *Id.*

The king's judgment also affects all lands which the king's debtor hath at or after the time of contracting the debt; wherein judgment between subject and subject, shall not bind the land in

in the hands of a *bona fide* purchaser, but only from the time of actually signing the judgment; nor the goods in the hands of a stranger, or a purchaser, but only from the actual delivery of the writ to the sheriff. *Id.* 420, 1.

A distress for rent, by the landlord, may be seized for the king's debts, before sale. 2 *Vez.* 288.

Lands and goods are to be appraised and extended by inquest of twelve men, and then delivered to the creditor, in order to the satisfaction of his debt; for every extent ought to be by inquisition and a verdict of a jury, and without such inquisition the sheriff cannot execute the writ. *Cro. Ja.* 569.

As the lands are to be delivered to the party at a reasonable yearly value, so the goods shall be delivered at a reasonable price; and, on a *scire facias* to account, the creditor is to account according to the extended value. *Hardr.* 136.

And when lands are delivered in extent, it is as if the creditor had taken a lease thereof for years, until the debt is satisfied. 1 *Lutw.* 429.

The plaintiff shall be satisfied for all his costs and damages, which, at the time of the *liberate* or delivery of the land to him, he hath sustained. 4 *Co.* 67.

The inquisition ought to be returned by the sheriff; otherwise it is void, and doth not give any title to the plaintiff, although the sheriff delivers to him the land upon it. *Jenk.* 318.

EXECUTION OF CRIMINALS, is the completion of human punishment; and this, in all cases, as well capital as otherwise, must be performed by the legal officer, the sheriff, or his deputy. In cases of felony, the usage is, for the judge to sign the calendar, or list, of all the prisoners names, with their separate judgments in the margin, which is left with the sheriff. As for a capital felony, it is written opposite to the prisoner's name,—“Let him be hanged by the neck;” which, formerly, in the days of Latin and abbreviation, was written in a very concise manner, *sus per coll'*, for *suspendatur per collum*. If, upon judgment to be hanged by the neck till he be dead, the criminal be not thereby killed, but revives, the sheriff must hang him again: for the former hanging was no execution of the sentence; and if a false tenderness were to be indulged in such cases, a multitude of collusions might ensue. 4 *Black.* 405.

EXECUTOR, is one that is appointed by a person's last will and testament, to have the execution thereof after his decease, and the disposing of all the testator's effects, according to the tenor of the will. He is as much as the *heres designatus* or *testamentarius* in the civil law, as to the debts, goods, and chattels, of the testator. *Terms of the Law.*

All persons are capable of being executors, that are capable of making wills, and many others besides, as femes covert, and infants;

infants; nay, even infants unborn, or in *ventre sa mere*, may be made executors. But no infant can act as such, till the age of seventeen years; until which time, administration must be granted to some other during his minority. In like manner it may be granted during the absence of the executor out of the kingdom, or when a suit is commenced in the ecclesiastical court touching the validity of the will. 2 *Black.* 503.

This appointment of an executor is essential to the making of a will; and it may be performed either by express words, or such as strongly imply the same. But if the testator makes his will, without naming any executors, or if he names incapable persons, or if the executors named, refuse to act; in any of these cases, the ordinary must grant administration with the will annexed, to some other person; and the duty of the administrator in such cases is very little different from that of an executor. *Id.*

The interest vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor; so that the executor of the executor is to all intents and purposes the executor and representative of the first testator; but the administrator of the executor is not the representative of the testator. For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence; but the administrator of the executor is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all, and his power is only to administer the effects of the intestate executor, and not of the original testator; in which case, therefore, it is necessary for the ordinary to commit administration afresh *de bonis non*; that is, of the goods of the testator not administered by his executor. *Id.* 506.

The office and duty of an executor is,

1. To *bury* the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expences are allowed, previous to all other debts and charges; but if he be extravagant, it is a species of devastation or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased. 2 *Black.* 508.

2. He must *prove the will* of the deceased; which is done either in common form, which is generally upon his own *oath* before the ordinary or his surrogate; but in the province of *York*, a witness hath been usually also sworn; or in solemn form, by all the witnesses, in case the validity of the will be disputed. When the will is so proved, the original must be deposited in the registry of the ordinary; and a copy thereof on parchment is made out under the seal of the ordinary, and delivered to the executor,

tor, together with a certificate of its having been proved before him; all which together is usually styled the *probate*. *Id.*

3. He must make an *inventory* of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver into the ordinary upon oath, if thereunto lawfully required. *Id.*

4. He is to *collect* all the goods and chattels so inventoried, and, to that end, he has very large powers and interests conferred on him by the law; being the representative of the deceased, and having the same property in his goods, as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest. *Id.* 510.

5. He must pay the *debts* of the deceased; in the payment whereof, he must observe the rules of priority; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And first, he must pay all funeral charges, and the expence of proving the will, and the like. Secondly, debts due to the king by matter of record. Thirdly, such debts as are by particular statutes to be preferred to all others; as forfeitures for not burying in woollen, money due on poor rates, and for letters to the post-office. Fourthly, debts of record; as judgments, statutes, and recognizances. Fifthly, debts due by specialty; as for rent, or upon bonds, covenants, and the like, under seal. Lastly, debts on simple contracts; namely, upon notes unsealed, and verbal promises. *Id.* 511.

Among debts of equal degree, the executor is allowed to pay himself first; by retaining in his hands so much as his debt amounts unto. *Id.*

6. When the debts are all discharged, the *legacies* claim the next regard; which are to be paid by the executor so far as his assets will extend; but he may not give himself the preference herein, as in the case of debts. *Id.* 512.

7. When all the debts and particular legacies were discharged, the *surplus*, or *residuum*, must be paid to the residuary legatee, if any be appointed by the will; and if there be none, it was long a settled notion, that it devolved to the executor's own use by virtue of his executorship: but whatever ground there might have been formerly for this opinion, it seems now to be understood with this restriction, that although where the executor hath no legacy at all, the residuum shall in general be his own; yet wherever there is sufficient on the face of the will (by means of a competent legacy or otherwise) to imply that the testator intended his executor should *not* have the residue, the undivided surplus of the estate shall go to the next of kin; the executor

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then standing upon exactly the same footing as an administrator.
Id. 514.

EXECUTOR DE SON TORT is, where a stranger takes upon him to act as executor, without any just authority; as by intermeddling with the goods of the deceased; in which case he is called executor of his own wrong, *de son tort*, and is liable to all the trouble of an executorship, without any of the profits or advantages. But merely doing acts of necessity or humanity, as locking up the goods, or burying the corps of the deceased, will not amount to such an intermeddling, as will charge a man as executor of his own wrong. Such a one cannot bring an action himself in right of the deceased, but actions may be brought against him. He is chargeable with the debts of the deceased, so far as assets come to his hands; and, as against creditors in general, shall be allowed all payments made to any other creditor, in the same or a superior degree, himself only excepted. And although, as against the rightful executor, he cannot plead such payment, yet it shall be allowed him in mitigation of damages, unless perhaps upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt. 2 *Black.* 507.

EXECUTORY is, where an estate in fee, created by deed or fine, is to be afterwards executed by entry, livery, writ, or the like. Estates *executed* are, when they pass presently to the person to whom conveyed, without any after act. And an *executory devise* is, where a future interest is devised, that vests not at the death of the testator, but depends on some contingency which must happen before it can vest. If a particular estate is limited, and the inheritance passed out of the donor, this is a *contingent remainder*; but where the fee by a devise is vested in any person, and to be vested in another upon contingency, this is an *executory devise*: and in all cases of executory devises, the estates descend until the contingency happens. So an *executory contract* is, as where two persons agree to exchange horses next week; here the right only vests, and their property in each other's horse is not in possession, but in action. A *contract executed* is, as if they agree to exchange, and do it immediately; in which case the possession and the right are transferred together. A *contract executory* conveys a thing in action; a *contract executed* conveys a thing in possession. 2 *Black.* 443.

EXHIBIT, is a word in law proceedings; as where a deed or other writing is in a suit in chancery exhibited to be proved by witnesses, and the commissioners certify on the back of it that the deed or writing was shewn to the witness and by him sworn to, this is called an exhibit.

EXIGENT, is a writ requiring the sheriff to cause the defendant to be proclaimed, required, or *exacted*, in five county courts successively,

successively, to render himself, and if he does, then to take him into custody; but if he does not appear, and is returned *quinto exactus*, that is, five times proclaimed, he shall then be outlawed by the coroners of the county.

EXILE, a banishment, or driving out of a person. This exile is either by restraint, when the government forbids a man, and makes it penal to return; or voluntary, where he leaves his country upon disgust, but may come back at pleasure. *Lit. Dic.* 2 *Lev.* 191.

EXILIUM, is spoken of in our old law books, in reference to tenants or villeins being injuriously driven out, or *exiled* from their tenements. There was *vastum*, *destructio*, and *exilium*; *vastum* and *destructio* were, when the tenants had their houses, gardens, and woods, wasted or destroyed; *exilium*, when the villein having been manumitted, was afterwards unlawfully driven out of his tenement. 1 *Inst.* 53.

EX OFFICIO, is so called from the power which an officer hath, by virtue of his office, to do certain acts, without being particularly applied to; as a justice of the peace may not only grant surety of the peace at the complaint or request of any person, but he may, in several instances, demand and take it *ex officio*. 1 *Harv.* 137.

The king, by his attorney general, may file informations *ex officio*, in the court of king's bench, which is usually done for such high misdemeanors as peculiarly tend to disturb the government. For offences of this kind, not admitting any delay, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal. 4 *Black.* 309.

EX PARTE, of the one part; as a commission in chancery *ex parte*, is that which is taken out and executed by one side or part only, on the other party's neglecting, or refusing to join.

EXPECTANCY, signifies having relation or dependence upon something future. *Estates* are of two sorts, either in *possession*, which are sometimes called estates *executed*; or in *expectancy*, which are *executory*: and of *expectancies*, there are two sorts; one created by the parties, called a *remainder*; the other by act of law, called a *reversion*.

EXPEDITATE, signifies the cutting out the ball of the fore feet of the dogs of persons living near the forest, to prevent them from running after the king's game; but, within the forest, no dogs were allowed to be kept but mastiffs, (these only being necessary for the keeping a man's house); and they were to be lawed, by cutting off the three claws of the fore foot on the right side, close by the skin.

EX POST FACTO, is a term used in the law, signifying a thing done after something that had been done before. An estate granted

granted may be made good or avoided by inatter *ex post facto*, where an election is given to the party to accept, or not accept. 1 Co. 146.

EXTENT, is a writ directed to the sheriff, to seize and value lands and goods to the utmost *extent*, if one that is bound to the king by specialty, or to others by statute or recognizance, hath forfeited his bond or recognizance; so that, by the yearly rent, the creditor may be satisfied. *F. N. B.* 131.

Upon this, the creditor may sue a writ to the sheriff out of the chancery, to deliver him the lands and goods to the value of the debt; which writ is called a *liberate*. *Wood. b. 4. c. 4.*

Upon an *extent*, the body, lands, and goods, may all be taken at once in execution, to compel the payment of the debt. 3 *Black.* 420.

The king's debt, on an *extent*, shall be preferred to that of every other creditor who hath not obtained judgment before the king commenced his suit. *Id.*

The king's judgment, also, affects all lands, which the king's debtor hath at or after the time of contracting his debt. Whereas, between subject and subject, the judgment shall not bind the lands in the hands of a *bona fide* purchaser, but only from the time of actually signing the same; nor the goods in the hand of a stranger, or a purchaser, but only from the actual delivery of the writ to the sheriff. *Id.*

The lands and goods are to be appraised and extended by inquest of twelve men, and then delivered to the creditor, in order to the satisfaction of his debt; for every *extent* ought to be by inquisition and verdict of a jury; and without such inquisition, the sheriff cannot execute the writ. *Cro. Ja.* 569.

EXTINGUISHMENT:

1. *Extinguishment, what.*
2. *Extinguishment of rent or service.*
3. *Extinguishment of copyhold.*
4. *Extinguishment of commo.*
5. *Extinguishment of a way.*
6. *Extinguishment of a franchise.*
7. *Extinguishment of debt.*

1. *Extinguishment, what.*

EXTINGUISHMENT comes of the verb *extinguere*, to destroy or put out; as when a rent is destroyed or put out, it is said to be extinguished. 1 *Inst.* 147.

2. *Extinguishment of rent or service.*

If a man hath a *rent charge* to him and his heirs, issuing out of certain land, if he purchase any part of this land to him and his heirs,

heirs, all the rent charge is extinct, because a rent charge cannot by such manner be apportioned; for the rent is intire, and of suing out of every part of the land, and therefore by purchase if part, it is extinct in the whole. But if a man hath a *rent service*, and purchaseth part of the land out of which the rent service is issuing, this shall not extinguish all, but only for the parcel; for a rent service in such case may be apportioned according to the value of the land. *1 Inst.* 147.

But if one holdeth his land of his lord, by the service to render to his lord yearly at such a feast, a horse, a spear, or the like; if in this case the lord purchase parcel of the land, such service is taken away, because it cannot be severed nor apportioned. *Id.* 148.

If there be lord and tenant by fealty and heriot service, and the lord purchase part of the land, the heriot service is extinct, because it is intire. *Id.* 149.

3. *Extinguishment of copyhold.*

As to the extinguishment of copyhold, it is laid down as a general rule, that any act of the copyholder which denotes his intention to hold no longer of his lord, and amounts to a determination of his will, is an extinguishment of his copyhold. *Hutt.* 81. *Cro. Eliz.* 21.

As if a copyholder in fee accepts a lease for years of the same land from the lord, this determines his copyhold estate; or if the lord leases the copyhold to another, and the copyholder accepts an assignment from the lessee, his copyhold is extinct. *Morr.* 184. *2 Co.* 16.

4. *Extinguishment of common.*

By purchasing lands wherein a person hath common appendant, the common is extinguished. *Cro. Eliz.* 594.

If a commoner releaseth his common in one acre, it is an extinguishment of the whole common. *Show.* 350.

But if one hath common appendant in a great waste, belonging to his tenant, and the lord improves part of the waste, leaving sufficient; if he after makes a feoffment to a commoner of the land improved, this will be no extinguishment. *Dyer.* 339. *Hob.* 172.

A commoner aliens part of his land, to which the common doth belong; the common is not extinct, but shall be divided. *2 Shep. Abr.* 152.

5. *Extinguishment of a way.*

Extinguishment of ways is, as if a man hath a way as appendant, and after purchases the land wherein this way is, the way is extinct. *Terms of the Law.*

6. *Extinguishment of a franchise.*

Extinguishment may be of liberties and franchises; as when the king grants any privileges, liberties, or franchises, which were in his own hands, as parcel of the rights of the crown, as goods of felons and fugitives, waifs, estrays, deodands, and the like; if they come to the crown again, they are drowned and extinct in the crown, and the king is seised of them *jure coronæ*: but if liberties of fairs, markets, or other franchises and jurisdictions, be erected and created by the king, they will not be extinguished, nor their appendances severed from the possessions. 9 Co. 25.

7. *Extinguishment of debt.*

If a woman obligee takes the obligor to her husband, it is an extinguishment of the debt, because it would be a vain thing for the husband to pay money to his wife in her own right: but he may pay money to her as executrix, because if she lays the money so paid to her by itself, the administrator *de bonis non* of the testator (if she dies intestate) shall have that money, as well as any other goods that were her testator's. 1 Salk. 306.

So if a debtor makes the debtee his executor, or him and another executors, and they take the executorship upon them, or if the debtee makes the debtor his executor, it is an extinguishment of the debt. 1 Salk. 300.

But where a debtee or debtor executor legally refuseth, or he and others being made executors they all refuse, then the debt is revived again. Plowd. 185.

Where administration of the goods of the obligee is committed to the obligor, this is only a suspension of the action, and not an extinguishment of the debt; and the reason is, because the commission of administration is not the act of the obligee: for all the interest of an administrator is only from the ordinary; but the interest of an executor is from the testator. 1 Salk. 303.

A creditor's accepting a higher security than he had before, is an extinguishment of the first debt; as if a creditor by simple contract accepts an obligation, this extinguishes the simple contract debt. 6 Co. 44.

So if a man accepts a bond for a legacy, he cannot after sue for his legacy in the spiritual court; for by the deed the legacy is extinguished, and it is become a mere debt at common law. 1elv. 38.

So if a bond creditor obtains judgment on the bond, or hath judgment acknowledged to him, he cannot after bring an action on the bond, for the debt is drowned in the judgment, which is a security of an higher nature than the bond. 6 Co. 44.

But the accepting a security of an inferior nature is not an extinguishment

tinguishment of the first debt, as if a bond be given in satisfaction of a judgment. *Cro. Ja.* 650.

Also the accepting a security of equal degree is no extinguishment of the first debt; as where an obligee hath a second bond given to him; for one deed cannot determine the duty upon another. *Cro. Eliz.* 304.

An account stated is no extinguishment of the original debt; and therefore it is no plea in bar to a demand of a debt of the same degree. Nor can a note of hand be pleaded in bar to an action upon simple contract. *Bur. Mansf.* 9.

EXTORTION, is an abuse of public justice, which consists in an officer's unlawfully taking, by colour of his office, from any person, any money or thing of value, that is not due to him, or more than is due, or before it is due. The punishment is fine and imprisonment, and sometimes a forfeiture of the office. 4 *Black.* 141.

EXTRAPAROCHIAL, signifies to be out of any parish Tithes of extraparochial places belong to the king by his prerogative. Extraparochial waltres and marsh lands, when drained and improved, are by the statute 17 G. 2. c. 37. to be assessed to all parochial rates in the parish next adjoining.

F A C

FACTOR. A factor is a merchant's agent, residing beyond the seas, or in any remote parts, constituted by letter or power of attorney.

In commissions, it is usual to give the factor power in express words, to dispose of the merchandize, and deal therein as if it were his own; by which the factor's actions will be excused, though they occasion loss to the principal. *Lex Mercat.* 151.

If a factor buys goods on account of his principal, where he is used so to do, the contract of the factor shall oblige the principal to a performance of the bargain; and he is the proper person to be prosecuted on non-performance: but if the factor enters into a charter party of affreightment with a master of a ship, the contract obliges him only, unless he lades aboard generally his principal's goods, when both the principal and lading become liable for the freight, and not the factor. *Goldsb.* 137.

If a factor has not a general, but a limited authority, to purchase at a certain particular price, if he exceeds that, his principal is not bound to accept of that contract. 1 *Vez.* 510.

Goods remitted to a factor ought to be carefully preserved, and he

he is accountable for all lawful goods which shall come to his hands; yet if the factor buy goods for his principal, and they receive damage after in his possession, through no neglect of his, the principal shall bear the loss; and if a factor be robbed, he shall be discharged in account against his principal. 4 *Co.* 83.

Generally, the cargo is liable to pay the freight, or expence of carrying the goods. 2 *Atk.* 622.

And a factor may detain goods to pay customs in any place, or for salvage. *Id.* 623.

Also, a factor, to whom a balance is due, hath a lien upon all the goods of his principal, so long as they remain in his possession; but if he parts with the goods, he parts with his lien. *Bur. Mansf.* 494.

If a man employs a factor to sell goods, who sells them on credit, and before the money is paid dies indebted more than his assets will pay, this money shall be paid to the principal merchant, and not to the factor's administrator, but thereout must be deducted what was due for commission; for a factor is in nature only of a trustee for his principal. 2 *Vern.* 638.

FAIRS AND MARKETS :

1. Fairs and markets can only be set up by the king's grants, or by long and immemorial usage and prescription, which presupposes a grant. 1 *Black.* 274.

And the reason why a fair or market cannot be holden without a grant, is not only for the sake of promoting traffic and commerce, but also for the preservation of order, and prevention of irregular behaviour, where multitudes of people are gathered together. *Burr. Mansf.* 1817.

2. Fairs are commonly annual, and were granted to be held on the day of the dedication of the church, as many of them are so holden to this day. And they were first held in the churches, afterwards in the church-yard, until restrained by authority. *Ken. Par. Ant.* 609.

And from this relation to the church, they were commonly kept on *Sundays*; but by 27 *Hen.* 6. c. 5. it was enacted, that no fair or market shall be kept upon any *Sunday*, except for necessary victual, and on the four harvest *Sundays* (when people on the week days are otherwise fully employed).

3. If I am intitled to hold a fair or market, and another person sets up a fair or market so near mine that it doth me a prejudice, it is a nuisance to the freehold which I have in my market or fair. But in order to make this out to be a nuisance, it is necessary that my market or fair be the elder, otherwise I myself am guilty of the nuisance. Also it is not a nuisance, unless it be within less than seven miles distant from mine. 3 *Black.* 218.

4. *Toll* is not necessarily incident to a fair or market, but the king may grant that toll shall be paid, although it be a charge upon

upon the subject; because the subjects (who in this case are as it were the vendees) have benefit and ease by such fairs or markets: but the king cannot appoint a burdesome toll, but it ought to be only a small sum, to charge the subject. 2 *Inst.* 220.

There is no certain toll limited to be taken; but if that which is taken be not reasonable, it is punishable by the statute of 3 *Ed.* 1. c. 31. and what shall be deemed in law to be reasonable, shall be judged, all circumstances considered, by the judges of the law, if it come judicially before them. *Id.* 222.

5. By the 2 *Ed.* 3. c. 15. every lord, at the beginning of his fair, shall there *proclaim* and publish how long the fair shall endure, that merchants may know the time when it expires.

6. Of common right no toll shall be paid for things brought to the fair or market, unless they be fold, and then toll to be taken of the buyer: but in ancient fairs and markets, toll may be paid for the standing in the fair or market, though nothing be fold. 2 *Inst.* 220.

If the king or any of his progenitors have granted to any to be discharged of toll, either generally or specially, this grant is good to discharge him of all tolls to his own fairs or markets, and of the tolls which, together with any fair or market, have been granted after such grant of discharge; but cannot discharge tolls formerly due to subjects, either by grant or prescription; for in every grant of a franchise, priority shall be preferred. 2 *Inst.* 221.

Tenants in ancient demesne, for things coming of those lands, shall pay no toll, because at the beginning by their tenure they applied themselves to the manurance and husbandry of the king's demesnes; and therefore for those lands so holden, and all that came or renewed thereupon, they had the same privilege: but if such a tenant be a common merchant for buying and selling of wares or merchandizes, that rise not upon the manurance or husbandry of those lands, he shall not have the privilege for them, because they are out of the reason of the privileges of ancient demesne. *Id.*

The king shall not pay toll for any of his goods. *Id.*

7. A court of the *clerk of the market* is incident to every fair and market, to punish misdemeanors therein; as a court of *pie poudre* is to determine all disputes relating to private or civil property. The object of this jurisdiction is principally the cognizance of weights and measures; and if they be found not according to the standard, besides the punishment of the party by fine, the weights and measures themselves ought to be destroyed. 4 *Black.* 275.

8. The court of *pie poudre*, *curia pedis pulverizati*, is commonly said to be so called from the *dusty feet* of the suitors; or according to others (which is the more probable derivation), from the old

old French *ped puldreaux*, a pedlar, being the court of such petty chapmen as resort to fairs or markets. It is the most expeditious court of justice known to this kingdom. 3 *Black.* 32.

It is a court of record, whereof the steward of him who owns or has the toll of the fair or market is the judge. *Id.*

It hath cognizance of all matters of contract that can possibly arise within the precinct of the fair or market; and the plaintiff must make oath that the cause of action arose there. *Id.*

9. Goods in a fair or market cannot be distrained for rent, for they are brought thither for the good of the public: but if they are driving to market, and by the way are put into a pasture, it is otherwise. *Wood. b. 2. c. 2.*

10. The true owner of goods doth not lose his property in them by a sale made by the possessor of them, unless it was in open market. 3 *Atk.* 49.

But, generally, all sales and contracts of any thing vendible, in fairs or open markets, shall be good not only between the parties, but also binding on all those that have any right or property therein. 2 *Black.* 449.

In London every day, except Sunday, is market day; and every shop, in which goods are exposed publicly to sale, is open market for such things as the owner professeth to trade in. *Id.*

But if my goods are stolen from me, and sold out of open market, my property is not altered, and I may take them wherever I find them. *Id.*

With regard to a *stolen horse*, the sale thereof in a fair or market shall not alter the property, unless the same shall be shewed one hour in the open place of such fair or market, and the sale entered, and the toll paid (where toll is due); otherwise the owner may take his horse again. But if all these circumstances be complied with, he cannot have his horse again, without paying the price for which the horse was sold in such fair or market. 2 *Et 3 P. Et M. c. 7.* 31 *Eliz. c. 12.*

11. A fair or market may be forfeited by *misuser*; as by keeping them otherwise than they are granted, as keeping a fair on two days when only one is granted, or keeping a market on the Monday when it is granted to be kept on Wednesday, or for extorting a toll where none is due. But a market shall not be forfeited for *non-usur.* *Finch, 154.*

FALSE IMPRISONMENT. By the great charter, no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land. And, by the petition of right, 3 *Cha.* 1. no freeman shall be imprisoned or detained without cause shewn, to which he may make answer according to law. And by the 16 *Cha.* 1. c. 10. if any person be restrained of his liberty, he may, upon application by his counsel, have a writ of *habeas corpus*, to bring him before the court of king's bench

bench or common pleas, who shall determine, whether the cause of his commitment be just, and thereupon do as to justice doth appertain.

To make imprisonment lawful, it must either be by process from a court of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrat^e, and express the cause of commitment. 1 *Black.* 137.

For false imprisonment, the law hath not only decreed a punishment by fine and imprisonment, as a heinous public crime, but hath also given a private reparation to the party by action at law, wherein he shall recover damages for the loss of his time and liberty. 3 *Black.* 127.

FALSE JUDGMENT, is a writ that lies where false judgment is given in the county court, court baron, or other court not of record. It is brought for errors in the proceedings of such inferior courts, or where they proceed not having jurisdiction. *F. N. B.*

FARDEL, of land, *ferlingata terra*, is the fourth part of a yardland, which differs in quantity in different places. So we read of *farding deal*, or *quadrantata terre*; so, *obolata*, *solidata*, *librata*, arising (as it seemeth) in proportion of quantity, as a farthing, halfpenny, shilling, and pound.

FARM, or *feorme*, is an old Saxon word, and signifies provisions; and it came to be used instead of *rent*, or render, because anciently the greater part of rents were reserved in provisions, as in corn, poultry, and the like, till the use of money became more frequent. So that a *farmer*, *firmarius*, was one who held his lands upon payment of a rent or feorme; though, at present, by a gradual departure from the original sense, the word *farm* is brought to signify the very estate or lands so held upon farm or rent. The usual words in the operation of the lease are, "Have demised, granted, and to farm let." 2 *Black.* 317.

FARRAND MAN, *Sax.* a person unknown, a stranger.

FAW-GANG; a strolling sort of people, commonly called *gypsies*, whose ancestors were driven out of *Egypt* about the year 1517, and seemed to have obtained the appellation of *Faw-gang*, from *John Faw*, one of their principal leaders. See **GYPSIES**.

FEALTY. Under the feudal system, every owner of lands held them of some superior or lord, from whom, or from whose ancestors, the tenant had received them; and there was a mutual trust or confidence subsisting between the lord and tenant, that the lord should protect the tenant in the enjoyment of the territory he had granted him; and, on the other hand, that the tenant should be faithful to the lord, and defend him against all his enemies. This obligation, on the part of the tenant, was called his *fideltas*, or *fealty*; and an oath of fealty was required,

required, by the feudal law, to be taken by all tenants to their lord.

Which oath is in this form: "Know ye this, my lord, that I will be faithful and true unto you, and faith to you will bear, for the lands which I claim to hold of you; and that I will lawfully do to you the customs and services which I ought to do, at the terms assigned: So help me God." *Litt.* 91.

This oath is now neglected in many places, but it is undoubtedly yet in force. 1 *Black.* 366. 2 *Black.* 86.

FEES, are certain perquisites allowed to officers who are concerned in the administration of justice, as a recompence for their labour and trouble; and these are either ascertained by act of parliament, or established by ancient usage, which gives them an equal sanction with an act of parliament. 2 *Bac. Abr.* 463.

Attorneys, before they charge their clients with their fees, must deliver a bill under their hands; and they shall not sue for the fees until after a month from the time of delivering the bill. And the client, on submission to pay the whole sum that on taxation shall appear due, may have the bill taxed by the proper officer; and no suit shall be commenced during the taxation. And if it appear on taxation that the attorney hath been overpaid, he shall refund; if the bill taxed shall be less by a sixth part than the bill delivered, the attorney shall pay the costs of taxation; but if it shall not be less, the court may charge the attorney or client at their discretion. 3 *Ja. c.* 7. 2 *G. 2. c.* 23.

The *coroner's* fee for taking an inquisition is 20s. and 9d. for every mile he shall be compelled to travel from home. 25 *G. 2. c.* 29.

Fees to be taken by clerks to the *justices of the peace*, are to be settled by the justices in sessions, and confirmed by the judges of assize; and copies thereof shall be by the clerk of the peace kept constantly in a conspicuous part of the room where the sessions are held. 26 *G. 2. c.* 14.

The fee for the *clerk of assize* or *clerk of the peace* for drawing an indictment of felony is 2s. by the 10 & 11 *W. c.* 23.

No *sheriff*, under-sheriff, or bailiff of liberty, shall take more for serving an extent or execution than 12d. for every pound above 100l. and 6d. for every pound levied under 100l.; on pain of treble damages to the party, and 40l. to the king. 29 *Elizabeth c.* 4.

By an ancient statute, the *bailiff's* fee for an arrest is 4d. 23 *H. 6. c.* 10.

Goalers fees are to be settled from time to time by the justices in sessions; and tables thereof shall be hung up by the clerk of the peace in the court where the sessions are held; and by the goaler shall be hung up in every gaol. 32 *G. 2. c.* 28.

A goaler must not disobey a writ of *habeas corpus* for want of his

his fees; but the court will not turn the prisoner over till the gaoler be paid all his fees. 2 *Haw.* 151.

By statute 14 *G. 3. c. 20.* if a prisoner is acquitted, or discharged upon proclamation for want of prosecution, or hath no bill found against him, he shall pay no fee to the gaoler for his discharge: but such fee as hath been usual, not exceeding 13s. 4d. shall be paid out of the general county rate.

FEE FARM, properly taken, is, when the lord, upon the creation of the tenancy, reserves to himself and his heirs, either the rent for which it was before let to farm, or at least a fourth part of that farm rent. 2 *Inst.* 44.

It is called a fee farm rent, because a *farm rent* is reserved upon a grant in *fee*. *Id.*

Fee farm rents of the crown, which remained to the kings of England from their ancient demesnes, were many of them alienated from the crown in the reign of king Charles the second, in pursuance of powers granted by 22 *C. 2. c. 6.* and 22 & 23 *C. 2. c. 24.* And by the annual land tax acts, the receivers of the said rents yet remaining, or which were purchased by virtue of the said acts, shall allow a deduction of so much in the pound as the land tax is laid at for that year; provided that such deduction do not exceed the sum assessed on the whole estate out of which such purchased fee farm rent issues.

FEE SIMPLE. A fee, in general, signifies an estate of inheritance; and when the term is used without any other adjunct, or has the adjunct of *simple* annexed to it, (as, a *fee*, or a *fee simple*,) it is used in contradistinction to a fee conditional at the common law, or a fee tail by the statute; importing an absolute inheritance, clear of any condition, limitation, or restriction to particular heirs, but descendible to the heirs general. 1 *Inst.* 1. 2 *Black.* 106.

FEIGNED ISSUE. A feigned issue is that whereby an action is feigned to be brought, by consent of the parties, to determine some disputed right, without the formality of pleading, and thereby to save much time and expence in the decision of a cause. 3 *Black.* 452.

FELO DE SE, a *felon of himself*, is a person who being of sound mind, and of the age of discretion, voluntarily kills himself; for if a person is insane at the time, it is no crime. But this ought not to be extended so far as the coroners' juries sometimes carry it, who suppose that the very act of self-murder is an evidence of insanity; as if every man who acts contrary to reason, had no reason at all; for the same argument would prove every other criminal *non compos*, as well as the self-murderer. The law very rationally judges, that every melancholy or hypochondriac fit doth not deprive a man of the capacity of discerning right from wrong; which is necessary

necessary to form a legal excuse. And the law so far discourages this offence, as not to allow the self-murderer christian burial; but he shall be buried ignominiously in the highway, with a stake driven through his body, and his goods and chattels forfeited. 4 *Black.* 189.

FELONY, is supposed by some to come from the Saxon *fell*, which signifies fierce or cruel, of which the verb *fell* signifies to throw down or demolish; and the substantive of that denomination signifies a mountain rough and uncultivated. But the same word, with a little variation, runs through most of the *European* languages, and signifies more generally an offence at large; and the *Saxon* word *fallan* signifies to offend, and *fallnisse* an offence or *failure*; and although felony, as it is now become a technical term, signifies in a more restrained sense an offence of an high nature, yet it is not limited to *capital* offences only, but still retains somewhat of this larger acceptation; for petit larceny is felony, although it is not capital.

According to *Sir Henry Spelman*, it signifies such an offence, for which, during the feudal institution, a man should lose or forfeit his estate; which he derives of two northern words, *fer*, which signifies a fief, feud, or beneficiary estate, and *lon*, which signifies price or value. And hence it is perhaps, that to this day felony incurs a forfeiture of estate.

Misprison of felony is the concealing a felony which a man knows, but never consented to; for if he consented, he is either a principal or accessory in the felony. The punishment thereof is fine and imprisonment. If a man will save himself from the crime of misprison, he must discover the offence to a magistrate with all speed that he can. 3 *Inst.* 140.

Compounding of felony, commonly called *theftbote*, is where a man takes his goods again or other amends, not to prosecute. This was anciently punished as felony, but at this day it is only punishable by fine and imprisonment. 1 *Harw.* 125.

By the 3 *Ja. c.* 10. the felon, if able, shall pay the charges of his carrying to gaol; and by the 27 *G. 2. c.* 3. if he is not able, the same shall be paid out of the county rate.

By the 14 *G. 3. c.* 2. a prisoner against whom no bill hath been found, or who shall on trial be acquitted, or be discharged by proclamation for want of prosecution, shall be immediately set at large in court, without paying any fee to the sheriff or gaoler; and such fees as had been usually paid in respect of such discharge, not exceeding 13*s.* 4*d.* shall, on certificate of the judge, be paid out of the county rate.

By the 25 *G. 2. c.* 36. the court, before whom any person hath been convicted of grand or petit larceny or other felony, may,
at

at the prayer of the prosecutor, order his reasonable charges of prosecution to be paid out of the county rate.

And by the aforesaid act of 27 G. 2. c. 3. when any poor person shall appear on recognizance to give evidence, the court may order such sum to be paid to him out of the county rate, as they shall think reasonable, for his time, trouble, and expences.

FEME COVERT, Fr. a married woman; so called from her being under the *cover*, protection, and influence of her husband. So a *feme sole* is a woman single, or unmarried.

FENCE, is a hedge, ditch, or other inclosure of land, for the better improvement thereof. And where a hedge and ditch join together, in whose ground or side the hedge is, to the owner of that land belongs the keeping the same, and the ditch adjoining to it, on the other side, in repair and scoured. *Par. Offic.* 188.

FENCE MONTH, in forests, is the month in which the deer fawn; during which time they are to be *defended* from the interruptions of fear or danger; and therefore it is unlawful to hunt in forests during that time; which begins fifteen days before *Midsummer*, and ends fifteen days after it, being in all thirty days. *Manw.* part 2. ch. 13.

So also, by several acts of parliament, certain rivers are put in *defence* for a limited time, for the protection of the fish during the spawning season.

FEOD, *feud*, *fief*, or *fee*, in the northern languages, signifies a conditional stipend or reward. The constitution of feuds had its original from the northern nations, that in the decline of the *Roman* empire invaded the *Roman* provinces. The conquering generals, in order to secure their acquisitions, allotted large districts or parcels of land to the superior officers, who again dealt out smaller parcels or allotments to the inferior officers and soldiers. And the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given, for which purpose he took the oath of fealty; and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them. 2 *Black.* 45.

These at first were only estates at will, and then they were called *munera*, or gifts; afterwards they were granted for life, and then they were termed *beneficia*; and for the like reason the livings of clergymen are called *benefices* to this day; and afterwards they were made hereditary, when they were called *feoda*, and in our law *fee simple*. *Rel. Spel.* 9.

FEODARY,

FEODARY, *feudatarius*, was an officer of the court of wards, whose business it was to be present with the escheator in every county at the finding of offices of lands, and to give in evidence for the king, as well concerning the value as the tenure. He also received the rents of the lands of the king's wards within his circuit, which he answered to the receiver of the court. This office, together with that court itself, was abolished by the 12C. 2. c. 24.

FEODUM MILITIS, a knight's estate or fee, was such an estate in value, as required a man to take upon him the order of knighthood; which of old time was estimated at 20l. a year.

FEOFFMENT, may be defined to be the gift of any corporeal hereditament to another. He that so gives, or infeoffs, is called the *feoffor*; and the person infeoffed is denominated the *feoffee*. 2 Black. 20.

But, by the mere words of the deed, the feoffment is by no means perfected. There remains a very material ceremony to be performed, called *livery of seisin*; without which, the feoffee hath but a mere estate at will. *Id.*

This conveyance by feoffment was anciently the most common and necessary method of conveyance, both because it is solemn and public, and, therefore, best remembered and proved; and also, because it clearth all disseisins, abatements, intrusions, and other wrongful and defeasible estates, where the entry of the feoffor is lawful; which neither fine, recovery, nor bargain and sale by deed indented and inrolled, doth. 1 *Inst.* 9.

But now, since the statute of uses, 27 H. 8. c. 10. the conveyance by lease and release, hath taken place of it, and is become a very common assurance to pass lands and tenements; for it amounts to a feoffment, the use drawing after it the possession without actual entry, and supplying the place of livery of seisin.

FERÆ NATURÆ. Animals *fera natura*, of a wild nature, are those in which a man hath not an absolute, but only a qualified and limited property, which sometimes subsists, and at other times doth not subsist. And this qualified property is obtained either by the art and industry of man, or the impotence of the animals themselves, or by special privilege.

1. A qualified property may subsist in animals, *fera natura*, by the art and industry of man, either by his reclaiming and making them tame, or by so confining them that they cannot escape and use their natural liberty; such as deer in a park, hares or conies in an inclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by the owner, and fish in a private pond, or in trunks.

These are no longer the property of a man, than while they continue

continue in his keeping, or actual possession : but if at any time they regain their natural liberty, his property instantly ceases ; unless they have *animum revertendi*, which is only to be known by their usual custom of returning.

2. A qualified property may also subsist in these animals, by reason of the impotence of the animals themselves ; as when hawks, or other birds build in my trees, or conies or other creatures make their nests or burrows in my land, and have young ones there, I have a qualified property in those young ones, till such time as they can fly, or run away, and then my property expires.

3. A man may have a qualified property in animals, *feræ nature*, by special privilege ; that is, he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Under which head may be considered, all those animals which come under the denomination of game. Here a man may have a transient property in these animals, so long as they continue with in his liberty, and may restrain any stranger from taking them therein ; but the instant they depart into another liberty, this qualified property ceases. 2 *Black.* 391.

FERRY, a liberty by prescription, or the king's grant, to have a boat for passage upon a river, for the carriage of horses and men for reasonable toll. *T. L.* A ferry is in respect of the landing place, and not of the water ; the water may be to one, and the ferry to another. And in every ferry, the land on both sides of the water, ought to belong to the owner of the ferry ; otherwise, he cannot land on the other part.

FESTINGMAN, from the Saxon *fest*, to bind ; a word not yet out of use. To be free of *festingman*, seems to be discharged from bond services. So *festing penny*, is earnest given to servants on their festing or binding.

FEUD, in *Scotland*, is a combination of kindred, to revenge injuries or affronts done or offered to any of their blood. So *deadly feud*, is a profession of irreconcilable hatred, till a person is revenged even by the death of his adversary.

FIAT (let it be done), is a short warrant, or order of some judge for making out and allowing certain processes, or the like.

FICTION OF LAW is allowed of in several cases ; but it must be framed according to the rules of law, and there ought to be equity and possibility in every legal fiction. A common recovery is a fiction of law, a formal act or device by consent, where a man is desirous to cut off an entail. 10 *Co.* 42.

But the law ought not to be satisfied with fictions, where it may be otherwise really satisfied ; and fictions in law shall not be carried farther than the reasons which introduced them necessarily require. 1 *Lill. Abr.* 610.

They

They were invented to avoid inconvenience; and it is a maxim invariably observed, that no fiction shall extend to work an injury, its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law. 3 *Black.* 43.

FIELD-ALE, a kind of drinking in the field, claimed by the bailiffs of hundreds from the contribution of the inhabitants.

A FIERI FACIAS is a writ of execution, whereby the sheriff is commanded *quod fieri faciat*; that is, that he cause to be made, of the goods and chattles of the defendant, the sum or debt recovered against him. 3 *Black.* 417.

And the sheriff having, by virtue of this writ, taken the goods and chattels, may sell the same (even an estate for years, which is a chattel real), until he hath raised enough to satisfy the judgment and costs; first paying the landlord of the premises upon which the goods are found, the arrears of rent then due, not exceeding one year's rent in the whole. *Id.*

If part only of the debt be levied, the plaintiff may, on return of the writ, have a writ of execution against the body of the defendant for the residue. *Id.*

FIFTEENTHS were a tribute, or temporary aid, issuing out of personal property, and granted to the king by parliament; it was a real fifteenth part of every man's personal estate, according to a reasonable valuation; for personal estate, in ancient times, was very inconsiderable, and quite a different thing from what it is at present: originally, the amount of the taxation was uncertain, being levied by assessments new made at every fresh grant of the commons. But in the eighth year of *Ed.* 3. it was reduced to a certainty, when a general taxation was made of every township, borough, and city, in the kingdom; which rate was the fifteenth part of the value of every township, the whole amounting to about 29,000*l.* 1 *Black.* 308.

FIGURES are not allowed to express numbers in indictments, but numbers must be expressed in words; 2 *H. H.* 170. *Cr. Cir.* 109. *Andr.* 137. *H.* 11 *G.* 2. *K. & Haddock*; or at least in *Roman* numerals; *Str.* 261. *H.* 6 *G.* *K. & Philips.* By 6 *G.* 2. *c.* 14. it is allowed to express numbers by figures in writings, pleadings, rules, orders, indictments, &c. in courts of justice, as have been commonly used in the said courts, notwithstanding any thing in the 4 *G.* 2. *c.* 26.

FILE, *filum*, a thread, string, or wire, upon which writs and other exhibits in courts and offices are fastened or *filed*, for the more safe keeping, and ready turning to the same. A file is a record of the court, and the filing of the process of a court makes it a record of it. 1 *Lill.* 112.: so *filacer*, in the court of common

common pleas, is an officer so called from his filing those writs whereon he makes out process.

FILUM AQUÆ, the thread or middle of the stream, where a river parts two lordships.

FINE OF LANDS.

1. *Fine of lands, what.*
2. *Manner of levying a fine.*
3. *Of the several kinds of fines of lands.*
4. *Effect of a fine levied.*

1. *Fine of lands, what.*

A FINE is sometimes said to be a feoffment of record; though it might, with more accuracy, be called, an acknowledgment of a feoffment on record: by which is to be understood, that it hath, at least, the same force and effect with a feoffment, in the conveying and assuring of lands: though it is one of those methods of transferring estates of freehold by the common law, in which livery of seisin is not necessary to be actually given; the supposition and acknowledgment thereof, in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to be, an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices; whereby the lands in question become, or are acknowledged to be, the right of one of the parties. In its original, it was founded on an actual suit, commenced at law for the recovery of the possession of land; and the possession thus gained by such composition, was found to be so sure and effectual, that fictitious actions were, and continue to be, every day commenced, for the sake of obtaining the same security. 2 *Black.* 349.

For, anciently, it was a determination of a real controversy; but now is generally a feigned action, and supposes a controversy, where, in reality, there is none, to secure the title that a man hath in his estate against all men; or to cut off intails, and with more certainty to convey the title of lands to whom he pleaseth, either in fee simple, fee tail, or for life or years. *West. Symb. par. 2. f. 1.*

It is called a *fine*, because it puts an end, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. 2 *Black.* 349.

2. *Manner of levying a fine.*

The manner of levying a fine by this kind of fictitious proceeding, is as follows:

1. The party, to whom the land is to be conveyed or assured, commenceth an action or suit at law against the other; generally an action of *covenant*, by suing out a writ or *præcipe*, called a

writ of covenant, the foundation of which is a supposed agreement or covenant, that the one shall convey the lands to the other; on the breach of which agreement the action is brought. On this writ there is due to the king a *primer*, or first fine, being a noble for every five marks of land, or a tenth part of the yearly value. The suit being thus commenced, there follows,

2. The *licentia concordandi*, or licence to agree the suit; for as soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of peace and accommodation to the plaintiff, who, accepting them, but having, upon suing out the writ, given pledges to prosecute his suit, which he indangers if he now deserts it without licence, he therefore applies to the court for leave to make the matter up. This leave is readily granted; and for it there is another fine due to the king, called the *king's silver*, and sometimes the *post fine*, with respect to the *primer fine* before mentioned; and it is as much as the primer fine, and half as much more.

3. Next comes the *concord* or agreement itself, after leave obtained from the court; which is usually an acknowledgment from the deforciant (or those who keep the others out of possession), that the lands in question are the right of the complainant: and, from this acknowledgment or recognition of the right, the party levying the fine is called the *cognizor* (or acknowledged), and he to whom it is acknowledged is called the *cognizee*. This acknowledgment must be made either openly in the court of common pleas, or before one of the judges of that court, or before commissioners in the country, by a special authority called a writ of *dedimus potestatem*; which judges and commissioners are bound by the statute 18 Ed. 1. *st.* 4. to take care that the cognizors be of full age, sound memory, and out of prison. If there be any feme-covert among the cognizors, she is privately examined, whether she doth it willingly, or by compulsion of her husband; and also, if there be any doubt of her age, she shall be examined as to that. 2 *Black.* 349. 2 *Inst.* 515. And by an order of the court of common pleas, *H.* 17 *G.* 2. in fines taken by commissioners, an affidavit on parchment must be made by an attorney of one of the courts of law at *Westminster*, of the great sessions in *Wales*, or of the counties palatine of *Chester*, *Lancaster*, and *Durham*, that he knows the cognizors; that the fine was duly signed and acknowledged by them before the two commissioners taking the same; that the cognizors, and two commissioners, were, at the time of taking and acknowledging the said fine, all of full age and competent understanding; that the femes-covert (if any) were solely and separately examined apart from their husbands, and freely and voluntarily consented to and acknowledged the said fine; and that the cognizors, and every of them, knew the same to be a fine to pass his, her, and their estate and estates; and

(*H.* 26)

(*H. 26 and 27 G. 2.*) that the said fine was duly signed and acknowledged upon the day and year mentioned in the caption; and that the razures or interlineations (if any) in the body or caption of such fine, were made before the parties signed the said fine, and before the caption was signed by the commissioners.

By these acts all the essential parts of a fine are completed; and if the cognizor dies after the fine is acknowledged, it may yet be carried on in all its remaining parts; provided that the writ be returned before such death of the cognizor. 2 *Black.* 351. 2 *Wilson*, 115.

4. The next thing is the *note* of the fine; which is only an abstract of the writ of covenant, and of the concord, naming the parties, the parcels of land, and the agreement. This must be enrolled of record in the proper office.

5. The fifth part is the *foot* of the fine, or conclusion of it; which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied.

And thus the fine is completely levied at common law.

But, by several acts of parliament, other solemnities are super-added; particularly, that the fine, after ingrossing, shall be openly read and proclaimed in court, once in the term in which it is made, and once in each of the three succeeding; and the chirographer of fines shall cause a table of all the fines levied in each county to be affixed in some open part of the court all the next term; and shall also deliver the contents thereof to the sheriff of every county, who shall, at the next assizes, fix the same in some open place in the court, for the more public notoriety of the fine.

Lands purchased of divers persons by several purchasers, may pass in one fine; and such joint fines are proper to save charges, where the purchases are of small value. 2 *Black.* 351.

But before such fine is allowed to pass, proof must be made that the whole purchase-monies do not exceed 200*l.*

3. *Of the several kinds of fines of lands.*

FINES thus levied are of four kinds. 1. What is called a fine *sur cognizance de droit come ceo que il ad de son done*; that is, a fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor. This is the best and surest kind of fine, for thereby the deforciant, in order to keep his covenant with the plaintiff of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment and livery, acknowledges in court a former feoffment, or gift in possession, to have been made by him to the plaintiff. This fine is therefore said to be a feoffment of record; the livery, thus acknowledged in court, being equivalent to an actual livery; so that this assurance is rather a confession of a former conveyance,

than a conveyance now originally made; for the deforciant, or cognizor, acknowledges (*cognoscit*) the right to be in the plaintiff or cognizee, as that which he hath *de son done*, of the proper gift of himself the cognizor. 2. A fine *sur cognizance de droit tantum*, or upon acknowledgment of the right merely, not with the circumstance of a preceding gift from the cognizor. This is commonly used to pass a reversionary interest which is in the cognizor; for of such reversions there can be no feoffment, or donation with livery, supposed; as the possession, during the particular estate, belongs to a third person. 3. A fine *sur concessit*, or upon grant; which is, where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the cognizee an estate *de novo*, usually for life or years, by way of supposed composition; and this may be done, reserving a rent, or the like; for it operates as a new grant. 4. A fine *sur done, grant, et render*; upon gift, grant, and render; which is a double fine, being in a manner two fines, comprehending the fine *sur cognizance de droit come ceo*, &c. and the fine *sur concessit*; and may be used to create particular limitations of estate. In this species of fine, the cognizee, after the right is acknowledged to be in him, grants back again, or renders to the cognizor, or perhaps to a stranger, some other estate in the premises.——But, in general, the first species of fine, *sur cognizance de droit come ceo*, &c. is most used, as it conveys a clear and absolute freehold, and gives the cognizee a seisin in law, without any actual livery; and is therefore called a fine *executed*; whereas the others are but *executory*. 2 *Black.* 352.

4. *Effect of a fine levied.*

The reason why such solemnity is required in passing a fine is, because the fine is so high a bar, and of so great force, and of a nature so powerful in itself, that it precludes not only those which are parties and privies to the fine, and their heirs, but all other persons whatsoever, who are of full age, out of prison, of sound memory, and within the four seas, on the day of the fine levied; unless they put in their claim within five years after proclamations made.

So that a fine extends both to *parties, privies, and strangers*; and the *parties and privies* are foreclosed by it presently, and the *strangers in futuro*. 2 *Infl.* 516.

The *parties* are either the cognizors or cognizees; and these are immediately concluded by the fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And indeed as this is almost the only act that a feme-covert (or married woman) is permitted by law to do (and that, because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband)

band), it is therefore the usual, and almost the only safe method, whereby the can join in the sale, settlement, or incumbrance, of any estate. 2 *Black.* 355.

Privies to a fine are such as are any way related to the parties who levy the fine, and claim under them by any right of blood, or other right of representation: such as are the heirs-general of the cognizor, the issue in tail, the vendee, the devisee, and all others who must make title by the persons who levied the fine. *Ibid.*

Strangers to a fine are all other persons in the world, except only parties and privies; whose right is bound unless they make claim within five years after proclamations made; except *femes-covert* (not being parties to the fine), infants, prisoners, persons beyond the seas, and such as are not of sound mind; who have five years allowed to them and their heirs, after such impediment removed. Persons also that have not a present, but a future interest only, as those in remainder or reversion, have five years allowed to claim in, from the time that such right accrues. And if within that time they neglect to claim, or (by the statute 4 *An. c.* 16.) if they do not bring an action to try the right within one year after making such claim, and prosecute the same with effect, all persons whatsoever are barred of whatever right they may have, by force of the statute of non-claim. *Ibid.*

And the courts of law will not suffer a fine to be impeached (when once levied) on account of any defect of understanding, or even lunacy or idiocy, of the cognizor. 12 *Co.* 124. 2 *Co.* 58. 10 *Co.* 42.

But in order to make a fine of any avail, it is necessary that the parties have some *interest* in the lands to be affected by it; otherwise two strangers, by confederacy, might defraud the owners, by levying fines of their lands.

Thus tenant *for years*, *at will*, or *at sufferance*, cannot by fine divest an estate, and turn it to a right. 2 *Atk.* 240. 2 *Vez.* 482.

If a fine be levied by *tenant for life*, it immediately operates as a forfeiture of the estate of the tenant for life, and the remainderman or reversioner may enter presently; but he is not bound so to do, for the law gives him five years after the death of the tenant for life; because it is not presumed that he will look after the determination of the estate, sooner than in the natural way. 2 *Vez.* 482.

If a man levy a fine of my land while I am in *possession* of it, this fine will not hurt me; for he that has the estate or interest in him cannot be put to his action, entry, or claim; because he has that already, which the action, entry, or claim, would give him. *Wood. b.* 2. *c.* 3.

But if I have a fee-simple, and am *disseised*, and the disseisor doth

doth levy a fine with proclamations, and I do not claim within five years after, I and my heirs are barred for ever. *Ibid.*

But a wrong doer, in order to gain a possession by disseisin, must not only step on the land, and then leave the rightful owner in possession; which, though sufficient to give him a seisin on a feoffment, is not sufficient to levy a fine. 3 *Atk.* 339.

But evidence of receipt of rent is a sufficient possession to levy a fine. *Ibid.*

A trustee cannot levy a fine to defeat the *cestuy que trust*; for every one in possession, with notice of the trust, is a trustee; and *cestuy que trust* hath nothing to do with the possession. 2 *Vez.* 476. 2 *Atk.* 240.

A fine levied by the mortgagor, or mortgagee will not bar the equity of redemption. *Hard.* 512. 2 *Vern.* 190.

So a fine by the mortgagor to a second mortgagee, will not bar the first mortgagee, though more than five years pass; the mortgagor continuing in possession, and paying the interest, being only tenant at will to the first mortgagee. *Cartb.* 414. (13 *Vin.* 282.)

A fine *sur cognizance de droit come ceo*, &c. without any consideration expressed, or uses declared, whether the cognizor be in possession, or the fine be of a reversion, shall enure to the old use, in whomsoever it was at the time of levying the fine; and, although it passes nothing, yet, after five years and non-claim, it will operate as a bar. 2 *Wilf.* 19.

And if a consideration appears, yet as it conveys an absolute estate, without any limitations, to the cognizee, this assurance could not be made to answer the purposes of family settlements (wherein a variety of uses is often expedient), unless its force were subjected to the direction of other more complicated deeds, wherein particular uses can be more particularly expressed. And if such deed is made previous to the fine, it is called a deed to lead the uses of the fine; if made subsequent to the fine, it is called a deed to declare the uses. 2 *Black.* 363.

FINE FOR ALIENATION, was an attendant of tenure by knight's service, whenever the tenant had occasion to make over his land to another. This depended on the nature of the feudal connection, it not being reasonable that a feudatory should transfer his lord's gift to another, without the consent of the lord, lest an enemy to the lord should be introduced into the tenure. And if the tenant aliened without licence, it was, in strictness, a forfeiture of the lands: but this severity was mitigated by the statute 1 *Ed.* 3. c. 12. which ordained, that, in such case, the lands should not be forfeited, but a reasonable fine be paid to the king: upon which statute it was settled, that one third of the yearly value should be paid for a licence of alienation; but if the tenant presumed

fumed to alien without licence, a full year's value should be paid. 2 *Black.* 71.

But, by 12 C. 2. c. 24. all fines for alienation, and other incidents of tenure by knight's service, are taken away; except fines for alienation due by particular customs of particular manors.

Which customary fines are, in some places, arbitrary at the will of the lord; in other places, limited and certain. But, even where they are arbitrary, the courts of law, in favour of the tenant, have tied them down to be reasonable in their extent; and therefore no fine is allowed to be taken, either upon alienations or descents (unless in particular circumstances), of more than two years' improved value of the estate. 2 *Black.* 98.

FINE FOR OFFENCES. By the bill of rights, 1 *W. 3.* 2. c. 2. excessive fines ought not to be imposed; and all grants and promises of fines and forfeitures of particular persons, before conviction, are declared to be illegal and void.

The reasonableness of fines in criminal cases hath been usually regulated by the determination of *magna charta*, c. 14. concerning ameracements for misbehaviour in matters of civil right, which is as follows: *A freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great fault, after the greatness thereof; saving to him his contenment; and a merchant likewise, saving to him his merchandize; and a villein, saving his wainage.*

Which intends, generally, that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear; saving to the landholder, his contenment or land; to the trader, his merchandize; and to the countryman, his wainage, or team and instruments of husbandry. In order to ascertain which, the same *magna charta* directs, that the amercement shall be set, or reduced to a certainty, by a jury. This method of liquidating the amercement to a precise sum, is usually done in the court-leet and court-baron by assessors, or jurors sworn to assess, tax, and moderate, the general amercement, according to the particular circumstances of the offence and the offender. In imitation of which, in courts superior to these, the ancient practice was, to inquire by a jury what a man was worth by the year, saving the maintenance of himself, his wife, and children. And since the difuse of such inquest, it is not usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood; but to inflict corporal punishment, or a stated imprisonment, which is better than an excessive fine, for that (when a man is not able to pay) amounts to imprisonment for life. 4 *Black.* 379.

FIRE. See BURNING.

FIREBOTE, a privilege of tenants to take wood for fuel. See ESTOVERS.

FIRE ORDEAL. See ORDEAL.

FIRMA

FIRMA ALBA, a white farm, or rent, paid in silver, and not in cattle or provisions for the lord's house.

FIRST FRUITS was the value of every spiritual living by the year, which the pope, claiming the disposition of all ecclesiastical livings within Christendom, reserved out of every living. 12 Co. 45.

These, together with the tenths (which were the tenth part of such livings paid annually), the pope claimed as due to himself by divine right; and this portion or tribute was, by ordinance, yielded to the pope in the 20 Ed. 1.; and a valuation then made of the ecclesiastical livings within this realm, to the end the pope might know, and be answered of, that yearly revenue; so as the ecclesiastical livings chargeable with the tenth (which was called spiritual) to the pope, were not chargeable with the temporal tenths or fifteenths granted to the king in parliament: and to render the payment of these to the pope more easy, the popes sometimes granted the same to our kings for certain terms. 2 Inst. 627, 8.

At the reformation these were taken from the pope, and annexed to the crown; and a valuation was then made of all the ecclesiastical livings, in the 26 Hen. 8.; according to which valuation, the first-fruits and tenths still continue to be paid.

Vicarages, according to the said valuation (which is recorded in what are now called the king's books), not exceeding 10*l.* a year, and parsonages not exceeding ten marks, are discharged of first-fruits. 1 El. c. 4. f. 29.

And all ecclesiastical benefices with cure of souls, not exceeding 50*l.* a year according to the improved value, are discharged of both first-fruits and tenths. 5 An. c. 24. f. 1.

By the 2 & 3 An. c. 11. these revenues are appropriated to the augmentation of small livings, and from thence have received the name of *queen's bounty*.

FISHERY. A *free* fishery, or exclusive right of fishing in a public river, is a royal franchise, held by grant or prescription. It differs from a *several* fishery, because he that has a *several* fishery must also be the owner of the soil, which, in a *free* fishery, is not requisite. It differs also from a *common* of fishery, in that the *free* fishery is an exclusive right, the *common* of fishery is not so; and therefore in a *free* fishery a man hath a property in the fish before they are caught; in a *common* of fishery, not till afterwards. 2 Black. 39.

Fishery, in navigable rivers, or arms of the sea, is common and public; it *prima facie* belongs to the crown, and the presumption is against any exclusive right; yet an exclusive right may be prescribed for; but the proof lies on the claimer of it. In private rivers, not navigable, it belongs to the lord on each side. Bur. Mansf. 2164.

FISHPOND,

FISHPOND. Any man may erect a fishpond without licence, because it is a matter of profit, and for the increase of victuals. 2 *Inst.* 199.

Stealing fish out of inclosed private fishponds, streams, or other waters, is transportation for seven years; and attempting to steal them is 5*l.* penalty. 5 *G.* 3. *c.* 14.

If any person, armed and disguised, shall steal any fish out of any river or pond; or (whether armed and disguised or not) shall break down the head or mound of any fishpond, whereby the fish shall be lost or destroyed; he shall be guilty of felony without benefit of clergy. 9 *G.* *c.* 22.

FLEDWITE, or *flightwite*, a freedom or discharge from ameracements, forfeited by a person having fled for an offence.

FLEMENFRITH (from *frid*, peace) seems to be an amercement for harbouring an offender, having broken the king's peace, and fled for the same.

FLIGHT, is evading the course of justice, by a man's voluntarily withdrawing himself. On an accusation of treason, or felony, or even petit-larceny, if the jury find that the party fled for the same, he shall forfeit his goods and chattels, although he be acquitted of the offence; for the very flight itself is an offence, carrying with it a strong presumption of guilt, and is at least an endeavour to elude and stifle the course of justice prescribed by the law. But now the jury very seldom find the flight; such forfeiture being looked upon, since the vast increase of personal property, as too large a penalty for an offence, to which a man is prompted by the natural love of liberty. 4 *Black.* 387.

FLORIN, a foreign coin, in *Spain* 4*s.* 4*d.* in *Germany* 3*s.* 4*d.* in *Holland* 2*s.*

FLOTSAM, is where a ship is sunk, or cast away, and the goods float upon the surface of the water.

FOCAGE (from *focus*, a hearth), the privilege of getting fuel: the same as *firebote*.

FOLK-LAND was such as was held by no assurance in writing, but distributed among the common *folk*, or people, at the pleasure of the lord, and resumed at his discretion; and was no other than villenage. It was so called in contradistinction to *bookland*, which was held by deed or writing, in which the tenant had a freehold of inheritance.

FOLK-MOTE (from *folk*, and *gemot*, an assembly), was a common council of the inhabitants of a city, town, or borough, convened at the *moot* hall or house. It seems to have been used for any kind of public meeting.

FOOTGELD, an amercement for not expediting, or cutting out the balls of the feet of dogs in the forest. To be free from *footgeld*, is a privilege to keep dogs within the forest unexpeditated, without punishment.

FORCIBLE

FORCIBLE ENTRY AND DETAINER, are the violent taking, and keeping possession of lands and tenements, with threats, force, and arms, and without the authority of law. This was formerly allowable to every person dispossessed or turned out of possession, unless his entry was taken away or barred by his own neglect, or other circumstances. But this being found very prejudicial to the public peace, it hath been thought necessary by several statutes to restrain all persons from the use of such violent methods, even of doing themselves justice; and much more if they have no justice in their claim. So that the entry now allowed by law is a peaceable one; the entry forbidden by law, is such as is supported and maintained with force, violence, and unusual weapons. By the statute 5 R. 2. *fl.* 1. *c.* 8. all forcible entries are punished with imprisonment and ransom at the king's will. And by the several statutes, 15 R. 2. *c.* 2. 8 H. 6. *c.* 9. 31 El. *c.* 11. and 21 Ja. *c.* 15. upon any forcible entry, or forcible detainer after peaceable entry, into any lands or benefices of the church, a justice of the peace, taking sufficient power of the county, may go to the place, and there record the force upon his own view; and, upon such conviction, may commit the offender to gaol till he makes fine and ransom to the king. And, moreover, the justice shall have power to summon a jury, to try the forcible entry or detainer complained of; and, if the same be found by that jury, then, besides the fine on the offender, the justice shall make restitution, by the sheriff, of the possession, without inquiry into the merits of the title; for the force is the thing to be tried, punished, and remedied, by them; and the same may be done at the general sessions. But this doth not extend to those who have had peaceable possession for three years next before. 4 Black. 148.

FORCIBLE MARRIAGE. By 3 H. 7. *c.* 2. if any person shall take away any woman, having lands or goods, or that is heir-apparent to her ancestor, by force and against her will, and afterwards she be married to him, or to another by his procurement, or defiled; he, and also the procurers and receivers of such woman, shall be adjudged principal felons. And, by 39 El. *c.* 9. the benefit of clergy is taken away from the principals, procurers, and accessaries before.

And, by 4 & 5 P. & M. *c.* 8. if any person shall take or convey away any unmarried woman under the age of sixteen (though not attended with force), he shall be imprisoned two years, or fined at the discretion of the court; and if he deflowers her, or contracts matrimony with her without the consent of her parent or guardian, he shall be imprisoned five years, or fined, in like manner. And, by 26 G. 2. *c.* 33. the marriage of any person under the age of 21, by *licence*, without such consent, is void.

FORECLOSURE

FORECLOSURE of equity of redemption is, where the mortgagee, in order to prevent the mortgagor from redeeming the estate, or to recover his money lent upon the security thereof, applies to a court of equity to compel the mortgagor either to sell the estate, or to redeem it by payment of the money presently; or, in default thereof, to be for ever debarred from redeeming the same, which is called the *foreclosure of the equity of redemption*.

FOREIGN, *forinfecus*, signifies of another country; and, in our law, is diversified in several respects.

Foreign attachment, is an attachment of the goods of foreigners, found in some liberty, to satisfy their creditors within such liberty.

Foreign kingdom, is a kingdom under the dominion of a foreign prince; so that *Ireland*, or any other place subject to the crown of *England*, cannot with us be called foreign, though to some purposes they are distinct from the realm of *England*. As if two of the king's subjects fight in a foreign kingdom, and one of them is killed, it cannot be tried here by the common law, but it may be tried by the constable and marshal according to the civil law; or the fact may be examined by the privy council, and tried by commissioners appointed by the king in any county in *England*. 3 *Inst.* 48.

Foreign plea, is a plea in objection to a judge, where he is refused as incompetent to try the matter in question, because it arises out of his jurisdiction. *Kitch.* 75. And if a plea of issuable matter is alledged in a different county from that wherein the party is indicted or appealed, such pleas can only be tried by juries returned from the counties wherein they are alledged. 2 *Haw.* 404.

Foreign service, is that whereby a mesne lord holds of another, without the limits of his own fee; or that which the tenant performs, either to his own lord or to the lord paramount, out of the fee. *Kitch.* 299. Also the payment of extraordinary aid, as opposed to *intrinsic service*, which was the common and ordinary duty within the lord's court.

Counterfeiting foreign coin, current in *England* by the king's proclamation, or bringing any such counterfeit foreign coin into *England*, with intent to utter the same in payment, is high treason. 1 *Mar. st.* 2. c. 6. 1 & 2 *P. & Mar. c.* 11. And counterfeiting foreign coin not current in this kingdom, is misprision of treason. 13 *El. c.* 2.

If any of the king's subjects shall *inlist* into any foreign service, he shall be guilty of felony without benefit of clergy. 9 *G.* 2. c. 30. 29 *G.* 2. c. 17.

A person contracting with, or endeavouring to persuade, any *artificer* to go into any foreign service, shall forfeit 500*l.* and be imprisoned

imprisoned for 12 months; for the second offence shall forfeit 1000*l.* and be imprisoned two years. And an artificer going out of the kingdom to teach any manufacture to foreigners, shall be incapable of a legacy, or of being executor or administrator, and of taking any lands by descent, devise, or purchase, and shall forfeit his lands and goods, and be deemed out of the king's protection. 3 *G. c.* 27. 23 *G. 2. c.* 13.

FOREIGN *bill of exchange*, is a bill drawn by a merchant residing abroad, upon his correspondent in *England*; or drawn by a merchant in *England*, on his correspondent abroad. 2 *Black.* 457.

If a stranger of *Holland*, or any foreign country, buys goods at *London*, and gives a note under his hand for payment, and then goes away privately into *Holland*, the seller may have a certificate from the lord mayor, on proof of sale and delivery of the goods; upon which the people of *Holland* will execute a legal process on the party. Also, at the instance of an ambassador or consul, such a person of *England*, or any criminal against the laws here, may be sent from a foreign kingdom hither. Where a bond is given, or contract made, in a foreign kingdom, it may be tried in the king's bench, and laid to be done in any place in *England*. *Hob.* 11. 2 *Bulstr.* 322.

FOREIGNERS, though made denizens, or naturalized here, are disabled to bear offices in the government, to be of the privy council, or members of parliament. 12 *W. c.* 2.

FORESTS, are waste grounds belonging to the king, replenished with all manner of beasts of chase or venary, which are under the king's protection, for the sake of his royal recreation and delight; and to that end, and for preservation of the king's game, there are particular laws, privileges, courts, and officers, belonging to the king's forests. 1 *Black.* 279.

The forest courts are, the court of *attachments*, of *regard*, of *swainmote*, and of *justice-seat*. 1. The court of *attachments*, is to be held before the verderers of the forest, once in every forty days, to inquire of all offenders against the king's deer, or covert for the same, who may be *attached* by their bodies, if found in the very act of transgression, otherwise by their goods; and, in this court, the foresters are to bring in their attachments or presentments of vert and venison; and the verderers are to receive the same, and to inroll them, and to certify them, under their seals, to the court of *justice-seat* or *swainmote*; for this court can only inquire of, but not convict, offenders. 2. The court of *regard*, or survey of dogs, is to be holden every third year, for the lawing or expeditating of mastiffs; which is done by cutting off the claws of the fore feet, to prevent them from running after deer. No other dogs but mastiffs were permitted to be kept within the king's forests, it being supposed that the keeping of these,

these, and these only, was necessary for the defence of a man's house. 3. The court of *swainmote*, is to be holden before the verderers as judges, by the steward of the swainmote, thrice in every year, the sweins or freeholders within the forest composing the jury. The jurisdiction of this court is, to inquire into the oppressions and grievances committed by the officers of the forest, and to receive and try presentments certified from the court of attachments against the offenders in vert and venison. And this court may not only inquire, but convict also; which conviction shall be certified to the court of *justice-seat*, under the seals of the jury; for this court cannot proceed to judgment. But the principal court is, 4. The court of *justice-seat*, which is held before the chief justice in eyre, or chief itinerant judge, *capitalis justiciarius in itinere*, or his deputy, to hear and determine all trespasses within the forest, and all claims of franchises, liberties, and privileges, and all pleas and causes whatsoever, therein arising. It may also proceed to try presentments made in the inferior courts of the forest, and to give judgment upon the convictions that have been made in the swainmote courts. It may be held every third year. This court may fine and imprison, it being a court of record. And a writ of error lies to the court of king's bench. 1 *Black.* 289. 2 *Black.* 33. 3 *Black.* 71.

But the forest laws have long ago ceased to be put in execution. 1 *Black.* 289.

A forest, in the hands of a subject, is, properly, the same with a chase, being subject to the common law, and not to the forest laws. 2 *Black.* 38.

Beasts of forest, are, properly, hart, hind, buck, hare, boar, and wolf; but legally, all wild beasts of venary or hunting. 1 *Inst.* 233.

FORESTALLING (*forestallan*, or *forestallan*), in the English Saxon, signifies, properly, to market before the public, or to prevent the public market; and, metaphorically, to intercept in general; and seemeth derived from *fore* (which is the same as *before*), and *stall*, a standing-place or department; from whence sprang the ancient word *stallage*, which signifies money paid for erecting a stall or stand, for the selling of goods in a fair or market. This offence of forestalling was described by the statute 5 & 6 *Ed. 6. c. 14.* to be buying or contracting for any merchandize, or victual, coming in the way to market; or persuading persons from bringing their goods or provisions there, or persuading them to enhance the price when there; and was punishable by the said statute, according to the degrees of the offence. Which statute being now repealed, by the 12 *G. 3. c. 71.* the same remains an offence at common law, punishable upon indictment by fine and imprisonment.

FORESTER.

FORESTER, is a sworn officer ministerial of the forest, to watch over the vert and venison, and to make attachments and true presentments of all manner of trespasses done within the forest.

FORFANG (from *fang*, to take) was the *taking* of provision in a fair or market, *before* the king's purveyors had been served for his majesty's use. A grant to be freed from *forfang*, was an immunity from amercement or forfeiture for the said offence.

FORFEITURE (*forisfactura*, *forfait*, Fr.) is the consequence of attainder for treason, felony, or misprision thereof: and it is of two kinds; either of *lands* or *goods*.

By the common law, all *lands* of inheritance, whereof the offender was seised in his own right, are forfeited to the king by an attainder of high treason; and to the lord of whom they are immediately holden, by an attainder of petty treason or felony. But the lord cannot enter into such lands, without a special grant, until it appear by due process, that the king hath had his prerogative of the year, day, and waste: concerning which it is enacted by the 17 *Ed.* 2. c. 16. that the land shall be forthwith taken into the king's hands, and he shall have all the profits thereof for a year and a day; and the land shall be wasted and destroyed in the houses, woods, and gardens, and in all manner of things belonging to the same land; and after the king hath had the year, day, and waste, the land shall be restored to the chief lord of the fee, unless he fine before with the king for the year, day, and waste. 2 *Haw.* 451.

As to forfeiture of *goods*, all things whatsoever, which are comprehended under the notion of personal estate, which the party hath or is intitled to in his own right, are liable to forfeiture, upon a conviction of treason or felony, or upon an acquittal of a capital felony or petty larceny; or of petty larceny if the party is found to have fled for it. But the jury very seldom find the flight; forfeiture being looked upon since the vast increase of personal property of late years, as too large a penalty for an offence to which a man is prompted by the natural love of liberty. 2 *Haw.* 441. 4 *Black.* 387.

Although the forfeiture upon an attainder of treason or felony, shall have relation to the time of the offence, for the avoiding of all subsequent alienations of the *land*, yet it shall relate to the time of the conviction or flight found only, as to *chattels*; and therefore the offender may *bona fide* sell any of his chattels, for the sustenance of himself and family, between the fact and conviction; for personal property is of so fluctuating a nature, that it passes through many hands in a short time; and no buyer would be safe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony. 4 *Black.* 387.

FORGERY,

FORGERY, is an offence at *common law*, and an offence also by *statute*. Forgery at the *common law* is an offence in falsely and fraudulently making or altering any manner of record, or any other authentic matter of a public nature; as a parish register, or any deed, will, privy seal, certificate of holy orders, and the like. As for writings of an inferior nature, such as private letters to friends, the counterfeiting of them is not properly forgery; therefore in some cases it may be more safe to prosecute such offenders for a misdemeanor as cheats. The punishment on an indictment of forgery at common law, may be by pillory, fine, and imprisonment. But indictments for this offence are now seldom brought at common law, but on some of the statutes which generally inflict a more severe punishment. 1 *Harv.* 184.

The *statutes* which make forgery an offence are numerous. The first is that famous one of 5 *El. c.* 14. whereby the forging or making, or knowingly publishing or giving in evidence, any forged deed, charter, or writing sealed, or any court roll, or will, is punishable by forfeiture of double costs and damages to the party grieved, standing upon the pillory, having both his ears cut off, his nostrils slit and seared, forfeiture to the king of the profits of his lands during life, and imprisonment during life: and for any forgery relating to a term of years, or annuity, bond, obligation, acquittance, release, or discharge of any *personal* chattels, the same forfeiture is given to the party grieved, and on the offender is inflicted the pillory, loss of one of his ears, and a year's imprisonment; and, in both cases, the second offence is made felony without benefit of clergy.

Another general statute is 2 *G. 2. c.* 25. whereby the first offence is made felony without benefit of clergy, in the case of forging or procuring to be forged, or uttering as true, any forged deed, will, bond, writing obligatory, bill of exchange, promissory note, indorsement or assignment thereof, or any acquittance or receipt for money or goods, with intent to defraud any person.

And by many other particular statutes, forgeries of divers kinds are made felony without benefit of clergy. As the forging of bank bills or notes, dividend warrants, exchequer bills, power to transfer stocks, lottery tickets, policy of assurance, army debentures, stamps whereby to defraud the revenue, and many other of the like kind.

FORISFAMILIATED, is where a man ceases to become part of his father's family, becoming himself the head of another family.

FORM, is required in law proceedings, otherwise the law would be no art; but it ought not to be used to ensnare or entrap. *Hob.* 232. The formal part of the law, or method of proceeding, cannot be altered but by parliament; for if once

those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself. 1 *Black.* 142.

FORMA PAUPERIS, is where any person is so poor, that he cannot bear the usual charges of suing at law or in equity. In this case, upon his making oath that he is not worth 5l. and bringing a certificate from a counsellor at law, that he believeth him to have cause of suit, he shall by the 11 *H. 7. c. 12.* have original writs and subpoenas gratis, and counsel and attorney assigned him without fee: and by 23 *H. 8. c. 15.* he shall, when plaintiff, be excused from costs, but shall suffer other punishment at the discretion of the judge. And it was formerly usual to give such paupers, if nonsuited, their election, either to be whipped, or pay the costs; though the practice is now disused; and *Holt* chief justice said, he had no officer for it, and he never knew it done. 3 *Black.* 400. 2 *Salk.* 506.

And it seems agreed, that a pauper may recover costs, though he pay none; for although the counsel and clerks are bound to give their labour to him, yet they are not bound to give it to his antagonist. 3 *Black.* 400.

On an indictment, the defendant may be admitted to defend in *forma pauperis*; for though it is not within the statute of *Hen. 7.* which relates to civil suits only, yet it may be reasonable to do it on indictments at common law, where the prosecutor (who can have no costs) is not prejudiced. *Str.* 1041.

And by the several stamp acts, persons admitted to sue or defend in *forma pauperis* shall not be liable to the duties on stamped paper or parchment.

FORMEDON upon an alienation by tenant in tail, whereby the estate tail is discontinued, and the remainder or reversion is by failure of the particular estate displaced, and turned into a mere right, the remedy is by action of (*formedon secundum formam doni*), because the writ doth comprehend the form of the gift; which is in the nature of a writ of right, and is the highest action that tenant in tail can have. For he cannot have an absolute writ of right, which is confined only to such as claim in fee simple; and for that reason this writ of *formedon* was granted him by the statute of 13 *Ed. 1. c. 1.* called the statute *de donis*.

This writ is distinguished into three species; a *formedon* in the descender, in the remainder, and in the reverter.

A writ of *formedon in the descender* lieth, where a gift in tail is made, and the tenant in tail aliens the lands intailed, or is disseised of them, and dies; in this case the heir in tail shall have this writ of *formedon in the descender* to recover these lands so given in tail, against him who is then the actual tenant of the freehold.

A *formedon in the remainder* lieth, where one giveth lands to another

another for life or in tail, with remainder to a third person in tail or in fee; and he who hath the particular estate dieth without issue inheritable, and a stranger intrudes upon him the remainder, and keeps him out of possession; in this case, the remainder man shall have his writ of *formedon in the remainder*.

A *formedon in the reverter* lieth, where there is a gift in tail, and afterwards by the death of the tenant in tail without issue of his body the reversion falls in upon the donor, his heirs, or assigns; in such case the reversioner shall have this writ to recover the lands. 3 *Black.* 191.

But these writs are now seldom brought, except in some special cases, where it cannot be avoided; and the trial of titles by *ejectment* is now the usual method, which is done with much less trouble and expence.

FORNICATION, is the act of intontinency in single persons; for if either party is married, it is adultery; the spiritual court hath the proper cognizance of this offence: but formerly, the courts leet had power to inquire of and punish fornication and adultery; in which courts the king had a fine assessed on the offenders, as appears by the book of Domesday. 2 *Inft.* 488.

FORPRISE, *taken beforehand*; is a word frequently used in leases and conveyances, implying an exception or reservation.

FORTIORI, *a fortiori*, or *multo fortiori*, is an argument often used by *Littleton*, to this purpose; if it be *so* in a feoffment passing a new right, *much more* is it for the restitution of an antient right. *Co. Litt.* 253. 260.

FORTLICE, a fortified place.

FORTUNE-TELLING. If any person shall pretend to exercise any kind of witchcraft, sorcery, enchantment, or conjuration, or undertake to tell fortunes, he shall be imprisoned for a year, and be set on the pillory once in every quarter of that year, and further bound to the good behaviour as the court shall award. 9 *G. 2. c. 5.*

FORTY-DAYS COURT. The court of *attachment* or *wood-mote*, held before the verderers of the forest once in every forty days, to inquire concerning all offenders against vert or venison. 3 *Black.* 71.

FOSSA, a ditch full of water, wherein women committing felony were drowned: it has been likewise in antient writings used for a grave. *Jacob. Dist.*

FOSSATURA, a work done by tenants in *digging* ditches or trenches.

FOSSEWAY, was antiently one of the four principal highways in *England*, leading through the kingdom, supposed to be dug and made by the *Romans*, and having a ditch on one side. *Coruel.*

FOURCHER, (Fr.) signifies a putting off or delaying of an action; which is chiefly when an action is brought against two, who, being jointly concerned, are not to answer till both appear; and they agree not to appear both in one day; whereupon the appearance of the one excusing the default of the other, he has day over to appear with the other, and at that day the other appears, but he that appeared before doth not to have another day by the adjournment of the party who then appeared.

By stat. of *West. 1. c. 42.* coparceners, jointenants, &c. may not *furch*, by *essoign*, to essoign severally; but shall have only one essoign, as one sole tenant: and 23 *H. 6. c. 2.* the defendants shall be put to answer without *furching*. 2 *Inst.* 250.

FRACTION. The law allows of no fraction of a day; as if a thing is to be done on such a day, the law allows all that day to do it in. If an offence be committed, as in case of murder, the year and day shall be computed from the beginning of the day on which the wound was given, and not from the precise minute or hour. 2 *Haw.* 163.

FRANCHISE, or liberty, is a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. 2 *Black.* 37.

Being therefore derived from the crown, it must arise from the king's grant; or, in some cases, may be held by prescription, which presupposes a grant. *Ibid.*

The same identical franchise, that hath before been granted to one, cannot be granted to another; for that would prejudice the former grant, and the priority of grants is to be regarded. *Id.*

To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise for a number of persons to be incorporated and subsist as a body politic, with a power to maintain perpetual succession, and do other corporate acts. Other franchises are, to hold a court leet: to have a manor or lordship, or at least a lordship paramount: to have waifs, wrecks, estrays, treasure-trove, royal-fish, forfeitures, and deodands: to have a court of one's own, or liberty of holding pleas, and trying causes: to have the cognizance of pleas (which is still a greater right), so that no other court shall try causes arising within that jurisdiction: to have a bailiwick, or liberty, exempt from the sheriff of the county, wherein the grantee only, and his officers, are to execute all process: to have a fair or market, with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like: to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty. *Id.*

All franchises or liberties, being derived from the crown, are there-

therefore extinguished if they come to the crown again by escheat, forfeiture, or otherwise.

Forfeiture may accrue either by *misuser*, or *non-user*. 1. By *misuser*; as by keeping a fair or market otherwise than it is granted; as keeping it on two days, when one only is granted; or keeping it upon a *Monday*, when it is granted to be kept on a *Wednesday*; or for extorting fees, and such like. 2. By *non-user*; for if one hath liberties, and doth not use them within memory, they are lost. But non-user of a market is no forfeiture. 9 *Co.* 50.

When a man claims or uses a franchise or liberty which he ought not to have, it is said to be an *usurpation* upon the king; and a writ of *quo warranto*, or a writ in the nature of a *quo warranto*, may be brought for that, as well as upon a misuser or non-user.

FRANKALMOIGN, free-alsms, is a tenure, whereby a religious corporation, aggregate or sole, holdeth lands of the donor, to them and their successors for ever. The service which they were bound to render for these lands was not certainly defined; but only in general to pray for the souls of the donor, his ancestors, and successors; and therefore they did no fealty (which is incident to all other services but this) because this divine service was of a higher and more exalted nature. This is the tenure by which almost all the ancient monasteries and religious houses held their lands; and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations, hold them at this day; the nature of the service being upon the reformation altered, and made conformable to the doctrine of the church of *England*.

So great regard was there shewn to religion, and religious men, in ancient times, that the tenants in frankalmoign were discharged of all other services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions. And even at present, this is a tenure of a nature very distinct from all others, being not at all feudal, but merely spiritual; for, if the service be neglected, the law gives no remedy, by distress, or otherwise, to the lord of whom the lands are holden, but merely a complaint to the ordinary or visitor to correct it: wherein it materially differed from what was called tenure by *divine service*, in which the tenants were obliged to do some special divine services in certain, as to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called *frankalmoign*, or *free-alsms*. 2 *Black.* 101.

FRANKING LETTERS. The privilege of letters coming free of postage to and from members of parliament, was claimed

by the house of commons in 1660, when the first legal settlement of the present post-office was made; but afterwards dropped, upon a private assurance from the crown, that this privilege should be allowed the members; and, accordingly, a warrant was constantly issued to the post-master-general, directing the allowance thereof, to the extent of two ounces in weight, till at length it was expressly confirmed by statute 4 G. 3. c. 24. with many new regulations.

And by 24 G. 3. c. 37. s. 7. no letters or packets shall be exempted from postage, except such, not exceeding two ounces weight, as shall be sent during the sitting of parliament, or within 40 days before or after any summons or prorogation, and whereon the whole superscription shall be of the hand-writing of the member directing the same; and shall have his name indorsed thereon, together with the name of the post-town from which the same is intended to be sent; and the day, month, and year, when put into the office (the day of the month to be in words at length); and the same shall be put into the office on the day of the date thereof.

And no letter to any member of either house of parliament shall be exempted, unless directed to such member at the place where he shall actually be at the time of the delivery thereof, or at his usual place of residence in *London*, or at the house of parliament, or the lobby of such house of which he is a member.

Also the said statute of 4 G. 3. c. 24. exempt from postage, printed votes or proceedings in parliament, or printed newspapers, sent without covers, or in covers open at the sides, signed on the outside by any member of parliament, or directed to a member at any place whereof he shall have given notice to the post-master-general.

Also clerks in the public offices may continue to frank votes and newspapers as heretofore, provided they be sent without covers, or in covers open at the sides.

FRANK-MARRIAGE, *liberum maritagium*, is where tenements are given by one man to another, together with a wife who is daughter or kinswoman of the donor, to hold in *frank-marriage*. By which gift, though nothing but the word *frank-marriage* is expressed, the donees shall have the tenements, to them and the heirs of their two bodies begotten; that is, they are tenants in special tail. It is called *frank* or *free* marriage, because the donees are liable to no service but fealty. But this is now entirely out of use. 2 *Black.* 115.

FRANKPLEDGE, was anciently a certain number of *freemen*, who became *pledges* or sureties for each other's good behaviour. In order whereunto, by the laws of king Alfred, it was ordained, that all freemen should cast themselves into several companies, by ten in each company, and that every of those ten men

of

of the company should be surety and pledge for the forthcoming of his fellows; so that if any harm were done by any of those ten against the peace, the rest of the ten should be amerced, if he of their company that did the harm should fly, and were not forthcoming to answer to that wherewith he should be charged. And every of those companies, consisting of ten men, with their families, was therefore call a *tithing*, and were to meet together once a year, and be viewed, and examined how the peace had been kept; which meeting was called the *view of frankpledge*, and is now no other than what is called the *leet* court. And as ten times ten do make an hundred, so it was ordained that ten of those companies, or pledges, should meet together for their matters of greater weight; therefore that general assembly was; and yet is, called the *hundred court*. *Lamb. Constab.*

FRAUD:

1. *Of fraud in general.*
2. *Of fraudulent alienations to defeat creditors or purchasers.*
3. *Concerning the statute of frauds and perjuries.*

1. *Of fraud in general.*

COVIN and fraud, in many cases (saith lord Coke), to do a wrong, doth choke a mere right; and the ill manner doth make a good matter unlawful. *1 Inst.* 357.

Where a man takes an unreasonable advantage against a necessitous heir, by drawing him into an agreement for a small sum at present, for a large sum to be paid on the death of his ancestor, a court of equity will relieve. *2 Atk.* 135.

But if a person will enter into a hard bargain with his eyes open, equity will not relieve him upon this footing only, unless he can shew fraud, or some undue means made use of to draw him into such agreement. *2 Atk.* 251.

But if a bargain be such as no man in his senses would make, a court of law will set it aside. As in the case of *Jones and Morgan* (*1 Lev.* 111.), an action was brought upon a promise to pay for a horse, one barley corn for the first nail, and double every nail further; and averred, that there were 32 nails in the shoes of the horse, which doubling every nail, came to 500 quarters of barley. At the trial at *Hereford* assizes, the judge (*Hide*) directed the jury to give no more than the real value of the horse in damages, being 8 *l.*, and so they did. *1 Willf.* 295.

Where an unconscionable bargain is made with an infant before he comes of age, and a note of hand is taken from him immediately on his coming of age, equity will order it to be cancelled. *2 Atk.* 25.

A consideration of some sort or other, is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement

ment to do or pay any thing on one side, without any compensation the on other, is totally void in law; and a man cannot be compelled to perform it: as if one promises to give another 100*l.*, in this case nothing is contracted for or given on the one side, and therefore there is nothing binding on the other. 2 *Black.* 445.

But as this rule was principally established to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned, it therefore doth not hold in some cases, where such promise is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration, in order to evade the payment; and courts of justice will support these, as against the contractor himself, but not to the prejudice of creditors, or strangers to the contract. *Ibid.*

And generally, a voluntary conveyance is held fraudulent against a subsequent purchaser for a valuable consideration. 3 *Atk.* 412.

A young man gave a note to a girl in this form, "Then borrowed and received of *A. B.* the sum of 20*l.*, which I promise never to pay:" It was held by the lord chief justice *Parker*, on the northern circuit, that an action for this money did well lie, upon the lending on one side and borrowing on the other, notwithstanding the words in the conclusion. 2 *Atk.* 32.

2. *Fraudulent alienations to defeat creditors or purchasers.*

By the 13. *El. c. 5.* "All conveyances of lands or goods, to defraud creditors and others of their just debts, damages, forfeitures, heriots, or mortuaries, shall be void as to them: Provided, that this shall not extend to purchasers *bona fide*, upon good consideration, not having notice of the fraud at the time of the conveyance."

And by the 27 *El. c. 4.* "All conveyances of lands to defraud purchasers shall be void; but with a proviso as before, that this shall not extend to purchasers on good consideration and *bona fide*. And if lands be conveyed with condition of revocation or alteration, and afterwards sold for good consideration, the former conveyance shall, with respect to the first vendees, be void."

No deed shall be deemed to be made *bona fide*, which is accompanied with any *trust*; as if a man makes a gift of his goods to one of his creditors in satisfaction of his debt, but in trust that the donee shall favour him, or permit him or some other to possess them, and to pay the debt when he is able, this is not *bona fide*. 3 *Co.* 81.

If a man conveys his estate to the use of himself for life, with power to mortgage such part as he think shall fit, remainder to trustees

tees to sell and pay all his debts, but continues in possession and keeps the deed, and afterwards becomes indebted by bond, judgment and simple contract; this deed is fraudulent as against creditors by bond and judgment, who, having no notice of the settlement, shall not come in on average only with the simple contract creditors. 2 *Vern.* 510.

Every *voluntary* conveyance is not fraudulent, but *prima facie* it is presumed to be so against purchasers, unless the contrary be made appear. *Cha. Ca.* 100.

But if a man makes a voluntary conveyance in consideration of natural affection, and is not at that time indebted to any, nor in treaty with any for the sale of the lands, such conveyance hath no badge of fraud; but otherwise it is, if he be indebted, or in treaty for the sale of the lands; and there is scarcely an instance, where the person conveying was indebted at the time, that the conveyance hath not been deemed fraudulent against creditors.

1 *Atk.* 15. 2 *Vez.* 11.

And where there is a voluntary conveyance made, and afterwards a subsequent conveyance for valuable consideration, though there be no fraud in that voluntary conveyance, nor the person making it at all indebted, yet such mere voluntary conveyance is void at law, by the subsequent purchase for valuable consideration. 2 *Vez.* 10.

By the 3 *H. 7. c. 4.* all deeds of gift of goods and chattles made of trust, to the use of the person that made the deed, shall be void.

If a man that is a debtor, makes a deed of gift of all his goods, to prevent the taking of them in *execution* for his debts, it is void as against creditors; but against himself, his own executors or administrators, or any man to whom he shall after convey them, it is good. *Bacon's Use of the Law*, 62.

But although a man fears an execution against his goods, yet he may sell them outright for money, at any time before the execution served; provided there be no reservation of trust, as that on paying the money he shall have the goods again, for that trust proves a fraud to prevent the execution. *Id.*

But after the writ of execution is delivered to the sheriff, such sale shall not bind the property.

If a man is *indicted*, and gives away his goods to prevent a forfeiture, the king shall have them upon an attainder or conviction; otherwise, if he sells them to one for a valuable consideration who had no notice of the indictment. 3 *Salk.* 174.

Marks or badges of fraud in a gift or grant of goods are, if it be general of *all* his goods without exception of some things of necessity; if the donor still possesses and uses the goods; if the deed be made secretly; if it be a trust between the parties; or if it be made pending the action. And therefore lord *Coke* advises, when

when a gift is made in satisfaction of a debt by one who is indebted to others also, that it be made, 1. In a public manner, before neighbours, and not in private. 2. That the goods be appraised by honest people to the full value, and the gift made in satisfaction of the debt. 3. That immediately after the gift, the donee take possession of them; for the continuance of the possession is a sign of a trust. 3 Co. 80.

Courts of equity, and courts of law, have a concurrent jurisdiction to suppress and relieve against fraud. What circumstances and facts amount to fraud, is properly a question of law. But the interposition of equity is often necessary for the investigating truth, and to give more complete redress. *Bur. Mansf.* 396.

3. Concerning the statute of frauds and perjuries.

By the 29 C. 2. c. 3. " All leases, estates, interests of freehold, or terms of years, or any uncertain interest out of lands, made by livery of seisin only or by parol, and not put in writing, and signed by the parties or their agents authorized in writing, shall have the effect of leases or estates at will only, any consideration for making such parol lease or estate notwithstanding. *f.* 1. Except all leases, not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord shall amount to two thirds at least of the full improved value of the thing demised." *f.* 2.

" And no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, shall be granted or surrendered, unless it be by deed, or note in writing, signed by the party or his agent in writing, or by act and operation of law." *f.* 3.

" And no action shall be brought, (1) whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or (2) whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or (3) to charge any person upon any agreement made upon consideration of marriage; or (4) upon any contract or sale of lands, or any interest therein; or (5) upon any agreement that is not to be performed within one year from the making thereof; unless the agreement, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some person by him lawfully authorized." *f.* 4.

" And all devises of lands shall be in writing, and signed by the devisor, and attested and subscribed in his presence, by three or four credible witnesses." *f.* 5.

" And all declarations or creations of trusts of lands shall be in writing, signed by the party who is by law enabled to declare

“clear such trust, or by his last will; except such trusts as shall arise or result, or be transferred or extinguished by act or operation of law. And all assignments of trusts shall also be in writing, signed by the party, or by his last will.” *f.* 7, 8.

9.

“And judgments, as against purchasers, shall be binding only from the time of signing the same, and not by referring back to the first day of the term.” *f.* 13, 14, 15.

“And writs of execution shall bind the property of goods only from the time of delivering the writ to the sheriff; who shall, for the better manifestation of such time, indorse the day and year when he received it.” *f.* 16.

“And no contract for sale of goods for ten pounds or upwards, shall be good, except the buyer shall receive part of the goods, or give something in earnest to bind the bargain, or in part of payment, or some note or memorandum in writing be signed by the parties or their agents lawfully authorized.” *f.* 17.

All leases, &c. On a parol agreement for a lease for a term of years, the lessee entered and enjoyed for some time; and on a bill brought against him to execute a counterpart, he pleaded the statute of frauds; but not allowed, because the agreement was in part carried into execution. *Str.* 783.

Except all leases not exceeding the term of three years. So that a verbal lease will hold for three years, and in this respect hath the advantage of a written lease; for a written lease for three years, or any other term, unless it be upon stamped paper or parchment, will only have the effect of an estate at will; that is, for one year: for by the several stamp acts, such written lease shall not be given in evidence in any court, until it shall have been stamped, and the stamp duty hath been paid, and also an additional sum of 1*o*l. if the lease hath been written upon paper or parchment before it was stamped.

To answer for the debt of another person. If a man promise to a surgeon, that, if he cure such a one of a wound, he will see him paid; this is only a promise to pay, if the other does not: but if he promise to pay the surgeon what he shall deserve for doing it, this is binding upon him without writing. *L. Raym.* 224.

And the distinction is this: where an action will lie against the party himself, there an undertaking by another for performance is within the statute, and is not good unless it be in writing; as if a man say, send goods to such a one, and if he doth not pay you I will: otherwise it is, where an action doth not lie against the party himself; as if a man say, send goods to such a one, and I will pay you. *L. Raym.* 1085, 6.

Upon any agreement made upon consideration of marriage. It is not necessary

necessary that a promise to marry another be in writing; for the statute extends only to *consideration* of marriage. *Str.* 34.

Upon any contract or sale of lands. A letter setting forth that the party had agreed to sell an estate, is not sufficient to take it out of the statute, unless the letter set forth what the agreement was. *Str.* 426.

Trust resulting by operation of law. A trust by operation or construction of law is, where an estate is purchased in the name of one person, and the money is paid by another, this is a resulting trust for him who paid the money; or where a trust is declared only as to part, and nothing is said as to the rest, what remains undisposed of results to the heir at law. *2 Atk.* 71. 150.

No contract for the sale of goods. If a man bespeak goods, and after they are made, refuses to take them, this is not within the statute, though no note was given for the money, nor any earnest paid; for the statute only relates to actual contracts for the sale of goods, where the buyer is immediately answerable, and the seller is to deliver the goods immediately. *Str.* 506.

FRAXINETUM, a woody ground, where ashes grow.

FREE BENCH, (a free seat,) *frank banc*, is the widow's share of her husband's copyhold or customary lands (in the nature of dower), which is variable according to the customs in particular places. In some manors it is one third, sometimes half, sometimes the whole, during her widowhood, of all the copyhold or customary land which her husband died possessed of. In some places by custom she holds them only during her *chaste* widowhood. In the manors of *East and West Enbourne*, in the county of *Berks*, and the manor of *Torre*, in *Devon*, and other parts of the *West of England*, there is a custom, that, when a copyhold tenant dies, his widow shall have her free bench in all the customary lands, while she continues sole and chaste; but if she commits incontinency, she forfeits her estate: yet, nevertheless, on her coming into the court of the manor, riding backwards on a black ram, with his tail in her hand, and saying the words following, the steward is bound by the custom to re-admit to her free bench. The words are these:

Here I am,
Riding upon a black ram,
Like a whore as I am;
And for my crincum crancum
Have lost my bincum bancum,
And for my tail's game,
Have done this worldly shame:

Therefore, I pray, Mr. Steward, let me have my lands again.—*Cowel.*

It is a kind of penance among jocular tenures and customs, by way of atoning for the offence committed. *2 Black.* 122.

FREE

FREE CHAPEL, is so called from its being free or exempt from the jurisdiction of the ordinary. Most of the free chapels were built upon the manors and ancient demesnes of the crown, whilst in the king's hands, for the use of himself and his retinue when he came to reside there. And when the crown parted with those estates, the chapels went along with them, and retained their first freedom. But some lords having had free chapels in manors that do not appear to have been ancient demesne of the crown, such are thought to have been built and privileged by grants from the crown. *Tanner's Not. Monast.* Pref. These chapels are visitable by the king, and not by the ordinary; which office of visitation is executed for the king by the lord chancellor.

A **FREEHOLD** may be in *deed* or in *law*: a freehold in *deed* is actual seisin of lands or tenements in fee simple, fee tail, or for life. A freehold in *law*, is a right to such lands or tenements before entry or seisin. So there is a *seisin* in *deed*, and a *seisin* in *law*: a seisin in *deed* is, when a corporal possession is taken; a seisin in *law* is, where lands descend before entry, or when something is done which amounts in law to an actual seisin. 1 *Inst.* 31. 266.

Tenant in fee simple, fee tail, or for life, is said to have a freehold, so called because it doth distinguish it from terms of years, chattels upon uncertain interests, lands in villenage, or customary or copyhold lands. 1 *Inst.* 43.

A freehold cannot be conveyed to pais *in futuro*, for then there would be want of a tenant against whom to bring a *præcipe*; and, therefore, notwithstanding such conveyance the freehold continues in the vendor: but if livery of seisin is afterwards given, the freehold from thence passeth to the vendee. 2 *Wilf.* 165.

A man is said to be *seised* of freehold, but to be *possessed* of other estates, as of copyhold lands, leases for years, or goods and chattels.

FREIGHT, Fr. *fret*, signifies the money paid for carriage of goods by sea; or, in a larger sense, it is taken for the cargo or burthen of the ship. Ships are freighted either by the ton, or by the great; and, in respect of time, the freight is agreed for at so much *per* month, or at a certain sum for the whole voyage. If a ship freighted by the great, is cast away, the freight is lost; but if a merchant agrees by the ton, or so much for every piece of commodities, and the ship is cast away, if part of the goods is saved, it is said she ought to be answered her freight *pro rata*: and when a ship is *insured*, and such a misfortune happens, the insured commonly transfer their goods over to the assurers towards a satisfaction of what they make good. *Merchants Compan.*

79.

FRESH FORCE, *frisca fortia*, is a force newly done in any city,

city, borough, or the like: and if a person be disseised of any lands or tenements within such city or borough, he who hath right to the land, by the usage and custom of such city or borough, may bring his assise or bill of *fresh force*, within forty days after the force committed, and recover the lands. *F. N. B.* But this is now out of use, the possession being usually recovered by ejectment.

FRESH SUIT, or pursuit, is the immediate and unintermitted following an offender, as of a robber in case of robbery, of a prisoner in case of prison breaking, or of goods escaped or driven off the premises in case of a distress. The benefit of the pursuit of a felon is, that the party pursuing may have his goods restored to him, which otherwise are forfeited to the king. But if the thief be not apprehended immediately, but it is some time before he is apprehended, yet if the party did what in him lay to take the offender, and notwithstanding that in such case he happened to be apprehended by some other person, it shall be adjudged fresh pursuit. This is in the discretion of the court, though it ought to be found by the jury; and the judges may, if they think fit, award restitution without making any inquisition concerning the same. Where a gaoler immediately pursues a felon, or other prisoner, escaping from prison, it is fresh suit, to excuse the gaoler. And if a lord follow his distress into another's ground, on its being driven off the premises, this is called fresh suit. So where a tenant pursues his cattle that escape or stray into another man's ground. And fresh suit may be either within the view or without. *2 Haw. 169.*

FRIENDLESS MAN, was the old Saxon appellation for him whom we call an *outlaw*; and the reason of his being called so was, because, being out of the king's protection, he was after a certain number of days denied all help of friends: hence there was a mulct or fine called *friendwite* for a man harbouring an outlaw.

FRIER, *frater*, a brother of some religious society.

FRITH, Sax. *peace*. So *frithbrech*, breach of the peace. *Frithgild*, or *frithmote*, the court or place of assembly of the freemen, the moot-hall. *Frithman*, the herdsman who takes care of the stint in the pasture, or to keep the pasture *freed* at certain seasons of the year.

FRUIT. By 37 *H. 8. c. 6. s. 4.* every person who shall bark any fruit tree, shall forfeit to the party grieved, treble damages, by action at the common law; and also 10*l.* to the king. And by 43 *El. c. 7. s. 1.* every person who shall rob any orchard or garden, or dig or pull up any fruit trees, with intent to take the same away (the same not being felony by the laws of this realm), shall, on conviction, before one justice, give to the party such satisfaction for damages as such justice shall appoint; and, in default

default of payment, to be whipped. And with respect to what shall be deemed *felony by the laws of this realm*, the distinction seems to be, that if they be any way annexed to the freehold, as trees growing, or apples growing upon the trees, then the taking and carrying them away is not felony, but trespass only for a man cannot steal a part of the freehold; but if they be severed from the freehold, as wood cut, or apples gathered from the trees, then the taking of them is not a trespass only, but felony.

FUGACIA, a chase.

FUMAGE, is mentioned in Domesday, and is that which is vulgarly called *smoke farthings*, which were paid by custom to the king for every smoke or chimney in the house. It is sometimes used to denote *wood for fuel*, as in an old grant—*Et sint quieti de fumagio et meremio cariendo* (to be free from the carrying of wood either for fuel or timber).

FUNERAL expences are allowed previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of devastation or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased. 2 *Black.* 508.

But in strictness, no funeral expences are allowable against a creditor, except for the shroud, coffin, ringing the bell, parson, clerk, grave-digger, and bearers' fees. 1 *Salk.* 196. And in general it is said that no more than forty shillings in the whole, for funeral expences, shall be allowed against creditors. 3 *Atk.* 249.

FURCA, the gallows. In ancient grants to lords of manors and others, there was often the privilege of *furca et fossa*; that is, of trying and punishing felons, the men by hanging, and the women by drowning. 3 *Inst.* 58. So there was *furca et flagellum*, which was the meanest of all servile tenures; where the bondman was at the disposal of his lord for life and limb.

FURLONG, is a quantity of ground in length, eight of which furlongs make a mile. It is otherwise the eighth part of an acre of land. *Ja. Di.*

FURNAGE (from *furnus*, an oven), is a sum paid to the lord by the tenants who are bound by their tenure to bake at the lord's oven, for their liberty to bake elsewhere. Also the word is used to signify the gain or profit taken for baking.

G A I

GAINAGE (*wainagium*), the plough and furniture for carrying on the work of tillage. It was applied only to arable land, when they had it in occupation, and had nothing from it for their sustenance but what they raised by their own labour, nor any other title but at the lord's will. And *gainer* is used by *Bracton* for a *sokeman* that hath such land in occupation. The word *gain* is mentioned by *Wesl.*, where he says, "land in demesne, but not in gain." And in the statute 51 *Hen.* 3. there are these words, "no man shall be distrained by the beasts that gain his land." By the *magna charta*, c. 14. *gainage* signifies no more than the ploughtackle or implements of husbandry, without any respect to gain or profit; where it is said of the knight and freeholder, he shall be amerced *salvo contenemento suo*, the merchant or trader *salva merchandiza sua*, and the villein or countryman *salvo wainagio suo*. In which cases it was, that the merchant or husbandman should not be hindered, to the detriment of the public, or be undone by arbitrary fines; and the villein had his wainage, that the plough should not stand still. For which reason the husbandman at this day is allowed a like privilege by law, that his beasts of the plough are in many cases not liable to distress.

GALLIGASKINS, wide hose or breeches, having their name from their use by the *Gascoigns*.

GALLIHALFPENCE, a coin brought into this kingdom by the *Genoese* merchants, who trading hither in *galleys*, lived commonly in a lane near *Tower-street*, and were called *galley-men*, landing their goods at *Galley-key*, and trading with their own silver coin called *galley-halfpence*. *Stowe's Survey of London*, 137.

GALLIMAWFRY, a meal of coarse victuals, given to *galley-slaves*.

GALOCHEs, a kind of shoe, worn by the *Gauls* in dirty weather; mentioned in the statute 14 & 15 *H.* 8. c. 9.

GAME. It is a maxim of the common law, that such goods of which no one can claim any property do belong to the king by his prerogative; and hence all those animals *feræ natura*, which come under the denomination of game, are styled in our laws, his *majesty's* game; and that which he hath, he may grant to another; and, consequently, another may prescribe to have the same, within such a precinct or lordship. And hence comes the right of the lords of manors or others, by grant or prescription, unto the game within their respective liberties. 2 *Bac. Abr.* 613.

By

By the statute of 22 & 23 C. 2. c. 25. every person, not having an estate of inheritance of 100*l.* a year, or leasehold for 99 years or upwards of 150*l.* a year (other than the son and heir apparent of an esquire or other person of higher degree, and the owners and keepers of forests, parks, chafes, or warrens), is declared to be a person not allowed, by the laws of this realm, to have or keep any guns, bows, dogs, snares, nets, or other engines, for the taking and killing of game.

The preservation of the game is provided for by a great variety of acts of parliament, upwards of forty in number.

And duties have lately been imposed on certificates to be issued to persons who shall use any dog, gun, net, or other engine for the taking or destroying of game; and to game-keepers; for which see *Burn's Just.* title *Game*.

GAMEKEEPER. All lords of manors or other royalties, not under the degree of an esquire, may appoint a gamekeeper within their respective manors, with power therein to kill game. But there shall be only one gamekeeper, with such power, within any one manor; and his name shall be entered with the clerk of the peace where such manor lies. And he shall also be a servant of such lord, or immediately employed by him to kill game for the sole use of the lord, and not otherwise; that is, unless qualified in his own right to kill game.

GAMING is said not to be an offence at common law, but only an offence prohibited by statute: but gaming houses are held to be nuisances, as drawing together a number of idle and disorderly people. 1 *How.* 198.

To restrain this practice of gaming, many statutes have been enacted. By 33 *H.* 8. c. 9. no person shall keep any common house or place of bowling, coying, cloysh, cayls, half bowl, tennis, dicing-table, or carding, or any unlawful game, on pain of 40*s.* a day; and every person resorting thither, and playing, shall forfeit 6*s.* 8*d.* And artificers, husbandmen, servants, and the like inferior persons, are prohibited to play at any such like games out of *Christmas*; or in *Christmas*, except only in their masters' houses.

By 16 C. 2. c. 7. if any person shall lose above 100*l.* at one time or sitting, and shall not pay the same at that time, he shall not be obliged to make it good; and the winner shall forfeit treble value, half to the king and half to him that shall sue.

By 9 *An.* c. 14. if any person shall at one time or sitting lose to the value of 10*l.* and pay down the same, he may recover the same back again with costs, on suit within three months; and if he shall not sue in that time, any person may sue for and recover the same and treble value. And all securities given for money won by playing shall be void. And if any person shall by *fraud*, or other ill practice, win any sum, he shall forfeit five times

times the value, and be deemed infamous, and suffer corporal punishment as in case of perjury. And if any person shall assault, or challenge to fight, any other person, on account of money won by gaming, he shall forfeit all his goods and chattels, and be imprisoned for two years.

And by several statutes in the reign of *Geo. 2.* all private lotteries, by tickets, cards, or dice (and particularly the games of faro, basset, ace of hearts, hazard, passage, roly poly, and all other games with dice, except backgammon), are prohibited under the penalty of 200*l.* for him that shall erect such lottery; and 50*l.* a time for any that shall play.

GANG DAYS, days for perambulation of the boundaries of parishes; from the Saxon *gangan*, to go.

GAOL AND GAOLER :

1. The keeping of gaols is incident to the office of sheriff, and therefore he hath the appointment of the gaoler, for whose acts or omissions the sheriff, in many cases, is answerable; and therefore it behoves him to put in such a person as is sufficient.

2. For the sustentation of prisoners in the gaol, the justices of the peace in sessions shall settle an allowance, which shall be paid out of the general county rate. 14 *Eliz. c. 5.*

3. By 24 *G. 2. c. 40.* no licence shall be granted for retailing spirituous liquors in any gaol, nor shall any spirituous liquors be brought into or used therein. And by the 24 *G. 3. c. 54.* no gaoler, or person in trust for him, shall be capable of being licensed to sell any wine, ale, or other liquors, or have any beneficial interest or concern whatsoever in the sale or disposal of any liquors of any kind; or in any tap-house, tap-room, or tap, on the penalty of 10*l.*

4. Debtors and felons shall not be kept or lodged in one room. 22 *C. 2. c. 20.*

5. For preservation of the health of prisoners, the walls and cielings both of the cells and wards shall be scraped and white-washed once a year at least, and the gaol shall constantly be kept clean, and supplied with fresh air by hand ventilators, or otherwise. 14 *G. 3. c. 59.*

6. If the gaoler voluntarily suffer a prisoner to escape, if it is for a criminal matter, he shall be punished in the same manner as the prisoner ought to have been who escaped, and the sheriff also may be punished by fine and imprisonment; if the gaoler negligently suffers him to escape, the court may charge either the sheriff or gaoler. If the gaoler suffers an escape in a civil case, the sheriff or gaoler, at the election of the party, shall answer damages for it to the party injured. 2 *Haw. 135.*

7. If the gaoler suffers a debtor, though confined only upon mesne process, to go at large, although the prisoner returns the same day, yet the gaoler is liable to an action upon the case for damages;

damages ; for after the gaoler hath permitted the escape, he cannot detain him again for the same matter ; and if it were otherwise, every gaoler would suffer his prisoner to go at large, as much as if he had never been arrested. 2 *Wilson*. 294.

GAOL DELIVERY. By the law of the land, that men might not be long detained in prison, but might receive full and speedy justice, commissions of gaol-delivery are issued out, directed to two of the judges, and the clerk of assise associate ; by virtue of which commission they have power to try every prisoner in the gaol, committed for any offence whatsoever. By divers ancient statutes no man was to act as judge in the county where he was born or inhabited ; but by the 12 G. 2. c. 27. he may act in the commission of *gaol delivery*, and of *oyer and terminer* in any county in *England* ; but he is still restrained in civil causes of *assise* and *nisi prius*. 4 *Black*. 269.

GARBA, (Fr. *garbe*,) signifies a sheaf or bundle of corn, faggots, or the like. Thus *decima garbarum*, is the tithe of the sheaves of corn, or other grain. *Garba sagittarum*, is a sheaf of arrows, containing in number twenty four. *Garb*, in *heraldry*, is a sheaf of wheat.

GARCIO, Fr. *garçon*, a groom or servant.

GARNISHMENT, a warning ; as *garnisher le court* is to warn the court, and *reasonable garnishment* is where a person hath reasonable warning.

GARNITURE, is a furnishing or providing ; as garniture of arms or implements of war, is a providing of them for the defence of a town or castle.

GARSUMA, *gersuma*, a rent or fine paid by the tenant to the lord of the manor.

GARTER, is the ensign of an order of knights, instituted by king *Ed. 3*. The word is also understood of the principal king at arms, attending upon the knights thereof, created by king *Hen. 5*.

GARTH, a small inclosure ; so a *fishgarth* is a place inclosed for the taking of fish.

GAVEL, *gabel*. Sax. a tax or tribute.

GAVELKIND, from the Saxon *gyfe-eal-kyn*, given to all the kindred, was a tenure or custom annexed and belonging to lands in *Kent*, *Wales*, and other places, which received not the laws of the Conqueror ; whereby the lands of the father were equally divided at his death among all his sons ; and, in more ancient times still, amongst all the children male and female. But now all, or most of these lands, both in *Kent* and *Wales*, are by several acts of parliament disgavelled, and made descendible according to the course of the common laws.

Mr. *Selden* was of opinion, that gavelkind, before the *Norman* conquest, was the general custom of the realm.

One property of gavelkind was, that it did not escheat in case of an attainder and execution for felony; their maxim being, "the father to the bough, the son to the plough."

GAVELMAN, a tenant liable to tribute; so *gavelmed*, a service of mowing the lord's meadow.

GELD, (*geldum*,) a fine or compensation for an offence. Hence in our ancient laws, *weregeld* was used for the value or price of a man slain, and *orsgeld* of a beast. It also signifies rent, money, or tribute; so, in many ancient charters, there are immunities granted from *geld*, and *danegeld*, and *borngeld*, and many such like. So *neatgeld* was a rent paid in cattle; *angeld* was the single value of a thing; *twigeld*, double value; and so of the rest.

GEMOTE, Sax. an assembly. So *wittena gemote* was an assembly of wisemen, the parliament.

GENERALE, the single commons, or ordinary provision in the religious houses, being their *general* allowance, distinguished from their *pittantie*, which were pittances added on extraordinary occasions.

GENERAL ISSUE, is that which traverses and denies at once the whole declaration, without offering any *special matter* whereby to evade it: and it is called the general issue, because, by importing an absolute and general denial of what is alledged in the declaration, it amounts at once to an issue; that is, a fact affirmed on one side, and denied on the other. 3 *Black.* 305.

GENTLEMAN, according to *Sir Edward Coke*, is one who bears coat armour, the grant of which adds gentility to a man's family. 2 *Inst.* 667.

But in modern acceptation, the name is not tied up to so much strictness; and *Sir Thomas Smith's* description of a gentleman seems to come much nearer to the matter; who says,—As for gentlemen, they are made good cheap in this kingdom; for whosoever studies the laws of the realm, who studies in the universities, who professeth liberal sciences, and (to be short) who can live idly and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman. 1 *Black.* 406.

GENTLEWOMAN, is a good addition of the state and degree of a woman, as gentleman is for that of a man; and if a gentlewoman be named spinster in any original writ or indictment, she may abate and quash the same; for she hath as good a right to that addition as baroness, viscountess, marchioness, or duchess, have to theirs. 2 *Inst.* 667.

A **GIFT** of chattels personal is the act of transferring the right and the possession of them; whereby one man renounces, and another immediately acquires, all title and interest therein. 2 *Black.* 440.

This

This may be done either in writing, or by word of mouth attested by sufficient evidence, of which the delivery of *possession* is the strongest and most essential. *Ibid.*

For a parol gift, without some act of delivery, will not alter the property. *Str.* 955.

A free gift is good, without a consideration; as if a man give to another 100*l.* or a flock of sheep, and puts him in possession of them immediately, this is a gift executed, and it is not in the donor's power to retract it: but if it doth not take effect by delivery of immediate possession, it is not properly a gift, but a contract; and this a man cannot be compelled to perform, but upon good and sufficient consideration. 2 *Black.* 441.

A general gift of *all* one's goods, without any exception, even though it be by deed, is liable to suspicion as fraudulent against creditors; for by giving all a man's goods, there seems to be a secret trust and confidence implied, in favour of the donor. 3 *Co.* 80.

GILD, a fraternity or company. See *guild*.

GIST of the action, from the French *gift* (*jacet*), is the cause for which the action *lieth*; the ground and foundation thereof, without which it is not maintainable.

GLASS. By several statutes regulations are made for the making, importing, and exporting of glafs, which is to be under the management of the officers of the customs and excise. And by 24 *G.* 3. *c.* 41. every glafs-maker shall take out a licence annually. And by 27 *G.* 3. *c.* 13. and 27 *G.* 3. *c.* 28. several duties are imposed on glafs imported; and also on glafs made in *Great-Britain*, as set forth in schedules annexed to the act.

GLEANING. It hath been said, that by the common law and custom of *England*, the poor are allowed to enter and glean upon another's ground after the harvest, without being guilty of trespass; and that this humane provision seemed borrowed from the *Mosaical* law. 3 *Black.* 212. *Bur. Mansf.* 1925.

But in the case of *Steele v. Houghton*, *T.* 28 *G.* 3. in the common pleas, it was determined, that no such right exists, or can be claimed as part of the general common law of the land. *Blackstone's Rep.* 51.

GLEBE, is the land which belongs to a church. Glebe lands in the hands of the parson shall not pay tithes to the vicar; nor being in the hands of the vicar shall they pay tithes to the parson; for the church shall not pay tithe to the church. *Degge.* *p.* 2, *c.* 2.

If a parson lease his glebe lands, and do not also grant the tithes thereof; the tenant shall pay the tithes thereof to the parson. *Id.*

And if a parson lets his rectory, reserving the glebe lands, he shall pay the tithe thereof to his lessee. *Gibf.* 661.

If an incumbent sows the glebe land and dies, his executor or administrator shall have the crop. But if his successor be induced before severance thereof from the ground, and before it is carried off, in this case, the successor shall not have the tithe; because, though it was not set out, yet a right to it was vested in the deceased parson by the severance from the ground. 1 *Roll's Abr.* 655.

GLOVES. By the 25 G. 3. c. 55. duties are imposed upon gloves, and on licences to be taken out by dealers therein.

GODBOTE, Sax. an ecclesiastical fine, paid for offences against religion.

GODGILD, a tribute or offering to *God* or his service.

GOOD BEHAVIOUR. Surety of good behaviour is near of kin to surety of the peace, but is of somewhat a larger extent. A man may be compelled to find sureties both for the peace and good behaviour, and yet the good behaviour includes the peace; for he that is bound to the good behaviour is therein also bound to the peace. *Dalt. c. 122.*

GOOD CONSIDERATION, is that of blood or natural love and affection, when a man grants an estate to a near relation; a *valuable* consideration, is that of money, marriage, or the like; which the law esteems an equivalent for the grant. 2 *Black.* 297.

GORCE, Fr. *gort*, a wear or dam whereby the passage of boats is obstructed. 1 *Inst.* 5.

GRACE. Acts of parliament for a general and free pardon, are commonly called *acts of grace.*

GRAIL, *gradale*, a *gradual* or book, containing some of the offices of the Romish church.

GRAND ASSISE, was an extraordinary trial by jury, instituted by king *Hen. 2.* by way of alternative offered to the choice of the tenant or defendant in a writ of right, instead of the barbarous custom of trial by battel. For this purpose, a writ *de magna assisa eligenda* is directed to the sheriff, to return four knights, who are to chuse twelve other knights to be joined with them; and these sixteen form the grand assise, or *great jury*, to try the right between the parties. 3 *Black.* 351.

GRAND CAPE, is a writ on a plea of land, where the tenant makes default in appearance at the day given, for the king to take the land into his own hands.

GRAND JURY. The sheriff of every county is bound to return, to every commission of oyer and terminer and of gaol delivery, and to every session of the peace, 24 good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute, all those things which, on the part of our lord the king, shall then and there be commanded them. They ought to be freeholders; but to what amount is not limited by law.

Upon

Upon their appearance, they are sworn upon the grand jury, to the amount of 12 at the least, and not more than twenty-three, that twelve may be a majority. 4 *Black.* 302.

They are only to hear evidence on behalf of the prosecution; for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire, upon their oaths, whether there be sufficient cause to call upon the party to answer it. *Id.* 303.

GRAND LARCENY. See **LARCENY.**

GRAND SERJEANTY, (*serjeantia, servitium,*) is where a person holdeth his lands of the king by such services as he ought to do in person; as to carry the king's banner, or his lance, or to carry his sword before him at his coronation, or to do other like services: and it is called *grand serjeanty*, because it is a greater and more worthy service than the service in the common tenure of escuage. *Litt.* 153.

GRANT. A grant is the regular method, by the common law, of transferring the property of *incorporeal* hereditaments, or such things whereof no livery of seisin can be had. For which reason all *corporeal* hereditaments, as lands and houses, are said to lie *in livery*; and the others, as advowsons, commons, services, rents, reversions, and such like, lie *in grant.* 2 *Black.* 317.

He that granteth is termed the grantor, and he to whom the grant is made is the grantee.

The grant is usually made in these words, "have given, granted, and confirmed:" and then, by delivery of the deed, the freehold passeth.

A grant differs from a *gift* in this; that *gifts* are always gratuitous, *grants* are upon some consideration or equivalent. 2 *Black.* 440.

Grants may be divided, with respect to their subject matter, into grants of *chattels real*, and grants of *chattels personal.* *Ibid.*

Under the head of *chattels real*, are comprehended all leases for years of land, assignments and surrender of those leases, and all other methods of conveying an estate less than freehold; and are usually expressed to be in consideration of blood, or natural affection, or of five shillings nominally paid to the grantor; and, in case of leases, always reserving a rent, though it be but a peppercorn. Any of which considerations will, in the eye of the law, convert a *gift*, if executed, into a *grant*; if not executed, into a *contract.* *Ibid.*

Grants or gifts of *chattels personal*, are the act of transferring the right and the possession of them, whereby one man renounces, and another man immediately acquires, all title and interest therein; which may be done either in writing, or by words attested by

by sufficient evidence, of which the delivery of possession is the strongest and most essential. But this conveyance, when merely voluntary, is somewhat suspicious; and is usually construed to be fraudulent, if creditors, or others, become sufferers thereby. 2 *Black.* 441.

GREAT TITHES, are the tithes of corn, hay, and wood; all other tithes come under the denomination of small tithes.

GREE, signifies satisfaction; as to make *gree* to the parties, is to *agree* with, or satisfy them for an offence done.

GREEN CLOTH, of the *king's household*, so termed from the *green* cloth on the table, is a court of justice composed of several great officers of the king's household, to which is committed the government and oversight of the king's court, and the keeping of the peace within the verge, &c.

GREENHUE, is every thing that bears a *green* leaf within the forest, which may be covert for the deer. It sometimes signifies a payment in money, for the privilege of cutting green wood in the forest.

GREEN-WAX, is where estreats are delivered to the sheriffs, out of the *exchequer*, under the seal of that court, made in *green-wax*, to be levied in the several counties.

GRESSOM, (*ingressus*), a rent or fine paid to the lord of the manor.

GREVE, Sax. *gerefa*, the same as *reve*, a word of power and authority; as *shire-gerefa*, the sheriff.

GRITH, Sax. *peace*. So *grithbreche*, breach of the peace.

GROSS, *in gross*, absolute, intire, not depending on another; as a *villein in gross*, was such a servile person as was distinct from, and not annexed to, the manor. An *advowson in gross* is spoken of in opposition to an *advowson appendant*, and not separated from the manor.

GROSS-BOIS, great wood, fit for timber.

GROSS, *common in*, is such as is neither *appendant* nor *appurtenant* to land, but is annexed to a man's person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right, and is a separate inheritance, and may be vested in one who has not any ground in the manor. 2 *Black.*

34.

GROUNDAGE, a custom or tribute paid for the standing of a ship in the port.

GUARDIAN. Of the several species of guardians of infants, the first are guardians by *nature*; viz. the father, and (in some cases) the mother of the child; for if an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits. 1 *Black.* 461.

There are also guardians *for nurture*; which are, of course, the father or mother, till the infant attains the age of fourteen years.

years. And in default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education. *Id.*

Next are guardians *in focage*, who are called guardians *by the common law*. These take place only when the minor is intitled to some estate in lands, and then, by the common law, the guardianship devolves upon his next of kin, to whom the inheritance cannot descend. These guardians *in focage*, like those for nurture, continue only till the minor is fourteen years of age; for then, in both cases, he is presumed to have discretion so far as to chuse his own guardian. *Id.*

But by the 12 C. 2. c. 24. any father, under age, or of full age, may, by deed or will, dispose of the custody of his child, either born or unborn, till such child attains the age of 21 years. And this guardian is commonly called a *testamentary* guardian.

A guardian cannot make a lease of lands for longer term than until his guardianship expires; if he does, the lease is void. 2 *Wilson*. 129. 135.

The guardian, ought to apply the estate in his hands to pay the debts of the infant. 1 *Cha. Ca.* 157.

He may pay off the *interest* of any *real* incumbrance, and *principal* of a *mortgage*; but no other real incumbrance. *Prev. Cha.* 137.

The guardian, when the infant comes of age, is bound to give him an account of all that he hath transacted on his behalf. In case of large estates, it is thought prudent sometimes to apply to the court of chancery, and account annually before the officers of that court. 1 *Black.* 463.

A guardian, upon account, shall have allowance of all reasonable costs and expences in all things. And if he receives the rents and profits, and be robbed without his default or negligence, he shall be discharged thereof. 1 *Inft.* 89.

GUARDIAN OF THE SPIRITUALTIES, is he to whom the spiritual jurisdiction of any diocese is committed, during the vacancy of the see. The archbishop is guardian of the spiritualties, on the vacancy of any see within his province; but when the archiepiscopal see is vacant, the dean and chapter of the archbishop's diocese are guardians of the spiritualties.

GUILD (from the *Saxon guildan*, to pay) signifies a fraternity, or company; because every one was to pay something towards the charge and support of the company. The original of these guilds and fraternities is said to be from the old *Saxon* law, by which the neighbours entered into an association, and became bound for each other, to bring forth him who committed any crime, or make satisfaction to the party injured; for which purpose they raised a sum of money among themselves, and put it into

into a common stock, whereout a pecuniary compensation was made, according to the quality of the offence committed. From whence came our fraternities and guilds; and they were in use in this kingdom long before any formal licences were granted for them; though, at this day, they are a company combined together (with orders and laws made by themselves) by the king's licence. *Guilda mercatoria*, or the merchant's guild, is a liberty or privilege granted to merchants, whereby they are enabled to hold certain pleas of land within their own precinct. And *guild-halls* are the halls of those societies, where they meet and make laws for their better government.

GULES OF AUGUST, from *gula*, a *throat*, is the entrance into, or the first day of, that month.

GYPSIES (*Egyptians*) are a kind of commonwealth among themselves of wandering impostors and jugglers, who made their first appearance in *Germany* about the beginning of the sixteenth century, and have since spread themselves over all *Europe and Asia*. About the year 1517, when sultan *Selim* conquered *Egypt*, this people refused to submit to the Turkish yoke, and retired into the deserts, where they lived by rapine and plunder, and frequently came down into the plains of *Egypt*, committing great outrages in the towns upon the *Nile*, under the dominion of the *Turks*: but being at length subdued, and banished from *Egypt*, they dispersed themselves, in small parties, into every country in the known world; and, as they were natives of *Egypt*, a country where the occult sciences, or black art (as it was called) was supposed to have arrived to great perfection, and which, in that credulous age, was in great vogue with persons of all religions and persuasions, they found the people, wherever they came, very easily imposed on. *Mod. Univ. Hist.* vol. 43. p. 271.

In the compass of a very few years, they gained such a number of idle proselytes, who imitated their language and complexion, and betook themselves to the same arts of chiromancy, begging, and pilfering, that they became troublesome, and even formidable, to most of the states of *Europe*. Hence they were expelled from *France* in the year 1560, and from *Spain* in 1591. And the government in *England* took the alarm much earlier; for, in 1530, they are described by the statute 22 H. 8. c. 10. as "outlandish people, calling themselves *Egyptians*, using no craft, or feat of merchandize, who having come into this realm, and gone from shire to shire, and place to place, in great company, and used great, subtil, and crafty means to deceive the people; bearing them in hand, that they, by palmestry, could tell men's and women's fortunes; and so, many times by craft and subtilty, have deceived the people of their money, and also have committed many heinous felonies and robberies." Wherefore they are directed to avoid the realm, and not to return, under pain

pain of imprisonment, and forfeiture of their goods and chattels; and, upon their trials for felony, they shall not be intitled to a jury *de medietate lingue*. And afterwards, it is enacted by 1 & 2 P. & M. c. 4. and 5 El. c. 20. that if any such persons shall be imported into this kingdom, the importer shall forfeit 40*l.*: and if the *Egyptians* themselves remain one month in this kingdom; or if any person, being 14 years old, whether a natural born subject or stranger, which hath been seen or found in the fellowship of such *Egyptians*, or which hath disguised him or herself like them, shall remain in the same one month; the same shall be felony without benefit of clergy. But it is now above a century since any persons were prosecuted for felony upon these acts; and the law now respects them chiefly as rogues and vagabonds, and they are described as such in the vagrant act of 17 G. 2. c. 5. 4 Black. 166.

In *Scotland* they seem to have met with some indulgence; for, in the year 1594, there is a record among the writs of privy seal, whereby king *James* the fifth charges all his sheriffs, stewards, bailies, and other officers, to be assistant to his beloved *John Faw*, lord and earl of *Little Egypt*, in the execution of justice against several of his company who had withdrawn themselves from his obedience, and prohibiting all his subjects to disturb or molest the said *John Faw*, or any of his company, in going about on their lawful business. And it is possible, that from this lord of *Little Egypt*, this kind of strolling people may have received the denomination (which they still retain) of *Fawgang*.

H A B

HABEAS CORPORA JURATORUM, is a writ to the sheriff to have the jurors before the judges at a certain day, to pass on a trial between the parties.

HABEAS CORPUS, is the most celebrated writ in the English law. Of this there are various kinds made use of by the courts at *Westminster*, for removing prisoners from one court into another, for the more easy administration of justice.

The most efficacious of which writs, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his taking and detention, *ad faciendum, subjiciendum, et recipiendum, to do, submit to, and receive* whatsoever the judge or court awarding such writ shall consider in that behalf. It is a high prerogative writ; and

and therefore, by the common law issuing out of the king's bench, not only in term time, but also during the vacation, by a *fiat* of the chief justice, or any of the judges. And the proceedings thereon are regulated by the statute 31 C. 2. c. 2. which, by way of eminence from thence, hath obtained the distinctive appellation of the *habeas corpus* act. By this act, unless the prisoner be committed for treason or felony, (or suspicion thereof,) plainly and specially expressed in the warrant of commitment, he may in open court, the first week of the term, or first day of assize, petition to be tried; and if he shall not be indicted some time in the next term or assize after commitment, he shall, upon motion of the last day of the term or assize, be bailed, unless it appear to the judge upon oath, that the king's witnesses could not be produced within that time, and then, if he is not tried in the second term or assize, he shall be discharged.

In order to obtain an *habeas corpus*, to bring the prisoner before the court, he must first demand of the gaoler a true copy of the commitment, which the gaoler shall deliver in six hours, on pain of 100*l.* Then application is to be made in writing to one of the courts at *Westminster*, or if out of term time, to the lord chancellor, or one of the judges, and a copy of the warrant of commitment delivered, or oath made that it was denied. But if he hath neglected for two terms to apply, he shall not have a *habeas corpus* granted in the vacation.

This being done, the lord chancellor or judges respectively shall grant the writ, returnable immediately; and shall indorse thereon the charges of bringing the prisoner, not exceeding 12*d.* a mile.

Then the writ shall be served on the gaoler, and the said charges tendered to him; and the prisoner shall give bond to pay the charges of carrying him back if he shall be remanded, and that he will not escape by the way.

This done, the gaoler shall, within the times respectively limited by the act, according to the respective distances, bring the body, and certify the cause of commitment. (But after the assizes are proclaimed for the county where the prisoner is detained, he shall not be removed.)

If upon the return it shall appear to the said lord chancellor or judges, that the prisoner is detained on a legal process, order, or warrant, out of some court that hath jurisdiction of criminal matters, or by warrant of a judge, or justice of the peace, for matters for which, by law, he is not bailable, in such case he shall not be discharged.

Otherwise he shall be forthwith discharged, and shall enter into recognizance to appear on his trial; and the writ, and return thereof, and the recognizance, shall be certified into the court where the trial must be. And persons so set at large, shall not be

be recommitted for the same offence, unless by order of court; on pain of 50*l.* to the party grieved.

But persons charged in debt or other action, or with process in any civil cause, after their discharge for a criminal offence, shall be kept in custody for such other suit.

HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, is a writ that issues out of any of the courts of *Westminster-hall*, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court, commanding the inferior judges to produce the body of the defendant, together with the day, and cause of his caption and detainer, (whence the writ is frequently denominated an *habeas corpus cum causa*,) to do and receive whatsoever the king's court shall consider in that behalf. But by the 21 *Ja. c. 23.* no such cause shall be removed, if the debt or damages do not amount to 5*l.*

HABEAS CORPUS AD PROSEQUENDUM, is a writ that issues to remove a man in order to prosecution and trial in the proper county or jurisdiction where the fact was committed.

HABEAS CORPUS AD RESPONDENDUM, is where a man hath a cause of action against one who is confined by the process of some inferior court; in which case, this writ is granted to remove the prisoner to answer this new action in the court above.

HABEAS CORPUS AD SATISFACIENDUM, is a writ where a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution.

HABEAS CORPUS AD TESTIFICANDUM, is where a person is removed in order to give testimony in a cause depending.

HABENDUM (to have), in a deed, is to determine what estate or interest is granted by the deed, the certainty thereof, for what time, and to what use. It sometimes qualifies the estate, so that the general implication of the estate, which, by construction of law, passeth in the premises, may by the *habendum* be controlled: in which case, the *habendum* may lessen or enlarge the estate, but not totally contradict, or be repugnant to it. As if a grant be to one and the heirs of his body, to have to him and his heirs for ever, here he hath an estate tail by the grant, and by the *habendum* he hath a fee-simple expectant thereon. But if it had been in the premises to him and his heirs, to have to him for life, the *habendum* would be utterly void; for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away, or divested by it. 2 *Black. 298.*

HABERE FACIAS SEISINAM, is a writ of execution directed to the sheriff, commanding him to give to the plaintiff possession of a freehold; if it is a chattel interest, and not a freehold,

freehold, then the writ is intituled *habere facias possessionem*. 3 Black. 412.

In the execution of these writs, the sheriff, if needful, may take with him the power of the county, and may justify breaking open doors, if the possession be not quietly delivered; but if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of a door, in the name of seisin, is sufficient. *Id.*

HACHIA, a *hack*, pick, or instrument for digging.

HACKNEY COACHES AND CHAIRS. By several acts of parliament, regulations are made for licensing hackney coaches not exceeding 1000, and chairs not exceeding 400, within the bills of mortality; and the same shall be distinctly marked on each side.

And certain duties are imposed on hackney coaches and chairs, according to the time they are employed, or the distance they travel. For which, see *Burn's Just.* title *Hackney Coaches and Chairs*.

And drivers and others misbehaving, are to be punished by the commissioners and justices of the peace.

HÆRETICO COMBURENDO, is a writ that lay against an heretic, whereby the person convicted of heresy was delivered over to the secular power; and upon certificate of such conviction unto the court of chancery, this writ issued to *burn* the offender. And this law continued till the latter end of the reign of king *Charles* the second, when, by the 29 C. 2. c. 9. the writ commonly called *breve de hæretico comburendo*, with all proceedings thereupon, and all punishment by death in pursuance of any ecclesiastical censures, shall be utterly taken away and abolished: provided, that this shall not extend to take away, or abridge, the ecclesiastical jurisdiction of protestant archbishops, bishops, or any other judges of any ecclesiastical courts, in cases of atheism, blasphemy, heresy, or schism, and other damnable doctrines and opinions; but they may proceed to punish them by excommunication, deprivation, degradation, and other ecclesiastical censures, not extending to death, as they might have done before.

HAIR-POWDER is not to be mixed with alabaster, talke, plaster of *Paris*, whiting, lime, or other thing of the like nature, under certain penalties. And by 27 G. 3. c. 13. a duty is imposed on the importation thereof. And by 26 G. 3. c. 49. a licence is to be taken out by persons dealing in perfumed hair-powder. And a duty is also laid upon all perfumed hair-powder according to the value thereof.

HALF BLOOD, is where brothers or sisters do not descend from the same couple of ancestors; as where a man marries a woman, and hath issue by her a son; and the wife dying, he marries another woman, by whom he hath also a son; now these two sons, though they are called brothers, are but brothers of the

the half blood, because they had not both one father and mother : and therefore by law, they cannot be heirs to one another ; for he that claims as heir to another by descent, must be of the whole blood to him from whom he claimeth ; and if there be no heir of the whole blood, the land shall escheat.

But, with respect to personal estate, the law is otherwise ; for the statute of distribution, 22 & 23 G. 2. c. 10. requiring an intestate's estate to be divided amongst every of the next of kindred in equal degree ; and brothers and sisters of the half-blood, being in the same degree of kindred with brothers and sisters of the whole blood, the half blood are allowed by our law to come in for an equal share.

HALFENDEAL, the moiety or *half* of a thing ; as *farding-deal* is a quarter or fourth part.

HALL, (Sax. *heal*,) signified anciently a manor-house or habitation, and is still in use to denote the mansion house belonging to any person of superior rank ; so also, it denotes the place of meeting of a town corporate, as the *Guildhall* in *London*.

HALLAGE, toll paid for goods or merchandize sold in a *hall* ; and particularly hath been applied to a fee or toll due for cloth brought for sale to *Blackwell-hall* in *London*.

HALLMOTE, or *halimote*, Sax. *heal*, and *gemote*, an assembly,) was particularly applied to the lord's court within the manor, called the court baron.

HALY-MOTE, an holy or ecclesiastical court. So *holywerkfolk* (holy-workfolk) were tenants who held their lands by the service of keeping in repair an ile in a church, a sepulchre, or the like.

HAM, a Saxon word, signifying a *home* or place of dwelling, as *Brigham*, *Petersham*, *Deerham*. So *hamlet* is a little village or place of habitation.

HAMBLING of dogs, an ancient term used by foresters for expeditating.

HAMESECKEN, by our ancient law, is a name for burglary, as it is in *Scotland* to this day. 4 *Black.* 223. Lords of manors had many of them privileges granted of punishing offences of this kind ; and a grant of freedom from *hamsecken*, or *hamfoken*, was to be free of ameracements for the like offences.

HANAPER OFFICE, in the court of chancery, is that out of which issue all original writs that pass under the great seal, and all commissions of charitable uses, sewers, bankrupts, idiocy, lunacy, and the like. These writs, relating to the business of the subject, and the returns to them, were originally kept in a *hamper*, in *hanaperio* ; the other writs (relating to such matters wherein the crown is immediately or mediately concerned) were preserved in a little sack or bag, in *parva бага* ; and thence hath arisen the distinction of the *hanaper* office, and *petty-bag* office ; both

both of which belong to the common law court in chancery. 3. *Black.* 48.

HANDHABEND, is where a thief is caught in the very fact, having the goods stolen in his *band*. The like was anciently called *backberend*, as a bundle or fardell at his back; which *Bracton* useth for manifest theft, and so doth *Britton*. 2 *Inst.* 188.

HANDBALE, is a selling by mutual shaking of *hands*; which ceremony, among all the northern nations, was anciently held necessary in order to bind the bargain: a custom which we still retain in many verbal contracts.

HANGWITE, is said to be a forfeiture anciently claimed by lords of manors, for one who hangs himself within the lord's fee.

HARES. Besides the general penalties for destroying the game, it is enacted by the 13 *G. 3. c. 80.* that if any person shall kill or destroy, or use any gun, dog, snare, net, or other engine, with intent to kill or destroy any hare in the night time, or on a *Sunday* or *Christmas-day*, he shall forfeit for the first offence, not less than 10*l.* nor exceeding 20*l.*; for the second offence, 20*l.*, and not exceeding 30*l.*: for the third offence, 50*l.* And on non-payment, he shall be imprisoned, for certain limited times respectively according to the several offences.

HARE HARRON, an outcry after felons and malefactors.

HART, is a stag or male deer of the forest, of five years old complete.

HATS. By 24 *G. 3. c. 51.* all retailers of hats shall take out a licence annually. And certain duties are also imposed on all hats which shall be sold, according to their value. And by 27 *G. 3. c. 13.* a duty is to be paid for all hats imported, and drawbacks are to be allowed on hats exported.

HAUGH, a great plot in a valley.

HAWKERS, by the statute 25 *H. 8. c. 9.* were described to be deceitful fellows who went from place to place, buying and selling brass, pewter, and other goods and merchandize, which ought to be sold in open market: and the appellation seems to grow from their uncertain wandering, like persons that with hawks seek their game where they can find it.

By 9 & 10 *W. c. 27.* and 3 & 4 *An. c. 4.* every hawker, pedlar, and petty chapman, going from town to town, or to other men's houses, carrying any goods to sell, shall pay an annual duty of 4*l.*; and if he travel with a horse or other beast of burden, he shall pay 4*l.* more: and by 29 *G. 3. c. 26.* every such person travelling on foot, or with a horse or horses, a further additional duty of 4*l.* for each year; and also 4*l.* yearly for each beast he shall so travel with. And if he trades without licence, he shall forfeit 12*l.*; and on non-payment thereof, shall be sent to the house of correction. But this shall not prohibit any person

son from selling acts of parliament, forms of prayer, proclamations, gazettes, almanacks, or other printed papers licensed by authority; or any fish, fruit, or victuals; nor the real maker of any goods carrying the same for sale; nor any tinker, cooper, glazier, plumber, harness mender, or any person selling woollen manufactures by wholesale: nor shall this hinder any person from selling any goods in any public fair or market.

And by 29 G. 3. c. 26. before any person shall be licensed, he shall produce a certificate, signed by the clergyman officiating within the place where he usually resides, and two reputable inhabitants of the same place, attesting that such person is of good character and reputation, and fit to be licensed.

By 9 G. 2. c. 35. if any pedlar, or other trading person, going from town to town, or other men's houses, and trading either on foot, or with any horse or otherwise, shall offer any tea to sale, although he have a permit, he shall forfeit and suffer as for running of goods in like manner as if he had a permit.

HAWKS, in ancient time, were of very great estimation, inasmuch that stealing of them was made felony; and there were other severe penalties for killing, driving them out of their covert, or stealing their eggs: but since the diversion of fowling hath fallen into another channel by gunpowder and hailshot, these penalties are become obsolete.

HAY, *haia*, (Sax. *hæg*,) an hedge, or inclosure; also a net to take deer; as *deer-bay*.

HAYBOTE, an allowance to the tenant of wood sufficient for reparation of the hedges, hays, or fences.

HAY-MARKET. Carts of hay which stand to be sold in the *hay-market*, are to pay 3*d.* per load towards repairing the street; and are not to stand loaden after 3 o'clock in the afternoon, on pain of forfeiting 5*s.* And hay sold in *London*, &c. between the 1st of *June* and the last of *August*, being new hay, is to weigh 60 pounds a truss, and old hay, the rest of the year, 56 pounds, on the penalty of 18*d.* a truss. 2 *W. & M. st.* 2. c. 8. 8 & 9 *W.* 3. c. 17. & 31 *G.* 2. c. 40.

HEADBOROUGH, is the *head* or chief man of the *borow* or pledge, and is only another name for constable.

HEALFANG, or *halsfang*, (Sax. from *heal* or *hals* the neck, and *fang* to take,) a punishment by compressing the neck (in the pillory.) Sometimes it is taken for a pecuniary mulct paid to lords of manors to commute for the punishment of the pillory.

HEARSAY, is generally not to be admitted as evidence; for no evidence is to be allowed but what is upon oath; for if the first speech was without oath, another oath that there was such speech, makes it no more than a bare speaking, and so of no value in a court of justice; and, besides, the adverse party had no opportunity of a cross examination; and if the witness is living,

what he has been heard to say is not the best evidence that the nature of the thing will admit. But, in some cases, hearsay evidence is allowed to be admissible; as to prove who was a man's grandfather, when he married, what children he had, and the like; of which, it is not reasonable to presume that there is better evidence. So in questions of prescription, it is allowed to give hearsay evidence, in order to prove general reputation; as where the issue was of a right to a way over the plaintiff's close, the defendant was admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was agreed. *Theory of Evid.* 111.

HEBBING WEARS, are wears or engines made or laid at *ebbing* water. So *hebbermen*, are fishers or poachers who fish at ebbing water.

HECCAGIUM, a rent paid to the lord of the fee for liberty to use *becks* or stoppages for catching of fish.

HEDAGIUM, a toll or customary duty paid at the *bithe* or wharf for the landing of goods; immunities from the payment whereof were granted by several ancient charters.

HEDGEBOTE, an allowance to the tenant of wood sufficient for reparation of the hedges or fences.

HEDGE BREAKERS, by statute 43 *El. c. 7.* shall pay such damages as a justice of the peace shall think fit; and, on non-payment, shall be whipped. And by the 15 *C. 2. c. 2.* the constable may apprehend a person suspected, and by warrant of a justice may search his houses and other places; and if any hedge-wood shall be found, and he shall not give a good account how he came by the same, he shall be adjudged the stealer thereof.

HEIR, *bares*, is he that succeeds by descent, in lands, tenements, and hereditaments, being an estate of inheritance: the estate must be in fee, because nothing passeth by right of inheritance, but fee; and by the common law, a man cannot be heir of goods and chattels. 1 *Inst.* 8.

A bastard born out of lawful matrimony cannot be heir; neither can a man attainted of treason or felony, whose blood is corrupted; nor an alien who was born out of the king's allegiance, and though he be made denizen by the king's letters patent, yet this shall not confer upon him a right of inheritance: but otherwise it is of a person naturalized by act of parliament. *Id.*

There is an heir *apparent*, and an heir *presumptive*. Heir *apparent* is such, whose right of inheritance is indefeasible, provided he outlives his ancestor; as the eldest son or his issue, who must by the course of the common law be heir to his father whenever he happens to die. Heir *presumptive* is such, who, if the ancestor should die immediately, would, in the present circumstances of things, be his heir; but whose right of inheritance may be defeated by the contingency of some nearer heir being

being born; as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, by the birth of a son. 2 *Black.* 208.

The heir is generally favoured by the common law, and by the courts of equity; and dubious words in a will shall be construed for the benefit of the heir.

If an executor hath assets, he is compellable in equity to redeem a mortgage for the benefit of the heir. And when the heir is sued for the debt of his ancestor, and pays it, he shall be reimbursed by the executor of the obligor, who hath personal assets. 1 *Atk.* 487.

But in an action of debt brought upon a bond against an heir, it is no good plea for the heir to say, that the executors have assets in their hands: for a creditor may sue either heir or executor, for they are both chargeable upon specialties. *Dyer*, 204.

Where a legacy is given out of a personal estate, payable at a future day, and the legatee dies before such future day, the legacy is transmissible to executors or administrators; but if the legacy be charged upon land, and the legatee dies before such future day, the legacy shall sink into the inheritance for the benefit of the heir. 1 *Atk.* 555.

HEIRESS, is a female heir to a person having an estate of inheritance of lands. If there are more than one, they are called *coheiresses*, or rather in legal expression, *coheirs*. The offence of stealing an heiress is founded on the statute 3 *H. 7. c. 2.* which enacts, that if any man shall, for lucre, take any woman, being maid, widow, or wife, and having substance either in goods or lands, or being heir apparent to her ancestor, contrary to her will, and afterwards she be married to such misdoer, or by his consent to another, or defiled; he, his procurors, and abettors, and such as knowingly receive such woman, shall be deemed principal felons: and by 39 *El. c. 9.* the benefit of clergy is taken away from the principals, procurors, and accessaries before. And it is not material, whether a woman so taken, contrary to her will, be at last married or defiled, with her own consent or not, if she were under the force at the time. 1 *Harv.* 110.

HEIR LOOMS, are such goods and personal chattels, as, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor. The termination *loom* is of *Saxon* original, in which language, it signifies a limb or member; so that an heir loom is nothing else but a limb or member of the inheritance. They are generally such things as cannot be taken away without damaging or dismembering the freehold: otherwise the general rule is, that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but shall vest in the executor. But deer in a real authorized park,

fishes in a pond, doves in a dove-house, though in themselves personal chattels, yet are so annexed to, and so necessary to the well being of the inheritance, that they shall accompany the land wherever it vests, by either descent or purchase. 2 *Black.* 28.

Charters likewise, and deeds, court rolls, and other evidences of the land, together with the chests in which they are contained, shall pass together with the land to the heir, in the nature of heir looms, and shall not go to the executor. *Id.* 428.

By special custom also, in some places, carriages, utensils, and other household implements, may be heir looms; but such custom must be strictly proved. *Id.*

Heir looms, though they be mere chattels, cannot be devised from the heir by will. For though the owner might, during his life, have sold or disposed of them, as he might of the timber of the estate; yet, they being at his death instantly vested in the heir, the devise (which is subsequent and not to take effect till after his death) shall be postponed to the custom, whereby they have already descended. *Id.* 429.

HEMP AND FLAX, are not to be watered in any river, running water, or common pond, where beasts are used to be watered, but only in ponds for that purpose; on pain of forfeiting 20s. 33 *H. 8. c.* 17.

HEORD-PENNY, *hearth-penny*, an annual tribute of one penny anciently paid out of every family to the pope at *Rome*; otherwise called *Romscot*, and *Peterpence*.

HERALD, *hereault*, according to *Verstegan*, is derived from *here*, an army, and *bealt*, *altus*, high, or valiant, as if a man should be called the champion of the army. The function of these officers, as now exercised with us, is to denounce war, proclaim peace, and to be employed by the king in martial messages. They are examiners and judges of gentlemen's coats of arms, and preservers of genealogies; and they marshal the solemnities at the coronations of princes, and funerals of great men. The three chief of these heralds are called *kings at arms*; of whom, *Garter* is the principal, instituted by king *Hen. 5.* whose office is, to attend the knights of the *garter* at their solemnities, and to marshal the funerals of the nobility. The next is *Clarencieux*, instituted by king *Ed. 4.* after he became duke of *Clarence* by the death of *George* his brother; whose proper office is to marshal and dispose the funerals of all the lesser nobility, knights, and esquires, on the south side of *Trent*. The third is *Norroy*, (*north roy*,) who has the like office on the north side of *Trent*. Besides these kings at arms, there are six inferior heralds, according to their original, as they were created to attend dukes and great lords in martial expeditions; that is, *York*, *Lancaster*, *Chester*, *Windsor*, *Richmond*, and *Somerset*; and three heralds extraordinary; that is, *Arundel*, *Norfolk*, and *Nottingham*.

There

There is also *Ulster*, king at arms, whose office is to attend the knights of the order of *St. Patrick* in *Ireland*, instituted 5th February 1783.

Their office in adjusting armorial ensigns, and preserving genealogies, is now grown much into disuse; so much falsity and confusion having crept into their records, that, though formerly some credit hath been paid to their testimony, yet now even their common seal will not be received as evidence in any court of justice. But their original visitation books, compiled when progresses were solemnly and regularly made into every part of the kingdom, to inquire into the state of families, and to register such marriages and descents as were verified to them upon oath, are allowed to be good evidence of pedigrees. It were to be wished, that this practice of visitation at certain periods were revived; for the failure of *inquisitions post mortem*, by the abolition of military tenures, combined with the negligence of the heralds in omitting their usual progresses, hath rendered the proof of a modern descent, for the recovery of an estate, or succession to a title of honour, more difficult than that of an ancient. This will indeed be remedied for the future, with respect to claims of peerage, by a standing order in the house of lords, 11 May 1767, directing the heralds to take exact accounts, and preserve regular entries, of all peers and peeresses of *England*, and their respective descendants; and that an exact pedigree of each peer and his family shall, on the day of his first admission, be delivered to the house by *Garter* principal king at arms. But the general inconvenience, affecting more private successions, still continues without a remedy. 3 *Black.* 105.

HERCE, *bercia*, an harrow.

HERDWIC, a grange or place for the herds of cattle.

HEREBANNUM, (from *here* an army, and *ban* an edict or proclamation,) was a mulct or fine for not going out to the field armed, upon summons of the lord or other superior; so *herelode* was a bidding or calling out the tenants for that purpose; *heresare*, a military expedition; *heregeld*, a tribute or tax for maintenance of an army.

HEREBERG, *Sax.* an inn. So *herbigare*, to harbour or entertain. *Herebinger*, or *harbinger*, an officer that goes before, and provides harbour or lodgings.

HEREDITAMENT, is a word of extensive signification; for it includes not only lands and tenements, but whatever may be *inherited*, be it corporeal or incorporeal, real, personal, or mixed. Thus an *heir-loom*, or implement of furniture, which by custom descends to the heir together with an house, is neither land nor tenement, but a mere moveable; yet, being inheritable, is comprized under the general word hereditament. 2 *Black.*

17.

HEREMITORIUM, a solitary place of retirement for *hermits*. So *hermitorium*, is the chapel or place of prayer belonging to an hermitage.

HERESY, among protestants, is a false opinion repugnant to some point of doctrine clearly revealed in scripture, and either absolutely essential to the christian faith, or at least, of most high importance. 1 *Haw.* 3.

By the statute 9 & 10 *W. c.* 32. if any person, having been educated in, or having made profession of the christian religion, shall, by writing, printing, teaching, or advised speaking, deny any one of the persons in the Holy Trinity to be God, or assert or maintain that there are more Gods than one, or shall deny the christian religion to be true, or the holy scriptures of the Old and New Testament to be of divine authority; he shall, for the first offence, be disabled to hold any office; for the second, he shall moreover be disabled to prosecute any action, or to be guardian, executor, administrator, or legatee.

HERETOCHÉ, (from the Saxon *here*, an army, and *togen*, to lead,) was the general or leader of an army. These *heretochs* were constituted through every province and county in the kingdom; being taken out of the principal nobility, and such as were remarkable for their wisdom, fidelity, and valour. Their duty was, to lead and regulate the armies, with a very unlimited power, as it should seem good to them, to the honour of the crown, and benefit of the kingdom: and because of this great power, they were elected by the people in their full assembly, in the same manner as sheriffs were elected; following still the old fundamental maxim of the *Saxon* constitution, that, where any officer was intrusted with such power, as, if abused, might tend to the oppression of the people, that power was delegated to him by the vote of the people themselves. 1 *Black.* 408.

HERIOT, *herigate*; from *here*, an army, and *geat*, a march or expedition, was first paid in arms and horses; it is now by custom sometimes the best live beast which the tenant dies possessed of, sometimes the best inanimate good, under which a jewel or piece of plate may be included. 2 *Black.* 422.

This is no charge upon the lands, but merely upon the goods and chattels. Therefore if a *feme covert* dies possessed of a copyhold or other customary estate, the lord can have no heriot; for, being a married woman, she can have no lands of her own.

By the 13 *El. c.* 5. all fraudulent conveyances of goods and chattels, to defeat the lord of his heriot, shall, in that respect, be void.

A heriot is not due upon the death of *cestuy que trust*, but of him that has the legal estate. 1 *Vern.* 441.

Jointenants are only one and the same tenant in the law; and therefore

therefore the lord shall not have heriot till after the death of the last of them. *Bro. Heriot. (Vin)*

Heriots are of two kinds; heriot *service*, and heriot *custom*. The former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent, for which the lord may distrain; the latter arise upon no special reservation, but depend merely upon immemorial usage and custom. *2 Black. Ibid.*

And for heriot *custom* the lord may seize out of the manor; because he claims it as his proper goods by the death of the tenant, which he may seize in any place where he finds it; yet hereby he is not debarred of his remedy by action. *2 Black. Ibid.*

And if the beast be removed, the lord may have an action against him that removed it; so also, as it seemeth, against him that detaineth it. *Br. Heriot. (Vin.)*

6 Co. 1. *Bruerton's case.* Lord and tenant of three acres of land by homage, fealty, annual service of an hawk, and suit of court; the tenant made a feoffment in fee of one acre, the feoffee shall hold by homage, fealty, hawk, and suit of court, by the common law: for the things which cannot be divided into parts are performed by each intire. And there is no diversity as to this purpose, between intire services annual, as suit, hawk, or the like, and not annual, as homage, fealty, and heriot. And as to the heriot, the statute of *quia emptores terrarum* cannot extend to intire services to hold for a part, because such services are not dividable; and, by consequence, every one shall hold by intirety, as he shall hold by the common law.

8 Co. 104. *Talbot's case.* If the lord purchase parcel of the tenancy, the heriot *service* is extinct. But if the custom of the manor be, that upon the death of every tenant of the manor, that dieth seized of any land holden of the same manor, the lord shall have a heriot, although the lord purchase part of the tenancy, yet the lord shall have a heriot by the custom of the manor for the residue; for he remains tenant to the lord, and the custom extends to every tenant.

Upon the whole, the custom of the manor is the law of it in all such like cases.

HERMAPHRODITE, a person that is both man and woman. *Lit. Dist.* And as they partake of both sexes, they may give or grant lands, or inherit as heirs to any, and shall take according to the prevailing sex. *Co. Lit. 2. 7.*

HEST, *Sax.* a command. It seems to have been applied to certain boons and services commanded by the lords to be performed by their tenants.

HIDE of land, is such a quantity as may be plowed with one plough in a year; or as much as may maintain one family. It contains

contains no determinate number of acres. 1 *Inst.* 69. *Hideage*, was a tax on every hide of land.

HIDEGELT, a mulct or fine, when a person had committed any crime for which he deserved whipping or other corporal punishment, to redeem such punishment, whereby to save his *hide* or skin.

HIGH CONSTABLE, is the same within the hundred or other large division, as the petty constable is within the township or vill; and in many cases being an officer subservient to the justices of the peace, he is commonly appointed by them and sworn in sessions.

HIGH TREASON. See **TREASON**.

HIGHWAY. Of high ways there are three kinds; first, a footway; secondly, a foot and horse-way, which is also a pack or drift-way; and, thirdly, a foot, horse, and cart way. 1 *Inst.* 56.

Every parish is bound of common right to keep their high-ways in good and sufficient repair; unless, by reason of the tenure of lands or otherwise, this care is assigned to some particular private person. From this burden no man was exempt by our ancient laws, whatever other immunities he might enjoy, this being part of the *trinoda necessitas* to which every man's estate was subject, *viz.* expedition against the enemy, building of castles, and reparation of bridges; for though *bridges* only are expressed, yet the roads were always understood. 1 *Black.* 357.

The surveyors are appointed by the justices annually, whose business it is to call out the statute labour, levy compositions, and order all things relating to the repairs; and at the end of their year, they shall give account to the justices of their whole proceedings.

If the statute labour and composition money be insufficient, an assessment by order of the justices may be laid, not exceeding 9d. in the pound for any one year. And if all this shall be insufficient, yet still the parish is obliged by the common law, upon indictment, to make their roads good at all events.

And besides the method of indictment, every justice of the peace, by the statute, upon his own view, or on oath made to him by the surveyor, may make presentment of roads being out of repair; and thereupon like process shall be issued as upon indictment.

In aid of the parish, in many places, turnpikes have been erected; whereby all who pass upon, and have benefit of the road, are brought in to be contributory.

HIGHWAYMEN. By 4 & 5 *W. & M. c.* 8. a reward of 40*l.* is given for the apprehending and taking a *highwayman*, to be paid within a month after conviction, by the sheriff of the county.

HIGLER,

HIGLER, a person who carries from door to door, and sells small articles by retail.

HIRING and borrowing are contracts by which a qualified property may be transferred to the hirer, or borrower; in which there is only this difference, that hiring is always for a price, a stipend, or additional recompence; borrowing is merely gratuitous. But the law in both cases is the same. They are both contracts, whereby the possession and a transient property is transferred for a particular time or use, on condition and agreement to restore the goods so hired or borrowed, as soon as the time is expired or use performed; together with the price or stipend, in case of hiring, either expressly agreed on by the parties, or left to be implied by law according to the value of the service. 2 *Black.*

454.

HOBLERS, light horsemen; or certain tenants bound by their tenure to maintain a light horse for discovering and giving notice of the enemy.

HOCKDAY, *hocktide*, was the second *Tuesday* after *Easter* week, commonly called *Hock Tuesday*, whereon the *English* mastered the *Danes*; which day was so remarkable in ancient times, that rents were reserved payable on that day. And in the accounts of *Magdalen* college in *Oxford*, there is a yearly allowance *pro mulieribus hockantibus*, in some of their manors in *Hampshire*, where the men on *Monday*, and the women on *Tuesday*, in merriment stopped the way with ropes, and *hocked* (houghed) or pulled passengers to them by the houghs, requesting them to give them something to be laid out in pious uses (or rather perhaps to be spent upon the occasion).

HOGENHINE, was one that came guestwise into an inn, and laid there for three nights, after which he was accounted one of the family, for whom the host was to be answerable. The first night he was *forman-night*, and reckoned as a stranger; the second night, *twa-night*, a guest; the third night, *hogen*, or *awn-kind*, one of the host's own domestics.

HOLDING OVER, is keeping possession of the land after the expiration of the term. By statute 4 *G. 2. c. 28.* if any person shall hold over after the determination of any term for life or years, and after demand made, and notice in writing given for delivering possession, he shall pay double the yearly value, to be recovered by action of debt. And by 11 *G. 2. c. 19.* if any person shall hold over, after himself hath given notice (either verbal, or in writing, *Bur. Mansf. 1603.*) to quit, he shall pay double rent; to be recovered in like manner as the single rent.

HOLME, Sax. a plain or level ground near the water side.

HOLT, Sax. a wood.

HOMAGE, *homagium*, is derived of *homo*; because when the tenant

tenant doth his service, he saith, *Jeo deveigne vostre home, I become your man.* 1 *Inst.* 64.

It is the most honourable service of reverence that a free tenant may do to his lord; for when the tenant shall make homage to his lord, he shall be ungirt, and his head uncovered, and his lord shall sit, and the tenant shall kneel before him on both his knees, and hold his hands extended and joined together between the hands of his lord, and shall say thus: "I become your man from this day forward, of life and limb and earthly honour, and to you will be faithful and loyal, and bear you faith, for the tenements that I claim to hold of you (saving the faith that I owe unto our sovereign lord the king): So help me God." And then the lord, so sitting, shall kiss him. *Litt.* 85.

Homage cannot be done to any but to the lord himself; but the steward of the lord's court, or bailiff, may take fealty for the lord. *Lit.* 92.

HOMAGE ANCESTREL, is where a tenant holdeth his land of his lord by homage; and the same tenant and his ancestors have holden the same land of the same lord and of his ancestors, time out of memory of man by homage, and have done to them homage. 1 *Inst.* 100.

HOMAGE JURY, is a jury in a court baron, consisting of tenants that do homage to the lord; who are to inquire and make presentments of the death of tenants, of surrenders, admittances, and the like.

HOMESTALL, a mansion house.

HOMICIDE, is the killing of any human creature; and is of three kinds; 1. *Justifiable*; such as is owing to some unavoidable necessity, without any will, intention, or desire, and without any inadvertence or negligence, in the party killing, and therefore without any fault in himself. 2. *Excusable*; which is either by *misadventure*, where a man is doing a lawful act, without intent of hurt to another, and death casually ensues; or in *self-defence*, where one who hath no other possible means of preserving his life, from one who combats with him on a sudden quarrel, kills the person by whom he is reduced to such an inevitable necessity. 3. *Felonious*; which is of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse; and that may be, either by killing one's self, or another person: in which latter case, if such other person is killed without malice, either express or implied in the perpetrator thereof, it is termed *manslaughter*; if with malice, it is *murder*. 4 *Black. c.* 14.

HOMINE REPLEGIANDO, is an ancient writ, which lies to replevy a man out of prison, or out of the custody of any private person upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. And if the person
be

be conveyed out of the sheriff's jurisdiction, the sheriff may return that he is eloiigned (*elongatus*); upon which a process issues, called a *capias in withernam*, to imprison the defendant himself, without bail or mainprize, till he produces the party. But this method of proceeding is now almost entirely antiquated, and superseded by the more effectual writ of *habeas corpus*. 3 *Black.* 129.

HONOUR. Before the statute of *quia emptores*, 18 *Ed.* 1. the king's greater barons, who had a large extent of territory holden under the crown, frequently granted out smaller manors to inferior persons to be holden of themselves; which do therefore now continue to be held under a superior lord, who is called in such cases the lord *paramount* over all these manors; and his feigniory is frequently termed an *honour*, not a *manor*, especially if it hath belonged to an ancient feudal baron, or hath been at any time in the hands of the crown. 2 *Black.* 91.

HOPS. By several statutes, regulations are made for the curing of hops, which are to be under the inspection of the officers of excise.

And by the 27 *G.* 3. *c.* 13. a duty is imposed upon all hops grown and cured in *Great Britain*; and also on hops imported; and drawbacks are allowed on the exportation thereof, as particularly set forth in schedules annexed to the said act.

HORA AURORÆ, the morning bell, or what is now called the four-o'clock bell; as the evening bell was at eight o'clock, commonly called the curfeu.

HORNGELD, a geld or tax for the privilege of putting *horned* cattle into the forest. In many ancient charters, there is a grant of immunity from such tax.

HORSE RACES. By the 13 *G.* 2. *c.* 19. Whereas the great number of horse races for small prizes contributes to the encouragement of idleness, and the breed of strong and useful horses hath been thereby discouraged; it is enacted, that no plate, sum of money, or other thing, shall be run for, or advertised or proclaimed to be run for, unless the same be of the value of 50*l.* or upwards: and if any person shall enter, start, or run any horse for any prize under that value, he shall forfeit 200*l.*; and the person who printed or published any advertisement for the same, shall forfeit 100*l.*; the said penalties to be applied half to the use of the poor, and half to him that shall sue. And all sums of money paid for entrance, shall go to the second best horse. And no person shall enter, start, or run any horse for any prize, unless the said horse be his own property; nor shall any person enter and start more than one horse for one prize; on pain that every such horse (other than that which was first entered) shall be forfeited, or the value thereof.

And by 24 *G.* 3. *c.* 31. there shall be paid for every horse entered

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ed to run for a plate, prize, sum of money, or other thing, a duty of 2*l.* 2*s.* over and above all other duties : and also 2*l.* 2*s.* as the duty for one year ; on the penalty of 20*l.*

HORSES. The sale of an horse in a fair or market shall not alter the property, unless the horse be shewed an hour at least in the open place where horses are usually sold ; nor unless the buyer and seller go to the toll-taker or book-keeper, and with him enter the particulars of the bargain, and the colour and mark of the horse ; and if the book-keeper doth not know the seller, then a voucher must be produced to testify his knowledge of the seller, and his name and place of abode. And the book-keeper shall give to the buyer a note of the particulars entered, on his paying 2*d.* for the same. But if the sale hath been regular, the owner may not have his horse again that hath been stolen, unless he pay to the purchaser the price which he gave for him. 2 & 3 *P.* & *M. c.* 7. 31 *El. c.* 12.

By the statute 22 & 23 *C. 2. c.* 7. killing any horse in the night is felony and transportation ; and maiming him makes the offender liable to treble damages.

And by 26 *G. 3. c.* 71. every person who shall keep any house or place for slaughtering horses, shall be licensed at the sessions, and be subject to the rules and regulations in the said act directed ; and in default thereof shall be guilty of felony.

And by 24 *G. 3. c.* 31. 25 *G. 3. c.* 47. & 29 *G. 3. c.* 49. several duties are imposed on horses kept and used for the purpose of riding, or for drawing any carriages subject to any excise duty ; the same to be paid annually, and to be under the management of the commissioners for the affairs of taxes.

And also by 24 *G. 3. c.* 31. every person exercising the trade of a horse dealer, shall take out a licence annually from the stamp officers.

HOSPITALARS, were an order of knights, who took their name from an *hospital* built at *Jerusalem* for the use of pilgrims coming to the Holy Land, dedicated to *St. John Baptist*. For the first business of these knights was, to provide for such pilgrims at that hospital, and to protect them from injuries and insults upon the road. They were instituted about the year 1092, and soon after came into *England*, and had an house built for them in *London* in the year 1100. In process of time they obtained so great honours, that their superior here in *England* was the first lay baron, and had a seat amongst the lords in parliament. They were at first called knights of *St. John of Jerusalem* ; but settling chiefly at *Rhodes*, they were afterwards called knights of *Rhodes* ; and after the loss of *Rhodes* in the year 1522, and their having the island of *Malta* given to them by the emperor *Charles the fifth*, they obtained the name of knights of *Malta*.

HOSPITALS, (from *hospes*, an host,) were originally founded in

in this kingdom for the relief and entertainment of travellers upon the road, and particularly of pilgrims, and therefore were generally built by the way side : but of latter times they have been founded for fixed inhabitants, subject to infirmities and maladies of divers kinds, according to the discretion and order of the founders.

HOTCHPOT, according to *Littleton*, signifies a pudding ; for in a pudding (he says) is not commonly put one thing alone, but one thing with other things together ; and it was used metaphorically to express the putting and mixing together lands given in frank marriage, and then dividing the same equally among all the daughters. As if a man be seised of thirty acres of land, and hath issue two daughters ; one of the daughters marries, and the father gives ten acres of the thirty to the husband with the daughter in frank marriage, and dies seised of the remaining twenty acres ; then the other sister shall enter into the said twenty acres, and occupy them to her own use, unless the husband and his wife will put the ten acres given to them in frank marriage, with the twenty acres in hotchpot : in which case, the husband and wife shall have, besides the ten acres given to them in frank marriage, five acres in severalty of the twenty acres, and the other sister shall have the remaining fifteen acres for her purparty ; so as upon the whole their shares of the father's estate shall be equal. *Litt.* 267, 8.

And by the statute of distribution of intestates effects, 22 & 23 C. 2. c. 10. the equity of this provision is transferred to the personal estate of the deceased ; which enacts, that no child of the intestate, (except his heir at law,) upon which child he settled in his life-time any estate in lands, or pecuniary portion, shall have any distributive share of the personalty, unless such child will bring his said advancement into hotchpot with the other children, so as to make the estate of the said several children, to be equal as near as can be estimated.

HOUSE, a place of habitation or dwelling. The doors of an house may not be broken open on arrests, except for treason, felony, or breach of the peace. 2 *Hale's Hist.* 117.

For the dwelling house of a man is as his castle ; therefore if thieves come to a man's house to rob or kill him, and the owner or his servants kill the thieves in defending him and his house, this is not felony, nor shall he forfeit any thing.

If a man builds his house so close to mine, that his roof overhangs my roof, and throws the water off his roof upon mine, this is a nuisance for which an action will lie. 3 *Black.* 217.

Also if a person keep his hogs, or other offensive animals, so near the house of another, that the stench of them incommodes him, and makes the air unwholesome, this is an injury, as it tends to deprive him of the use and benefit of his house. *Id.*

A like

A like injury is, if one's neighbour sets up, and exercises any offensive trade; as a tanner's, a tallow chandler's, or the like: for although these are lawful and necessary trades, yet they should be exercised in remote places; therefore it is an actionable nuisance. *Id.*

But depriving one of a mere matter of pleasure, as of a fine prospect, by building a wall, or the like; this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance. *Id.*

A man ought so to use his house as not to damnify his neighbour: and a man may compel another to repair his house, in several cases, by the writ *de domo reparanda*. 1 *Salk.* 360.

By 19 *G. 3. c. 59.* annual duties are imposed on dwelling houses inhabited, according to the yearly values thereof.

HOUSE BOTE, an allowance to the tenant of wood, sufficient for reparation of the houses and for fuel.

HOUSE OF CORRECTION. See CORRECTION.

HUE AND CRY, (*butefum et clamor*, by *booting*, or blowing a horn, and by making an *outcry*,) is the ancient common law process after felons, and such as have dangerously wounded any person, or assaulted any one with intent to rob him. And it hath received great countenance and authority by several acts of parliament. In any of which cases, the party grieved, or any other, may resort to the constable of the vill; and, 1. Give him such reasonable assurance thereof, as the nature of the case will bear. 2. If he knows the name of him that did it, he must tell the constable the same. 3. If he knows it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstances as he knows, which may conduce to the discovery. 4. If the thing be done in the night, so that he knows none of these circumstances, he must mention the number of the persons, or the way they took. 5. If none of all these can be discovered, as where a robbery or burglary or other felony is committed in the night, yet they are to acquaint the constable with the fact, and desire him to search in his town for suspected persons, and to make hue and cry after such as may be probably suspected, as being persons vagrant in the same night; for many circumstances may happen to be useful for discovering a malefactor, which cannot at first be found out. 2 *H. H.* 100.

For the levying of hue and cry, although it is a good course to have a justice's warrant, when time will permit, in order to prevent causeless hue and cry; yet it is not necessary, nor always convenient, for the felon may escape before the warrant be obtained. And upon hue and cry levied against any person, or where any hue and cry comes to a constable, whether the person be certain or uncertain, the constable may search suspected places within his vill, for the apprehending of the felon. And if the person, against whom the hue and cry is raised, be not found

found in the constablewick, then the constable, and also every officer to whom the hue and cry shall afterwards come, ought to give notice to every town round about him, and not to one next town only; and so from one constable to another, until the offender be found, or till they come to the sea side. And this was the law before the conquest. *Il.*

And in such cases it is needful to give notice in writing, to the pursuers, of the thing stolen, and of the colour and marks thereof, as also to describe the person of the felon, his apparel, horse, or the like, and which way he is gone, if it may be: but if the person that did the fact be neither known, nor describable by his person, cloaths, or the like, yet such a hue and cry is good, and must be pursued, though no person certain can be named or described. *Id.* 103.

HUNDRED, is a district originally comprehending one hundred families; for in ancient time, for the more sure keeping of the peace, all freemen were to cast themselves into several companies, by ten in each company, and every of these ten men was to be pledge or surety for the forthcoming of his fellows; and this district was therefore called the *decennary*, at the head of which is the petty constable. Upon solemn occasions, ten of these *decennaries* assembled together; and as every decennary consisted of ten families, so these ten decennaries constituted what is now called the *hundred*; over which the high or chief constable presides. In many cases, agreeably to the ancient institution, where an offence has been committed, and the offender escapes, the hundred by special acts of parliament is rendered liable to answer damages; as in cases of robbery; cutting river or sea-banks; cutting hop-binds; burning houses, barns, out-houses, hovels, cocks, mows, or stacks of corn, straw, hay, or wood; mines or pits of coal; destroying granaries, turn pikes, and works of navigable rivers; and divers other such like.

HUNDRED-LAGH, Sax. *laga*; the law relating to the hundred courts and matters cognizable therein.

HUNDRED-PENY, a tax or contribution collected by the sheriff, in aid of the expences of his *hundred* court or tourn.

HUNREDUM, in ancient grants, as where a privilege is granted to a man to be free from the *hundredis*, signifies that money which was paid to the sheriff towards his charges of holding the hundred courts: the same as *hundred-peny*.

HURST, *hyrst*, *herst*, Sax. a wood or grove of trees. There are many places in *England* which begin or end with this word, from the nature of their situation when they received that name.

HUS; Sax. *houfe*. So *husbrece*, house breaking or burglary. *Huscarle*, a domestic servant in tilling the lord's lands. *Husfastne*, one that hath a fixed home or habitation, a house of his own. *Husgable*, a house rent or tax.

HUSBAND AND WIFE:

I. THE

1. THE husband and wife are but one person in law ; for which reason, a man cannot grant lands to his wife during the coverture, nor any estate or interest to her, nor enter into covenant with her. But he may by his deed covenant with others for her use, as for her jointure, or the like ; and he may give to her by devise or will, because the devise or will doth not take effect till after his death. 1 *Inst.* 112.

2. All deeds executed by the wife, and acts done by her during her coverture, are void ; except it be a fine, or the like matter of record, in which case, she must be solely and secretly examined, that it may be known whether or no her act is voluntary. 1 *Black.* 444.

3. In trials of any sort, husband and wife are not allowed to be evidence for or against each other. *Id.* 443.

But where the offence is directly against the person of the wife, this rule hath been usually dispensed with ; and therefore, by the statute 3 *Hen. 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. *Id.*

Also, a wife may have security of the peace against her husband ; so may the husband have security of the peace against his wife. *Id.* 445.

4. If a wife hath title to present to a benefice, the presentation must be by husband and wife. *Wood. b. 2. c. 2.*

5. If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name as well as her own. 1 *Black.* 443.

So for a trespass done by the wife, or for a scandal published by her, the action lieth against both husband and wife ; and the husband is chargeable for the damages or fine, because he is party to the action and judgment : and both husband and wife may be taken in execution. 11 *Co.* 61. 1 *Wilf.* 149.

But if a wife, without her husband, be indicted of a trespass, riot, or other wrong, there the wife shall answer and be party to the judgment only, and the fine set upon her shall not be levied upon the husband ; and as for imprisonment, or other corporal pain, it shall be inflicted upon the wife only, and not upon the husband for his wife's act or default. 11 *Co.* 61. *Dalt. c.* 139.

6. If a bond be given to a woman unmarried, and she afterwards marries ; the husband and wife must join in the action, and both must recover : but if a bond be made to the wife subsequent to her marriage, the husband alone, without the wife, may bring the action and recover. 2 *Atk.* 208.

7. If a wife be made executrix, she cannot act therein without her husband's consent ; nor can she bring an action alone, but her husband must join with her. 2 *Bac. Abr.* 378.

8. In

8. In the civil law, the husband and wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries: and therefore in the ecclesiastical courts, a woman may sue and be sued without her husband. 1 *Black.* 444.

9. A wife is so much favoured in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft in company with, or by coercion of her husband. 1 *Haw.* 2.

But if she commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of treason, murder, or robbery, in company with, or by coercion of her husband, she is punishable as much as if she were sole, because of the odiousness and dangerous consequence of these crimes. *Id.*

10. The husband by marriage obtains a *freehold* in the right of his wife, if he takes a woman to wife that is seised of a freehold; and he may make a lease thereof for twenty-one years, or three lives, if it be made according to the statute of 32 *H. 8. c.* 28. 1 *Inst.* 351.

The husband also gains a *chattel real*, as a term for years, to dispose of, if he pleases, by grant or lease in her life-time, or by surviving her: otherwise it remains with the wife. And upon execution for the husband's debt, the sheriff may sell the term during the life of the wife. *Id.* 299. 351.

So the husband may assign and dispose of the wife's mortgage, whether it be a mortgage for a term of years, or a mortgage in fee. 2 *Atk.* 208.

The husband also by the marriage hath an absolute gift of all *chattels personal* in possession of the wife in her own right, whether he survives her or not. But if these chattels personal are *chofes in action*; that is, things to be sued for by action; as debts by obligation, contract, or the like, the husband shall not have them, unless he and his wife recover them. 1 *Inst.* 351.

11. If rent be paid to a wife, yet the husband may recover it again; so if a legacy be bequeathed to a wife, the husband, and not the wife, must receive it. 1 *Vern.* 261.

12. By custom in *London*, a wife may carry on a separate trade; and as such, is liable to the statutes of bankruptcy, with respect to the goods in such separate trade, with which the husband cannot intermeddle. *Bur. Mansf.* 1776.

13. If the wife be indebted before marriage, the husband is bound afterwards to pay the debt, living the wife; for he has adopted her and her circumstances together. 1 *Black.* 443.

But if the wife die, the husband shall not be charged for the debt of his wife after her death, if the creditor of the wife do not get judgment during the coverture. 9 *Co.* 72.

14. The husband is bound to provide his wife necessaries; and if she contracts for them, he is obliged to pay for the same; but for any thing besides necessaries, he is not chargeable. Also, if a wife elopes, and lives with another man, the husband is not chargeable even for necessaries: at least, if the person who furnishes them is sufficiently apprized of her elopement. 1 *Black.* 442.

So if the husband forbid particular persons to trust her, he shall not be chargeable: but a prohibition in general not to trust a wife, as by putting her in the Gazette, or the like, doth not amount to legal notice. 1 *Ventr.* 42.

15. If a husband seised in fee or for life in right of his wife, do sow the land, and his wife dies before severance, he shall have the corn. 1 *Inst.* 55.

After her death, if he hath had issue by her born alive, he shall be tenant by the curtesy of all the lands in fee-simple, or fee tail general, of which she died seised. *Litt.* 52.

And after her death, he shall have all *chattels real*, as the term of the wife, or a lease for years of the wife, and all other chattels in possession; and also, all such as are of a *mixed nature*, (partly in possession, and partly in action,) as rents in arrear, incurred before the marriage, or after: but of things merely *in action*, as of an obligation or bond to the wife, he can only claim them as administrator to his wife, if he survives her. *Wood. b. 1. c. 6.*

16. If the wife survives the husband, she shall have for her dower, the third part of all his freehold lands: so she shall have her term for years again, if he hath not altered the property during his life: so also, she shall have again all other chattels real and mixed: and so things in action, as debts, shall remain to her, if they were not recovered during the marriage. *Id.*

But if she elopes from her husband, and goes away with her adulterer, she shall lose her dower; unless her husband had willingly, without coercion ecclesiastical, been reconciled to her, and permitted her to cohabit with him. 1 *Inst.* 32.

HUSSEL, *Sax.* the holy sacrament. So *buffeling people*, are people of age to receive the sacrament.

HYPOTHECA, a pledge, where the possession of the thing remains with the debtor.

HYFH, a wharf or little haven, whereat to lade or unlade goods.

I D I

JACK, a kind of defensive coat armour, worn by horsemen in war; not made of solid iron, but of many plates fastened together; which some tenants were bound by their tenure to find upon any invasion.

JACTITATION of marriage, is when one of the parties *boasts*, or gives out, that he or she is married to the other, whereby a common reputation of their matrimony may ensue. On this ground, the party injured may libel the other in the spiritual court; and unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head. 3 *Black.* 93.

JAMBEAUX, leg armour; from *jambe*, tibia.

JAMPNUM, furze or goss, or ground where furze grows; as distinguished from arable, pasture, or the like.

ICH DIEN, I serve; a motto belonging to the prince of *Wales*. It was first the motto of *John* king of *Bohemia*, slain in the battle of *Cressy* by *Edward* the *Black Prince*: and taken up by him to shew his subjection to his father king *Edward* the third.

IDENTITATE NOMINIS, is a writ that lies for him who is taken and arrested in a personal action, and committed to prison for another man of the same name. In such case, he may have this writ directed to the sheriff, which is in nature of a commission to inquire whether he be the same person against whom the action is brought; and if not, then to discharge him. *F. N. B.*

Where a father has the same name and the same addition with a defendant, being his son, the action is abateable unless it had the addition of *the younger*, to the other addition; but where the father is defendant, there is no need of the addition of *the elder*. 2 *Haw.* 187.

IDENTITY OF THE PERSON, is when the defendant in a criminal cause, pleads that he is not the same person that was attainted; in which case, a jury shall be impanelled to inquire concerning the identity of the person. And this shall be done immediately, and no time allowed to the prisoner to make his defence, or produce his witnesses, unless he will make oath that he is not the person attainted. 4 *Black.* 396.

IDIOT, is one that hath had no understanding from his birth; and is therefore by law presumed never likely to attain any. 1 *Black.* 302.

A man is not an idiot, if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters. *Id.* 304.

By the old common law, there is a writ *de idiota inquirendo*, directed to the sheriff, to inquire by a jury, whether the party is an idiot or not; and if they find him a perfect idiot, the profits of his lands, and the custody of his person, belongs to the king, according to the statute of *prerogativa regis*, 17 Ed. 2. c. 9. by which it is enacted, that the king shall have the custody of the lands of natural fools, taking the profits of them without waste or destruction, and shall find them necessaries, of whose fee soever the lands be holden. And after the death of such idiots, he shall render it to the right heirs, so that such idiots shall not aliene, nor their heirs be disinherited.

But it seldom happens, that a jury finds a man an idiot from his nativity; but only *non compos mentis* from some particular time; which has an operation very different in point of law: for, in this case, he comes under the denomination of a *lunatic*; in which respect, the king shall not have the profits of his lands, but is accountable for the same to the lunatic when he comes to his right mind, or otherwise to his executors or administrators. 1 *Black.* 303.

Formerly it was adjudged that the issue of an idiot was legitimate, and consequently that his marriage was valid: but it hath been since determined otherwise; for consent is absolutely necessary to matrimony; and an idiot is not capable of consenting to any thing. 1 *Black.* 438.

IDLE AND DISORDERLY persons, by the vagrant act, 17 G. 2 c. 5. are thus described: 1. Those that threaten to run away and leave their wives and children to the parish. 2. Persons returning without a certificate from the place to which they had been lawfully removed. 3. All those who, not having wherewith to maintain themselves, live idle without employment, and refuse to work for the usual and common wages. 4. All those who go about from door to door, or place themselves in streets or passages, to beg or gather alms in the parishes or places where they dwell. All these, for every such offence, are to be sent to the house of correction, to be kept to hard labour for a month.

JEOFAIL is compounded of the French *j'ay faille*, that is, *I have failed*; and signifies an oversight in pleading, or other law proceedings. *T. L.*

Formerly, suitors to the courts were much perplexed by writs of error brought upon very slight and trivial grounds, as mis-spellings, and other mistakes of the clerks; all which might be amended at the common law, while all the proceedings were in paper, for they were then considered as only *in fieri*, and therefore subject to the control of the courts. But when once the record was made up, it was hretofore held, that by the common law no amendment could be permitted, unless within the very term in which.

which the judicial act so recorded was done; for during the term, the record is in the breast of the court; but afterwards it admitted of no alteration. But now the courts are become more liberal; and, where justice requires it, will allow of amendments at any time while the suit is depending, notwithstanding the record be made up, and the term be past. For they at present consider the proceedings as *in fieri* till judgment is given; and therefore that, till then, they have power to permit amendments by the common law. Mistakes are also effectually helped by the statutes of *amendment* and *jeofails*, so called, because, when a pleader perceives any slip in the form of his proceedings, and acknowledgeth such error, (*jeo faile*,) he is at liberty by those statutes to amend it; which amendment is seldom actually made, but the benefit of the acts is attained by the court's overlooking the exception. These statutes are many in number, whereby all trifling exceptions are so thoroughly guarded against, that writs of error cannot now be maintained, but for some material mistake assigned. 3 *Black.* 406.

JETSAM, (from the French *jetter*, to cast,) is any thing cast out of a ship being in danger of wreck, which doth not float, but sinks, and remains under water.

JEWS. In seven years time, lord *Coke* tells us, from the 50 *Hen.* 3. to 2 *Ed.* 1. the king received of the Jews 420,000*l.* 15*s.* 4*d.*; at which time, the ounce of silver was but 20*d.*, and now it is more than treble as much. 2 *Inst.* 506.

Nevertheless, in the 18 *Ed.* 1. the Jews, to the number of 15,060, were banished out of *England*; and never returned, until *Oliver Cromwell* re-admitted them.

On their banishment, the richest of them having embarked themselves with their treasure in a ship of great burthen, when the ship was under sail, and got down the *Thames* towards the mouth of the river below *Quinborough*, the master of the ship, confederating with some of the mariners, invented a stratagem to destroy them, and to bring the same to pass, commanded to cast anchor, and rode at anchor till the ship at the ebb lay on the dry sands. The master and his confederates, in further execution of their plot, moved and enticed those rich Jews to walk with the master on land for their health and recreation, which they did. At last, when the master understood the tide to be coming in, he stole away from them, and got him back to the ship. The Jews made not so much haste as he did, because they knew not the danger; but when they perceived what peril they were in, they cried out to him for help. He answered that they ought rather to cry to *Moses*, by whose conduct their fathers passed through the Red Sea; and in a short time the water swallowed them up. The master, and such other as were consent-

ing to this fact, were before the justices itinerant indicted, convicted of murder, and hanged. 2 *Inft.* 508.

A *Jew* is to be sworn on the Old Testament; and perjury may be assigned on that oath. 2 *Keb.* 313.

When any of his majesty's subjects, professing the Jewish religion, shall take the oath of abjuration, the words, *upon the true faith of a Christian*, shall be omitted. 10 *G. c.* 4.

Jews, on taking an oath, are allowed to put on their hats. *Str.* 821.

If a Jewish parent in order to compel his Protestant child to change his religion, shall refuse to allow to such child a competent maintenance; the lord chancellor shall make such order therein as he shall think meet. 1 *An. ft.* 1. c. 30.

IGNORAMUS (we are *ignorant* of the matter), was formerly indorsed by the grand jury on the back of a bill for which they did not find sufficient evidence; but now, since the proceedings were in *English*, they indorse *no bill*, or *not a true bill*, or (which is the better way) *not found*. 4 *Black.* 305.

IGNORANCE, *ignorantia*, which is want of knowledge of the law, shall not excuse any man from the penalty of it. Every person is bound at his peril to take notice what the law of the realm is; and ignorance of it, though it be invincible, where a man affirms that he has done all that in him lies to know the law, will not excuse him. But though ignorance of the law excuseth not, ignorance of the fact doth; as if a person buy a horse or other thing in open market, of one who had no property therein, not knowing but he had right, in that case he hath good title, and the ignorance shall excuse him; but if he bought the horse out of the market, or knew the seller had no right, the buying in open market would not have excused. *Doct. & Stud.* 5 *Rep.* 83.

ILE, from the French *aile* (*ala*), a *wing*, is part of a church, not in the body of the church, but most commonly on one side of the church; and had its name from the form of the *Norman* churches, which were built in the form of a cross, with a nave and two *wings*.

An *ile* in a church, which hath time out of mind belonged to a particular house, and been maintained and repaired by the owner of that house, is part of his frank-tenement, and the ordinary cannot dispose of it, or intermeddle in it: and the reason is, because the law in that case presumes, that the ile was erected by his ancestors, or those whose estate he hath, and is thereupon particularly appropriated to their house. But no such title can be good, either upon prescription, or upon any new grant by a faculty, to a man and his heirs; but the ile must always be supposed to be held in respect of the house, and will always go with the house to him that inhabits it. 12 *Co.* 106.

ILLU-

ILLUMINARE, to illuminate; to draw in gold and colours the initial letters and occasional pictures in manuscript books. Those who particularly practised this art were called *illuminatores*: hence our *limners*.

IMBARGO, a stop, stay, or arrest, of ships or merchandize, by public authority.

IMBEZILLING, signifies to steal, pilfer, or purloin; or to waste, consume, or destroy, goods committed to one's charge or custody; which is prohibited by several statutes. By 31 *El. c. 4.* if any person shall, for gain, or to impede the public service, imbezil any of the king's armour, ordnance, ammunition, or habiliments of war, he shall be guilty of felony without benefit of clergy. In like manner there are several punishments inflicted by divers statutes, for imbezilling the public money, for imbezilling the public records of courts, for imbezilling the materials in divers kinds of manufacture, and many other such like.

IMPANEL: to impanel a jury is, to enter into a parchment schedule, by the sheriff, the names of the jury summoned to appear for the performance of such public service as juries are employed in.

IMPARLANCE, from the French *parler*, to speak, is a petition in court, for a day to consider or advise what answer the defendant shall make to the action of the plaintiff; being a continuance of the cause till another day, or a larger time given by the court, which is generally till the next term.

IMPEACHMENT (from the Latin *impetere*), is the accusation and prosecution of a person in parliament, for treason, or other crime and misdemeanor. An impeachment before the lords, by the commons of *Great Britain*, is a presentment to the most high and supreme court of criminal jurisdiction, by the most solemn grand inquest of the whole kingdom. A *commoner* cannot be impeached before the lords for any *capital* offence, but only for high misdemeanors; but a *peer* may be impeached for any crime. The articles of impeachment are a kind of bills of indictment, found by the house of commons, and afterwards tried by the lords, who are, in cases of misdemeanors, considered not only as their own peers, but as the peers of the whole nation. By statute 12 & 13 *W. c. 2.* no pardon under the great seal shall be pleadable to an impeachment by the commons in parliament. 4 *Black. 259.*

IMPEACHMENT OF WASTE, is the prosecuting or *impeaching* any person for committing waste; unto which all tenants for life, or any less estate, are liable. But he who hath a lease to hold *without impeachment of waste*, hath thereby such an interest given him in the land, that he may make waste without being impeached for it; that is, without being questioned,

tioned, or any demand of recompence for the waste done. 11 Co. 82.

IMPLICATION, is where the law doth imply something that is not declared between parties in their deeds and agreements; as if a grant be made to a man of an office, generally, without adding other words, the law tacitly annexes hereto an implied *condition*, that the grantee shall duly execute his office; on breach of which condition it is lawful for the grantor, or his heirs, to oust him, and grant it to another person. 2 Black. 152.

An implied *contract* is such, where the terms of agreement are not expressly set forth in words, but are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. As if I employ a person to do any business for me, or perform any work, the law implies that I undertook or contracted to pay him as much as his labour deserves: if I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value. *Id.* 443.

Implied *malice* is, where no malice is expressed, but is such as will arise by construction. As where a man wilfully poisons another; in this deliberate act the law presumes malice, though no particular enmity can be proved. So if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person but one utterly abandoned would be guilty of such an act, upon a slight or no apparent cause. 4 Black. 200.

IMPOSTORS in religion, are such as falsely pretend an extraordinary commission from heaven, or terrify and abuse the people with false denunciations of judgments. They are punishable by fine, imprisonment, and infamous corporal punishment. 1 Harv. 7. And by the statute 9 G. 2. c. 5. all persons who pretend to use any kind of witchcraft, sorcery, enchantment, or conjuration; or undertake to tell fortunes; or pretend, from their skill in the occult sciences, to find out goods that have been stolen; shall be imprisoned for a year, and once in every quarter of that year be set on the pillory.

IMPOTENCY, in the ecclesiastical law, signifies an inability of generation, or propagating the species; which is cause of divorce *a vinculo matrimonii*, as being merely void, and therefore needs only a sentence declaratory of its being so.

IMPRESSING seamen. See **NAVY**.

IMPRISONMENT, is the restraint of a man's liberty under the custody of another; and extends not only to a gaol, but a house, stocks, or where a man is held in the street, or any other place; for, in all these cases, the party so restrained is said to be

be a prisoner, so long as he hath not his liberty freely to go about his business, as at other times. 2 *Inst.* 589.

IMPROPRIATION, is, properly, where a benefice ecclesiastical is in the hands of a *layman*; and *appropriation*, when in the hands of a bishop, college, or *religious* house. But they are often confounded. The impropriations, which had belonged to the monasteries, coming into the king's hands, after the dissolution of those religious societies, came from thence many of them into lay hands, by grant from the crown; and from thence are called *lay impropriations*.

INCENDIARY LETTER. Sending any letter, without any name subscribed thereto, or signed with a fictitious name, demanding money, or other valuable thing; or threatening to kill any of his majesty's subjects; or to *burn* any out-house, barn, stack of corn or grain, hay or straw, is felony without benefit of clergy.

INCEST, is the carnal knowledge of persons within the Levitical degrees of kindred. These, by our law, are totally prohibited to marry with each other; and sentence of divorce, in such case, is only declaratory of the illegality of the marriage, for the marriage itself is void *ab initio*.

INCHANTER (*incantator*), is he that by *charms* deals with evil spirits. These *charms* were anciently called *carmina*, by reason that they were in verse. By the 9 *G.* 2. *c.* 5. all prosecutions for enchantment, conjuration, or witchcraft, are abolished; and pretending to exercise any of these incurs the penalty of imprisonment for a year, being set on the pillory four times in that year, and, further, being bound to the good behaviour at the discretion of the court.

INCIDENT, is a thing necessarily depending upon, appertaining to, or following, another that is more worthy or principal. A court-baron is inseparably incident to a manor; a court of piepowders, to a fair: these are so inherent to their principals, that, by the grant of one, the other is granted. Rent is incident to a reversion; timber-trees are incident to the freehold, and also deeds and charters, and a way to lands. Fealty is incident to tenures; distress, to rent and amercement; estovers of wood, to a tenancy for life or years. *Kitch.* 36. 1 *Inst.* 151.

INCLOSURE, pulling down; if it is done in the night time, and it is not known who did the same, the towns near adjoining shall be compelled to repair the same and render damages. 13 *Ed.* 1. *st.* 1. *c.* 46. And by statute 9 *G.* 3. *c.* 29. if any person shall wilfully or maliciously pull down or damage any fence, made for dividing or inclosing any common or other grounds, in pursuance of any act of parliament, he shall be guilty of felony and transported for seven years.

INCON-

INCONTINENCY, *incontinentia*, where persons are vicious, and have no command of themselves.

INCORPORATION, power of. To the erection of any corporation, the king's consent is necessary, either *impliedly* or *expressly* given. The king's *implied* consent, is to be found in corporations which exist by force of the common law, to which our former kings are supposed to have given their concurrence; of this sort are all bishops, parsons, vicars, churchwardens, and some others, who, by common law, have ever been held to have been corporations by virtue of their office. Another method of implied consent is with regard to all corporations by prescription; such as the city of *London*, and many others, which have existed as corporations for time immemorial; for though the members thereof can shew no legal charter of incorporation, yet, in cases of such high antiquity, the law presumes there once was one, and that, by the variety of accidents which a length of time may produce, the charter is lost or destroyed. The methods by which the king's consent is *expressly* given, are either by act of parliament or charter; but the immediate creative act is usually performed by the king alone, in virtue of his royal prerogative. 1 *Black.* 472.

INCORPOREAL HEREDITAMENT, is a right issuing out of, or annexed unto, a thing corporeal; as a rent out of houses or lands; and of these incorporeal hereditaments there are divers kinds, of which the principal are advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents. 2 *Black.* 20.

INCROACHMENT, signifies an unlawful gaining upon the right of another; as where a man sets his fence too far into the ground of his neighbour that lies next to him; or a lord by distress or otherwise, compels his tenant to pay more than he owes.

INCUMBENT, cometh of the word *incumbo*, to mind diligently; and signifies a clergyman that is diligently resident upon his benefice, and applies, or ought to apply, all his study to the discharge of the cure of the church to which he belongs. 1 *Inst.* 119.

INDEBITATUS ASSUMPSIT, is used in declarations and law proceedings, wherein the plaintiff sets forth, that the defendant being *indebted* to him in such a sum, *assumed*, undertook, or promised to pay it, but failed therein. It is an action on the *case*, wherein the plaintiff shall recover damages, according to the circumstances that shall appear to the jury; and hath generally succeeded in the place of an action of *debt*, unless where the debt is certain and determinate; for in an action of *debt*, the plaintiff recovers the whole debt he claims, or nothing. 3 *Black.* 154.

INDEMNITY, was a pension paid to the bishop, in consideration

ration of discharging, or *indemnifying*, churches united, or appropriated, from the payment of procurations; or by way of recompence for the profits which the bishop would otherwise have received during the time of the vacation of such churches. *Gibf. Cod. 706. 719.*

INDENTURE (*instar dentium*), is a writing, containing a conveyance between two or more, indented or cut unevenly, or in and out, on the top or side, answerable to another writing that likewise comprehends the same words. Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some word or letters written between them, through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on one part, and half on the other: and this custom is still preserved in making out the indentures of a fine. But at last, indenting only hath come into use, without cutting through any letters at all; and it seems at present to serve for little other purpose, than to give name to the species of the deed. *2 Black. 294.*

The indenture may be *bipartite*, where there are two parts and parties to the deed; *tripartite*, where there are three parts and parties; and so *quadripartite*, *quinquepartite*, according to the number of parts and parties thereto. *1 Inst. 229.*

If it begins, *This indenture*, and in truth the parchment or paper is not indented, this is no indenture, because words cannot make it indented: but if the deed be actually indented, and there be no words of indenture in the deed, yet it is an indenture in law, for it may be an indenture without words, but not by words without indenting. *Id.*

When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *counterparts*: though of late it is most frequent for all the parties to execute every part, which renders them all originals. A deed, made by one party only, is not indented, but *polled* or shaved quite even, and therefore called a *deed-poll*, or a single deed. *2 Black. 294.*

INDICAVIT (so called from those words in the writ, *indicavit nobis*), is a writ of prohibition that lieth for the patron of a church, whose clerk is defendant in the ecclesiastical court, in an action for tithes, commenced by another clerk, and extending to the fourth part of the value of the church at least; in which case the suit belongs to the king's court, by the statute of *13 Ed. 1. c. 5.* But, at this day, writs of *indicavit*, as well as all other real actions, are grown almost obsolete, and seldom put in practice.

INDICTION, *ab indicendo*, was a space of fifteen years, by which

which charters and public writings were dated at *Rome*; which method of computing time was also sometimes used in *England*. It began at the dismissal of the council of *Nice*, and the first year was reckoned the first of such an indiction, and so on to the number of fifteen, which was reckoned the fifteenth year of such an indiction; and the next year was the first of the next succeeding indiction.

INDICTMENT, is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented on oath by, a grand jury. 4 *Black.* 302.

As an *appeal* is the suit of the party, so the indictment is always the suit of the king, and as it were his declaration; and the party who prosecutes it, is a good witness to prove it. And when such accusation is found by a grand jury, without any bill brought before them, and afterwards reduced to a formed indictment, it is called a *presentment*; and when it is found by jurors returned to inquire of that particular offence only which is indicted, it is properly called an *inquisition*. 1 *Inst.* 126.

2. All capital crimes whatsoever, and also all kinds of inferior crimes of a public nature, as misprisions, contempts, disturbances of the peace, oppressions, and all other misdemeanors whatsoever, of a public evil example against the *common law*, may be indicted; but no injuries of a private nature, unless they some way concern the king. 2 *Haw.* 210.

Also it seems to be a good general ground, that wherever a *statute* prohibits a matter of public grievance to the liberties and security of the subject; or commands a matter of public convenience, as the repairing the common streets of a town; an offender against such statute is punishable, not only at the suit of the party grieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it. 2 *Haw.* 210.

A fact amounting to a felony, is not indictable as a trespass. *L. Raym.* 712.

3. Indictments must have a precise and sufficient *certainty*. By the statute 1 *H.* 5. c. 5. all indictments must set forth the christian name, surname, and addition of the state, degree, and mystery of the person accused, and of the town or place, and county, where he doth inhabit; and all this to identify his person. 4 *Black.* 306.

But the inhabitants of a parish may be indicted for not repairing a highway, although no person is particularly named. *Wood. b. 4. c. 5.*

4. The *time* and *place* are also to be ascertained, by naming the day, and township, in which the fact was committed: though a mistake in these points is in general not held to be material, provided the time be laid previous to the finding of the indictment,

ment, and the place to be within the jurisdiction of the court; unless where the place is laid as part of the description of the fact; and the time also may be sometimes material, where there is any limitation in point of time assigned for the prosecution of offenders; as by statute 7 & 8 *W. c.* 3. which enacts, that no prosecution shall be had for several of the treasons therein mentioned, unless the indictment be found within three years after the offence committed; and in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. 4 *Black.* 106.

Also all indictments on any penal statute, whereby the forfeiture is limited to the king, shall be sued within two years after the offence committed; if limited to the king and prosecutor, the suit shall be in one year; and in default thereof, the same shall be sued for the king, within two years after that year ended. But where a statute limits a shorter time, the suit shall be brought within such time limited. 31 *El. c.* 5.

But where an indictment charges a man with a bare omission, as the not scouring such a ditch, it is said that it needs not shew any time. 2 *Haw.* 236.

5. If the county is in the margin, and the indictment sets forth the act to be done at such a place in the county aforesaid, it is good, for it refers to the county in the margin; but if there be two counties named, one in the margin, and another in the addition of any party, or in the recital of an act of parliament, the fact laid at such a place, in the county aforesaid, vitiates the indictment, because two counties are named before, and therefore it is uncertain to which it refers. *Crown Circ. Comp.* 115.

And if the offence be done in the night, the indictment shall suppose it to be done in the day before: and if it happen after midnight, then it must say it was done that day after. *Lamb.* 492.

6. There are several words of art which the law hath appropriated for the description of the offence, which no circumlocution can supply; as *feloniously*, in the indictment of any felony; *burglariously*, in an indictment of burglary; and the like. 2 *H. H.* 184.

And if a man be indicted that he *stole*, and it is not said *feloniously*, this indictment imports but a trespass. *Id.* 172.

7. Also, in indictments, the *value* of the thing, which is the subject or instrument of the offence, must sometimes be expressed. In indictments for larceny, this is necessary, that it may appear whether it be grand or petit larceny; in homicides of all sorts, it is necessary; as the weapon, with which it is committed, is forfeited to the king as a deadand. 4 *Black.* 307.

8. The

8. The grand jury are only to hear evidence on behalf of the prosecution; for the finding of an indictment, is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it. However, they ought to be thoroughly persuaded of the truth of an indictment so far as their evidence goes; for the indictment being the foundation of all, and commonly found in the absence of the party accused, it is necessary there should be substantial proof. 4 *Black.* 303. 3 *Inst.* 25.

INDORSEMENT, (from *indorsum*, a back,) signifies any thing written upon the back of a deed or other instrument. On sealing of a bond, the condition of the bond may be indorsed, and then the bond and indorsement shall both stand together. The writing of a man's name on the back of a note or bill of exchange, and so in passing from one to another, every succeeding person indorsing his name, makes all the indorsers answerable as well as the drawer. In order to the executing a justice of the peace's warrant in another county, it must be indorsed by some justice in such other county, which is commonly called *backing* the warrant.

INDUCTION, is the giving a clerk instituted to a benefice the actual possession of the temporalities thereof, in the nature of livery of seisin. It is performed by a mandate from the bishop to the archdeacon, who commonly issues out a precept to some other clergyman to perform it for him. Accordingly, the inductor usually takes the clerk by the hand, and lays it upon the key or ring of the church door, and says to this effect: "By virtue of this mandate, I do induct you into the real, actual, and corporal possession of this church of C., with all the rights, profits, and appurtenances thereto belonging." After which, the inductor opens the door, and puts the person inducted into the church; who usually tolls a bell, to make his induction public and known to the parishioners. Which being done, the clergyman who inducts him, indorses a certificate of his induction on the archdeacon's mandate, and they who were present testify the same under their hands. And by this, the person inducted is in full and complete possession of all the temporalities of his church. And what induction worketh in parochial cures, is effected by instalment into dignities, prebends, and the like, in cathedral and collegiate churches.

INDULGENCES, in the Romish church, are the good works of the saints, over and above those that were necessary towards their own justification, together, with the infinite merits of *Christ*, which are deposited, as it were, in one inexhaustible treasury. The keys of this were committed to *St. Peter*, and to his successors the popes, who may open it at pleasure, and by

by transferring a portion of this superabundant merit to any particular person, for a sum of money, may convey to him, either the pardon of his own sins, or a release for any one in whom he is interested, from the pains of purgatory. Such indulgences were first invented in the eleventh century by pope *Urban* the second. 2 *Robertf. Hist. Cha.* V. p. 79.

IN ESSE, is any thing in *being*; and the learned make this distinction between things *in esse*, and things *in posse*; as, a thing that is not, but may be, they say is *in posse*, or *in potentia*; but what is apparent and visible, is *in esse*; that is, it hath a real being, whereas the other is casual, and but a possibility. A child before he is born or conceived, is a thing *in posse*; after he is born, he is said to be *in esse*.

INFAMOUS persons are disabled either to be witnesses or jurors. A conviction of treason or felony, or judgment for any heinous crime to stand on the pillory, or to be whipped, or branded, are good causes of exception. But no such conviction or judgment can be made use of for such disability, unless the record be actually produced in court. 2 *Haw.* 433.

And it is a general rule, that a witness shall not be asked any question, the answering to which might oblige him to accuse himself of a crime; and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes, whereof he never was convicted. *Id.*

And the king's pardon, after a conviction or attainder, restores the party to his credit. *Id.*

INFANGTHIEF, from the Saxon *fang*, to take, signifies a privilege or liberty granted to the lords of certain manors to try any thief taken within their fee; as *outfangthief* was a privilege whereby the lord was enabled to call any man dwelling in his manor, and taken for felony in another place *out* of his fee, to judgment in his own court. But these kinds of franchises are long since antiquated and gone. 2 *Inst.* 31.

INFANT:

1. The ages of male and female are different for different purposes: A male at 12 years of age may take the oath of allegiance; at 14, is of years of discretion, and therefore may consent or disagree to marriage, may chuse his guardian, and (if his discretion be actually proved), may make his testament of his personal estate; at 17, may be an executor; and at 21, is at his own disposal, and may aliene his lands, goods, and chattels. A female, at 7 years of age may be betrothed or given in marriage; at 9, is intitled to dower; at 12, is of years of maturity, and therefore may consent or disagree to marriage, and (if proved to have sufficient discretion), may bequeath her personal estate; at 14, is at years of legal discretion, and may chuse a guardian; at

at 17, may be executrix ; and at 21, may dispose of herself and her lands. 1 *Black.* 463.

2. An infant in the mother's womb is capable of having a legacy ; or a surrender of a copyhold estate made to it. It may have a guardian assigned to it, and is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. 1 *Black.* 130.

3. In criminal cases, an infant of the age of 14 years may be capitally punished for any capital offence ; but under the age of 7 he cannot. The period between 7 & 14 is subject to much uncertainty : for the infant shall, generally speaking, be judged *prima facie* innocent : yet if he was capable of discretion, and could distinguish between good and evil, he may be convicted. 1 *Black* 464.

And generally, by the law, (as it now stands,) the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment ; for one infant of 11 years old may have as much cunning as another of 14. Under 7 years of age, indeed, an infant cannot be guilty of felony ; but above that age, if it clearly appear to the court and jury that he could discern between good and evil, he may be convicted and suffer death. 4 *Black.* 23.

4. By the 18 *Eliz. c. 7.* carnally knowing or abusing any woman child under the age of ten years, is felony without benefit of clergy : in which case, consent or not consent is immaterial, as by reason of her tender years she is incapable of judgment and discretion. And from the necessity of the thing, the infant may be a witness in such case ; and if she hath any idea of an oath, may be also sworn ; it being found, by experience, that infants of very tender years, often give the clearest and truest testimony. But where a man's life is concerned, it is desirable, in order to render her evidence credible, that there should be some concurrent testimony of time, place, and circumstances ; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. 4 *Black.* 214.

5. An infant under 14, is presumed, by law, unable to commit a rape ; and therefore although in other felonies, a capacity of understanding in some cases may supply the want of age, yet it seems, as to this fact, the law presumes him impotent, as well as wanting discretion. 1 *Hale's Hist.* 630.

6. The law doth in some cases privilege an infant under the age of 21, as to common misdemeanors ; so as to escape being fined, imprisoned, or the like : and particularly in cases of omission, as not repairing a bridge, or a highway, or other similar offences : for not having the command of his fortune till 21,
he

he wants the capacity to do those things which the law requires.
4 *Black.* 22.

But where there is any notorious breach of the peace, a riot, battery, or the like; for these, an infant above the age of 14, is equally liable to suffer, as a person of the full age of 21.

4 *Black.* 23.

And an infant under 14, if he commit a trespass against the person or possession of another, shall be compelled in a civil action to give satisfaction for the damage. 1 *Haw.* 2.

7. An infant shall lose nothing by non-claim, or neglect of demanding his right. 1 *Black.* 465.

8. An infant may bind himself apprentice by indenture; also he may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries: but if he binds himself in an obligation, or writing, with a penalty for the payment of any of these, that obligation shall not bind him. 1 *Inst.* 72.

9. An infant may present to a benefice; for the judgment of the fitness of the person presented remaineth with the bishop. 1 *Black.* 465.

10. An infant may purchase lands; but when he comes of age, he may either agree or disagree to it. *Id.* 466.

11. Generally, an infant cannot aliene his estate; but infant trustees or mortgagees are enabled to convey, under the direction of a court of equity, the estates which they hold in trust or mortgage, to such person as the court shall appoint. *Id.* 465.

And by the 29 *G.* 2. c. 31. infants may surrender leases in the courts of chancery or exchequer, in order to renew the same.

And a conveyance by lease and release by an infant, is voidable only, and not void. *Bur. Mansf.* 1794.

Also, there are several kinds of powers which infants may execute, as where an infant is a mere instrument only; as delivery of seisin, which is a mere ministerial act, and requires no judgment or discretion. 3 *Atk.* 710.

And generally, whatsoever an infant is bound to do by law, the same shall bind him although he do it without suit of law; as, if he makes equal partition, if he pays rent, if he admits a copyholder upon a surrender. *Bur. Mansf.* 1801.

12. An infant cannot be sued but under the protection of and joining the name of his guardian: but he may sue either by his guardian, or *prochein amy*; that is, his next friend who is not his guardian. This *prochein amy* may be any person who will undertake the infant's cause. 1 *Black.* 464.

And if an infant refuseth to name a guardian to appear by, the plaintiff, by order of court, may do it for him. *Str.* 1076.

13. A guardian cannot make a lease of the infant's lands, for longer term than until his guardianship expires; if he does, the lease is void. 2 *Wilson*. 129. 135.

INFORMATIONS, are of two kinds: first, those which are partly at the suit of the king, and partly at the suit of a subject; and, secondly, such as are only in the name of the king: the former are usually brought upon penal statutes, which inflict a penalty on conviction of the offender, one part to the use of the king, and another to the use of the informer, and are a sort of *qui tam*, or popular actions, only carried on by a criminal instead of a civil process. 4 *Black*. 308.

Informations that are exhibited in the name of the king alone, are also of two kinds; first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the attorney general; secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person, or common informer; and they are filed by the master of the crown-office, under the express direction of the court. The objects of the king's own prosecutions, filed *ex officio* by the attorney general, are properly such enormous misdemeanors, as peculiarly tend to disturb or endanger the government: the objects of the other species of informations, filed by the master of the crown-office, upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, or other immoralities of an atrocious kind, not peculiarly tending to disturb the government, but which, on account of their magnitude, or pernicious example, deserve the most public animadversion. And when an information is filed either thus, or by the attorney general *ex officio*, it must be tried by a petit jury of the county where the offence arises; after which, if the defendant be found guilty, he must resort to the court of king's bench for his punishment. *Id*.

Of near affinity to an information *qui tam*, is an action upon the statute; which is either a *private* action, when an action is given upon a statute to the king, and to the party grieved only; or a *popular* action, where the action is given to the *people* in general; that is, to any one that will sue for the king and for himself.

By 31 *El. c. 5.* informations on any penal statute, whereby the forfeiture is limited to the king, shall be brought within two years after the offence committed; if limited to the king, and to any other who shall prosecute, then within one year; and, in default of such prosecution, then to be brought for the king in two years after that year ended.

Forasmuch as an information differs from an indictment in little more than this, that the one is found by the oath of twelve men, and the other is not so found, but is only the allegation of the officer

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cer or person who exhibits it ; whatsoever certainty therefore is required in an indictment, the same, at least, is necessary also in an information. And the statutes of jeofails, which remedy oversights in pleading, extend not to informations. 2 *Haw.* 260.

By the 18 *El. c. 5.* if any person informing under pretence of a penal law, shall make any composition without leave of the court, or take any money or promise from the defendant to excuse him, he shall forfeit 10*l.* and stand two hours on the pillory, and shall be for ever disabled to sue on any popular or penal statute.

The court of king's bench will not grant an information against a justice of the peace for an error in judgment only, or for having acted illegally, in the execution of his office ; but will leave the party injured to his ordinary remedy at law : but if the justice acts with partiality, malice, or corruption, an information will be granted. *Bur. Mansf.* 561.

Also the court will grant an information against a parish officer, for procuring a poor man of another parish to marry a poor woman of his own parish, in order to get the woman settled in that other parish. *Id.* 2106.

But in the case *K. v. Compton et al. H. 23 G. 3.* an information was denied against the overseers of *Doncaster*, for conspiring to prevail upon a soldier to marry a poor woman of their parish, then big with child, in order to throw her upon another parish ; on the ground, that great inconvenience had been felt from the practice of obliging persons in low circumstances, to shew cause against informations at a great expence ; as justice might be as effectually had by way of indictment. *Cald. Casf.* 246.

ING, *Sax.* a watery meadow.

INGRESS, *egress*, and *regress*, are words in leases of land, to signify a free entering into, going forth of, and returning from, some part of the lands let ; as to get in a crop of corn, or the like, after the term is expired.

INGROSSING, (from *in*, and *gross*, great or whole,) is the getting into one's possession, or buying up large quantities of corn, or other dead victual, with intent to sell the same again. This was formerly punishable by the statute 5 & 6 *Ed. 6. c. 14.* which statute being repealed by the 12 *G. 3. c. 71.* the same remains now only an offence at common law, punishable by fine and imprisonment.

INHABITANTS, of a town or parish, with respect to the public assessments, and the like, are not only those who dwell in an house there, but also those who occupy lands within such town or parish, although they be dwelling elsewhere. But the word inhabitants doth not extend to lodgers, servants, or the like ; but to householders only. 2 *Inst.* 702.

INHERITANCE, *hereditas*, is a perpetuity in lands or tenements, to a man and his heirs; and the word inheritance is not only intended where a man hath lands or tenements by descent, but also every fee-simple, or fee-tail, which a person hath by purchase, may be said to be an inheritance, because his heirs may inherit it. *Litt. f. 9.*

Inheritances are *corporeal* or *incorporeal*. *Corporeal* inheritances, relate to houses and lands, which may be touched or handled; and *incorporeal* hereditaments, are rights issuing out of, annexed to, or exercised with corporeal inheritances; as advowsons, tithes, annuities, offices, commons, franchises, privileges, and services. *1 Inst. 49.*

There are several rules of inheritances of lands, according to which, estates are transmitted from ancestor to heir; *viz.* 1. That inheritances shall lineally descend to the issue of the person last actually seised, *in infinitum*, but shall never lineally ascend. 2. The male issue shall be admitted before the female. 3. Where there are two or more males in equal degree, the eldest only shall inherit; but the females altogether. 4. The lineal descendants, *in infinitum*, of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living: thus the child, grandchild, or great grandchild (either male or female), of the eldest son, succeeds before the younger son, and so *in infinitum*. 5. On failure of issue of the person last seised, the inheritance shall descend to the blood of the first purchaser. 6. The collateral heir of the person last seised, must be his next collateral kinsman of the whole blood. 7. In collateral inheritances, the male stocks shall be preferred to the female, unless where the lands have descended from a female: thus the relations on the father's side are admitted, *in infinitum*, before those on the mother's side are admitted at all; and the relations of the father's father, before those of the father's mother, and so on. *2 Black. c. 14.*

INHIBITION, is a writ to forbid a judge from a farther proceeding in a cause depending before him, being in nature of a prohibition. It most commonly issues out of an higher court christian to an inferior, upon an appeal. But there are also inhibitions on the visitations of archbishops and bishops: thus, when the archbishop visits, he inhibits the bishop; and when the bishop visits, he inhibits the archdeacon. And this is to prevent confusion. *T. L.*

INJUNCTION, is a kind of prohibition granted in divers cases. It is generally grounded upon an interlocutory order or decree out of the court of chancery or exchequer, to stay proceedings in courts of law. It is also sometimes granted to quiet the possession of lands, or to stay waste. *West. Symb. sect. 25.*

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It is sometimes also issued to the spiritual courts ; as, particularly, where there is a trust, or any thing in the nature of a trust, notwithstanding the ecclesiastical court may have an original jurisdiction, as in the case of legacies, yet the chancery will grant an injunction to stay the proceedings. : *Atk.* 491.

An injunction may be prayed at various stages of the cause, according to the circumstances of the case. If the bill be to stay execution upon an oppressive judgment, and the defendant doth not put in his answer within the stated time allowed by the rules of the court, an injunction will issue of course ; and, when the answer comes in, the injunction can only be continued upon a sufficient ground, appearing from the answer itself. But if an injunction be granted to stay waste, or other injuries of an equally urgent nature, then upon the filing of the bill, and a proper case supported by affidavit, the court will grant an injunction immediately, to continue till the defendant hath put in his answer, and till the court shall make some farther order concerning it : and, when the answer comes in, whether it shall be then dissolved or continued till the hearing of the cause, is determined by the court upon argument, drawn from considering the answer and affidavit together. 3 *Black.* 443.

The court will grant an injunction at the suit of a ground landlord, to stay waste in an under-lessee, who holds by lease from the original lessee. 3 *Atk.* 723.

A remainder man in fee may have an injunction to stay waste in the first tenant for life, notwithstanding an intermediate estate for life. *Id.*

If a mortgagee cuts down timber, and doth not apply the money arising from the sale in sinking the interest and principal, the mortgagor may have an injunction to stay waste. *Id.*

So where the mortgagor commits waste, the court will grant the mortgagee an injunction ; for they will not suffer the mortgagor to prejudice the incumbrance. *Id.*

INLASH, a person under the protection of the law, as an *outlaw* is a person put out of its protection.

INLAND, *terra interior*, the inner or inclosed land, was the demesne of the lord ; as that which was let to tenants was called *outland*. In an ancient will are these words : " To *Wulfey* I give the *inland* or demesnes ; and to *Elfey* the *utlands* or tenancy." *Testam Brittherici*. This word was in great use among the *Saxons*, and often occurs in *Domesday*.

An *inland bill of exchange* is where the person that draws the bill and he upon whom it is drawn, do both of them reside within the kingdom ; as a *foreign bill of exchange* is, where one of the parties resides out of the kingdom. So *inland trade* is that which is carried on within the kingdom ; as *foreign trade* is that which is carried

carried on by a merchant within this kingdom, with his correspondent abroad.

INMATE, is one that is admitted to dwell in the same house with another person, not being able to provide an house for himself. Inmates, by the 31 *El. c. 7.* were prohibited to be admitted in cottages: but by 15 *G. 3. c. 32.* the said statute of the 31 *El.* is repealed; setting forth that the same had laid the industrious poor under great difficulties to procure habitations, and tended very much to lessen population.

INNS, *hospitia*, were instituted for lodging and relief of travellers; and at common law any man might erect and keep an inn or alehouse, but now they are to be licensed by justices of the peace. For which, see **ALEHOUSES**.

INNUENDO, (from *innuo*, to nod or beckon with the head,) is a word used in declarations and law pleadings, to ascertain a person or thing which was named before; as to say, he (innuendo the plaintiff) did so and so, when there was mention before of another person. In an action of *slander*, for instance, two things are requisite; first, that the *person* slandered be certain; and next, that the *words* be certain which contain the slander. As to the *person*: If a man say, without any previous communication, that one of the servants of *A. B.* (he having several servants) is a notorious felon; here, for the uncertainty of the *person*, no action lieth, and an innuendo cannot make this certain: but when the *person* hath been once named in certain, as if two speaking of *J. S.* one of them saith, he is a notorious felon, this is certain enough, and an innuendo will be admitted to shew the person intended. So as to the *words*: If a man say, that such a one had the pox, innuendo the French pox, this will not be admitted, because the French pox was not mentioned before, and the words shall be construed in a more favourable sense. But, if in discourse of the French pox, one say, that such an one had the pox, innuendo the French pox, this will be admitted to render that certain which was uncertain before. 4 *Co. 17.*

INPENY, and *outpeny*, money paid by the customs of certain manors, on being admitted to, or on the alienation of lands within the manor.

INQUEST OF OFFICE, is an inquiry made by the king's officer, sheriff, coroner or escheator, by virtue of their office, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that intitles the king to the possession of lands or tenements, goods or chattels. This is done by a jury of no determinate number, being either twelve, or less, or more. As, to inquire, whether one who held immediately of the king died without heirs, in which case the lands belong to the king by escheat; whether one be attainted of treason, whereby his estate is forfeited to the crown; whether one who hath purchased

chafed lands is an alien, which is another cause of forfeiture ; whether such a one be an idiot, in which case he and his lands appertain to the custody of the king : and while the military tenures subsisted, to inquire of what lands the king's tenant died seized, who was his heir, and of what age, in order to intitle the king to the wardship, marriage, relief, and other advantages. And with regard to other matters, the inquests of office still remain in force ; as in the case of wreck, treasure trove, and the like, and especially as to forfeitures for offences : for every jury which tries a man for treason or felony, every coroner's inquest that sits upon a *felo de se*, or one killed by misadventure, is, in all respects, an inquest of office ; and if they find the treason or felony, or even the flight of the party accused, (though innocent,) the king is thereupon, by virtue of this office, found intitled to have his forfeitures. 3 *Black.* 258.

Some of these inquisitions are in themselves convictions, and cannot afterwards be traversed or denied ; and therefore the inquest ought to hear all that can be alledged on both sides : of this nature are all inquisitions of *felo de se* ; of flight in persons accused of felony ; of deodands, and the like ; and presentments of petty offences in the sheriff's tourn or court leet, whereupon the presiding officer may set a fine. Other inquisitions may be afterwards traversed and examined ; as particularly the coroner's inquisition of the death of a man ; for, in such cases, the offender may be arraigned upon the inquisition, and dispute the truth of it. 4 *Black.* 301.

INQUISITION POST MORTEM, was an inquiry by the escheator in every county, upon the death of any of the king's tenants *in capite*, what lands such tenant held in such county, what was the yearly value thereof, who was his heir, and of what age ; in order to entitle the king to his relief, wardship, marriage, or other advantages, as circumstances should require.

INROLLMENT, (*irrotulatio*,) is the registering or entering in the rolls of the chancery, king's bench, common pleas, or exchequer, or by the clerk of the peace in the records of the quarter sessions, of any lawful act : as a statute or recognizance acknowledged, a deed of bargain and sale of lands, and the like : but the inrolling a deed doth not make it a record, though it thereby becomes a deed recorded ; for there is a difference between matter of record, and a thing recorded to be kept in memory ; a record being the entry in parchment of judicial matters controverted in a court of record, and whereof the court takes notice ; whereas an inrollment of a deed is a private act of the parties concerned, of which the court takes no cognizance at the time of doing it, although the court gives way to it. 2 *Lill. Abr.* 69.

The inrolling must be in parchment only, for the strength and continuance

continuance thereof; though the indenture may be either in parchment or paper. 2 *Inff.* 673.

By statute 27 *H. 8. c.* 16. no lands shall pass, whereby any estate of inheritance or freehold shall take effect, or any use thereof be made, by reason only of any bargain and sale thereof, except the bargain and sale be made by writing indented, sealed, and within six months inrolled in one of the king's courts of record at *Westminster*; or else within the county where the lands lie, before the clerk of the peace, and one or more justices. But by 5 *Eliz. c.* 26. in the counties palatine, they may be inrolled in the respective courts there, or at the assizes.

Deeds and wills of papists must in like manner be inrolled, otherwise no interest therein will pass. 3 *G. c.* 18.

By the mortmain act, 9 *G. 2. c.* 36. no lands, nor money to be laid out in lands, shall be given to any charitable use, unless it be by deed executed twelve months before the death of the donor, and inrolled in chancery in six months after execution; and unless the same be made to take effect immediately.

By several special acts of parliament, memorials of deeds and wills are to be registered in several parts of the county of *York*, and elsewhere; in order to render it more easy to borrow money on land security.

Every deed before it is inrolled, is to be acknowledged to be the deed of the party, before a master of chancery, or a judge of the court wherein it is inrolled; which is the officer's warrant for inrolling the same; and the inrollment of a deed, if it be acknowledged by the grantor, will be good proof of the deed itself upon a trial. 2 *Lill. Abr.* 69.

But a deed may be inrolled without the examination of the party himself; for it is sufficient if oath is made of the execution. If two are parties, and the deed is acknowledged by one, the other is bound by it. And if a man lives abroad, and would pass lands here in *England*, a nominal person may be joined with him in the deed, who may acknowledge it here, and it will be binding. 1 *Salk.* 389.

If after execution of the deed, and before the inrollment, either party dies; yet the land hereby passes, if the deed be inrolled within six months after the execution: so if there be two bargains and sales of the same land to two several persons, and the last deed is first inrolled, and afterwards the first deed is also inrolled within six months; the first buyer shall have the land; for when the deed is inrolled, the buyer is seised of the land from the delivery of the deed, and the inrollment shall relate to it. *Wood. b.* 2. 3.

INSIDIATORES VIARUM, are persons that lie in wait, in order to the commission of felony, or other misdemeanors. These were always excluded by the common law from the benefit of

of clergy ; and, therefore, sometimes these words were put in indictments of felony, on purpose to deprive the offenders of that benefit : and this caused the statute of 4 Hen. 4. c. 2. to be made, to put these words out of indictments, and to allow benefit of clergy if they were in them.

INSIMUL COMPUTASSENT, is a writ that lies upon a stated account between two merchants or other persons ; in which case the law implies, that he against whom the balance appears hath engaged to pay it to the other, though there be not any actual promise : and from this implication, it is frequent for actions on the case to be brought, declaring that the plaintiff and defendant had settled their accounts together, *insimul computassent*, and that the defendant engaged to pay to the plaintiff the balance, but hath since neglected to do it : if no account has been made up, then the legal remedy is, by bringing a writ of account, *de computato*, commanding the defendant to render a just account to the plaintiff, or shew to the court good cause to the contrary. 3 Black. 162.

INSOLVENT. An act of insolvency is an occasional act frequently passed by the legislature, whereby all persons whatsoever, who are either in too low a way of dealing to come within the statutes of bankruptcy, or not being in a mercantile state of life, are not included within the bankrupt laws, are discharged from all suits and imprisonment, upon delivering up all their estate and effects to their creditors upon oath, at the assizes or sessions ; in which case, if they be guilty of fraud or perjury, they are commonly punished with death. 2 Black. 484.

By the statute 32 G. 2. c. 28. if a defendant charged in execution for any debt under 100*l.* will surrender all his effects to his creditors (except his apparel, bedding, and tools of his trade, not amounting, in the whole, to the value of 10*l.*), and make oath of his punctual compliance with the statute, he may be discharged, unless the creditor insists on detaining him ; in which case, he shall allow him 2*s.* 4*d.* a week, to be paid on the first day of every week, and, on failure of regular payment, the prisoner shall be discharged. Yet the creditor may, at any future time, have execution against the lands and goods of the defendant, though never more against his person. And, on the other hand, the creditors may compel (under pain of transportation) such debtor charged in execution for any debt under 100*l.* to make a discovery and surrender of all his effects for their benefit ; whereupon he is also intitled to a like discharge of his person. 3 Black. 416.

INSPEXIMUS, is a word in letters patent, reciting a former grant, *inspeximus*, (we have seen,) such former grant ; and so reciting the same *verbatim*, and then granting such further privileges as are thought convenient.

INSTALL-

INSTALLMENT. Payment of debt by installment, is where several future days are appointed for discharging the debt, part at one time, and part at another. If a man be bound in a bond, or by contract to another, to pay 100*l.* at five several days, he shall not have an action of debt before the last day be past: and so note a diversity between duties which touch the realty, and the mere personalty. But if a man be bound in a recognizance to pay 100*l.* at five several days, presently after the first day of payment, he shall have execution upon the recognizance for that sum, and shall not tarry till the last day be past; for that it is in the nature of several judgments: and so note a diversity between a debt due by recognizance, and a debt due by bond or contract. And so it is of a covenant or promise; after the first default, an action of covenant, or an action upon the case, doth lie, for they are several in their nature: where also note a diversity between debts and covenants, or promises. 1 *Inst.* 292.

Installment, in case of ecclesiastical dignities, is putting the party into actual possession; as placing a prebendary in his *stall* in the quire.

INSTANTER, instantly, immediately; as where a person who hath been for some time attainted of felony, is brought into court, and it is demanded of him what he hath to allege why execution should not be awarded against him; if he denies that he is the same person, this shall be tried *instanter*, by a jury immediately, without giving him time to make his defence, or produce his witnesses, unless he will make oath that he is not the person attainted. 4 *Black.* 396.

INSTITUTION, to a benefice, is that whereby the ordinary commits the cure of souls to the person presented; as by induction he obtains a temporal right to the profits of the living. Previous to the institution, there are several oaths and subscriptions requisite to be taken and made before the ordinary; as, the oath against simony, the oaths of allegiance and supremacy, and (if it is a vicarage) the oath of residence; and to subscribe the thirty-nine articles, and the articles concerning the king's supremacy and the book of common prayer.

INSUPER, is used by auditors in their accounts in the exchequer; as when so much is charged upon a person as due on his account, they say so much remains *insuper* to such accountant.

INSURANCE, amongst merchants, is where a man, for a sum of money paid to him by a merchant, obligeth himself to make good the loss of a ship, or goods therein, or both. 2 *Black.* 458.

Bottomry, is in nature of a mortgage of a ship, when the owner borrows money to enable him to carry on his voyage, and pledges the *bottom* (that is, in effect the whole of it) as a security for

for the repayment; in which case, it is understood, that, if the ship be lost, the lender loses his whole money; but, if it returns in safety, then he shall receive back his money, and also the premium agreed upon, in consideration of the extraordinary hazard run by the lender, however it may exceed the legal rate of interest: and in this case, the ship and tackle, if brought home, are answerable, as well as the person of the borrower, for the money lent. *Ibid.*

But if the loan is not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage; then only the borrower, personally, is bound to answer the contract; who, therefore, in this case, is said to take up money at *respondentia* (which he himself will answer for). *Ibid.*

Insurances, being contracts, the very essence of which consists in observing the purest good faith and integrity, are therefore vacated by any the least shadow of fraud or undue concealment; and, on the other hand, being much for the benefit of trade, they are greatly encouraged and protected both by the common law and acts of parliament. *Ibid.*

But as a practice had obtained of insuring large sums without having any property on board, which were called insurances, *interest or no interest*, and also of insuring the same goods several times over, both of which were a species of gaming, and therefore were denominated *wagering* policies; it is enacted by the 19 G. 2. c. 37. that all these kinds of insurance shall be void; and that no re-insurance shall be lawful, except the former insurer shall be insolvent, a bankrupt, or dead; and that in the *East India* trade, the lender of money on bottomry, or at *respondentia*, shall alone have a right to be insured for the money lent; and the borrower shall (in case of a loss) recover no more upon any insurance than the surplus of the property, above the value of his bottomry, or *respondentia* bond.

But different persons may insure various interests on the same thing; and each to the whole value. *Bur. Mansf.* 494.

When a ship has been long missing, and no advice is had of her, the premium runs proportionably high; and in that case, these words are usually inserted in the policy, *lost or not lost*; and if it so happens, that at the time of the subscription the ship is cast away, yet the insurer shall be answerable.

An insurance of the ship, tackle, and furniture, against perils of the sea, fire, and other accidents in a voyage to and from such a port, and the ship stays in the passage to clean and refit, during which time the sails and furniture are, for security, carried into a storehouse at land, and there accidentally burned; this doth not make the policy void, but the insurers shall be answerable. *Bur. Mansf.* 347.

But

But if the loss happens by the alteration of the voyage, or variation of the chance, or other fault of the owner or master of the ship, the insurer ceases to be liable. *Ibid.*

Otherwise it is, if the thing be done for just cause; as if a ship warranted to depart with convoy, goes out of the way in order to have the opportunity of convoy, this is no deviation. *Ibid.*

It is established upon a principle of convenience, that a man shall not recover more than he has lost. Insurance is an indemnity only, in case of a loss; and therefore the satisfaction ought not to exceed the loss. *Bur. Mansf. 492.*

And if the insured is to receive but one satisfaction, natural justice requires that the several insurers shall all of them contribute *pro rata*, to satisfy that loss, against which they have all insured. *Ibid.*

Where a man makes a double insurance of the same thing, in such a manner that he can recover against several insurers in distinct policies a double satisfaction, the law says, that he ought not to recover doubly for the same loss, but be content with one single satisfaction for it; and if the whole be recovered from one, he ought to stand in the place of the insured, to receive contribution from the other who was equally liable to pay the whole. *Ibid.*

Generally, if an insured ship be taken by the enemy, the insured may demand as for a total loss, and abandon to the insurer; but he cannot by abandoning, turn what was in its nature an average loss into a total loss. *Bur. Mansf. 697.*

Writers and nations differ in opinion with respect to the change of property by capture of the enemy: some hold it to be as soon as the engagement is over; some hold that the prize must be brought into some of the enemy's ports; others that 24 hours quiet possession by the enemy is the criterion; the *English* courts of admiralty, not till after sentence of condemnation. But as between insurer and insured, the ship is lost by the capture; and the insurer must indemnify the insured, as to the loss actually sustained; and he shall stand in the place of the insured, in case of a re-capture or abandonment. *Bur. Mansf. 694.*

By the 11 *G. c. 29.* if any owner of, or captain, master, mariner, or other officer, belonging to any ship, shall wilfully cast away, burn, or otherwise destroy the same, with intent to prejudice any person that shall underwrite any policy of insurance thereon, or any merchant having goods therein; he shall be guilty of felony without benefit of clergy.

INTENDMENT. The intent of the parties in deeds and other instruments is much regarded by the law. With respect to wills, lord *Coke* says, the intention of the testator is the pole star

star to guide the judges in the exposition thereof: yet such intention must be collected out of the words, and it must consist with the law. *Swinb.* 10. The intendment shall sometimes supply that which is not fully expressed or apparent; and when a thing is doubtful in some cases, intendment may make it out. Also, many things shall be intended after verdict in a cause to make a good judgment; but intendment cannot supply the want of certainty in a charge in an indictment for any crime. 2 *Haw.* 227. 441.

INTER CANEM ET LUPUM, between the dog and the wolf; the twilight: for when the night begins, the dog sleeps, and the wolf seeketh his prey. 3 *Inst.* 63.

INTERCOMMONING, is where the commons of two manors lie together, and the inhabitants of both have, time out of mind, depastured their cattle promiscuously in either.

INTERDICT, is an ecclesiastical censure, whereby the divine services are prohibited, either to particular persons, or in particular places, or both. And both these kinds of interdict have been frequently exercised heretofore, upon whole villages, towns, provinces, and even kingdoms; till they should make satisfaction for injuries done, or abstain from injuries they were doing to the church. *Lindw.* 320.

In the year 1208, the pope excommunicated king *John* and all his adherents, and put the whole kingdom under an interdict; which began the first *Sunday* after *Easter*, and continued six years and one month.

During the time of interdict, baptism was allowed, because of the frailty and uncertainty of life; but the holy eucharist was not allowed, except in the article of death; so also Christian burial was denied in any consecrated place, except it were done without divine offices.

But this censure hath been long disused; and nothing of it appears in the laws of church or state since the reformation. *Gibf. Cod.* 1047.

INTERDICTED *of fire and water*, were anciently those persons who suffered banishment for some crime; by which judgment, order was given that no man should receive them into his house, but should deny them *fire* and *water*, the two necessary elements of life.

INTEREST, is vulgarly taken for a term, or chattel real, and more particularly for a future term; in which case it is said in pleading, that he is possessed of the interest of the term (*de interesse termini*). But in legal understanding, it extends to estates, rights, and titles, that a man hath of, in, to, or out of lands, for he is truly said to have an interest in them; and by the grant of his whole interest in such lands, as well reversions as possessions in fee-simple shall pass. 1 *Inst.* 345.

INTEREST

INTEREST OF MONEY. See **USURY.**

INTERLINEATION. When a deed is altered in any material point, either by interlineation, rasure, addition, or by drawing a pen through the line, or through the middle of any word material, this will vacate the deed, unless a memorandum be made thereof at the time of the execution and attestation.

11 *Co.* 27.

INTERLOCUTORY JUDGMENTS, are such as are given in the middle of a cause, upon some plea, proceeding, or default; which is only intermediate, and doth not finally determine or complete the suit. 3 *Black.* 295.

INTERPLEADER, bill of, is where a person who owes a debt or rent to one of the parties in suit in the chancery, but, till the determination thereof, he knows not to which of them, desires that they may *interplead*, that he may be safe in the payment. In this case it is usual to order the money to be paid into court, for the benefit of such of the parties, to whom, upon hearing, the court shall decree it to be due: and the plaintiff must annex an affidavit to his bill, swearing, that he doth not collude with either of the parties. 3 *Black.* 448.

INTERROGATORIES, are particular questions demanded of witnesses brought in to be examined in a cause, especially in the courts modelled by the rules of the civil law. And these interrogatories must be exhibited by the parties in suit on each side; which are either *direct* for the party producing them, or *counter* on behalf of the adverse party; and generally both plaintiff and defendant may exhibit interrogatories. They are to be pertinent, and only to the points necessary, and either drawn or perused by counsel and signed by them. If the interrogatories are leading, such as to say, "Did you not see such a thing?" the deposition thereupon ought not to be admitted; for it should be, "Did you see, or did you not see?" without leaning to either side. The commissioners who examine witnesses upon interrogatories, must examine only to one interrogatory at a time; and take what comes from the witnesses without asking any impertinent questions, or putting down any nugatory answers not relating to the interrogatories.

INTESTATE, is when a man dies having made no disposition of his personal estate by will. In which case, by the old law, the king was intitled to seize upon his goods, as the general trustee of the whole kingdom. Afterwards the king, in favour of the church, granted this prerogative to the ordinary; who therefore might seize upon the intestate's goods, and give, aliene, or sell them as he pleased, and dispose of the money to pious uses, for the benefit of the soul of the deceased. Lastly, the ordinary, by special acts of parliament, was required to grant administration

nistration of the effects of the deceased to the widow or next of kin; who shall first pay the debts of the deceased, and then distribute the surplus amongst the kindred, in the manner and according to the proportions directed by the 22 & 23 C. 2. c. 10. commonly called the statute of distribution.

INTRUSION, is where a tenant for term of life dieth seized of certain lands and tenements, and a stranger enters thereon, after such death of the tenant, and before any entry of him in remainder or reversion. This entry and interposition of the stranger differs from an *abatement*, in that an *abatement* is always to the prejudice of the *heir* or immediate *devisee*; an *intrusion* is always to the prejudice of him in *remainder* or *reversion*. The remedy in either of these cases may be by entry of the legal owner, without being put about to bring his action; for the original entry of the wrong doer being unlawful, the law allows this easy remedy by the mere entry of him that hath right, provided that he enter without force and violence, and provided that the intruder is living, and consequently no descent cast, for in case of a descent, the rightful owner shall not enter without bringing his action.

In case of intrusion into an ecclesiastical benefice, where the intruder gets possession, and holds the same with force and violence, a writ issues to the sheriff *de vi laica amovenda*; that is, to abate and remove the force; and the writ being returned into the king's bench, the offenders shall there be fined, and restitution awarded to the party intruded upon.

INVENTORY, is a list or schedule of all the goods and chattels which a person deceased died possessed of, with their value appraised by indifferent persons; which every executor or administrator ought to exhibit to the ordinary, at such time as he shall appoint. And by the ecclesiastical law, if an executor or administrator, without making an inventory, shall intermeddle himself with the goods of the deceased (except in certain cases, as for the expences of the funeral, and necessary preservation of the goods), he is bound to answer to every one of the creditors his whole debt. Also, it is said, that every legatee may recover his whole legacy; for in such case the law presumes, that there are sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same. Whereas, otherwise, the executor is presumed not to have any more goods which were the testator's, than are described in the inventory. And, therefore, if any creditor or legatary doth affirm, that the testator had any more goods than are comprised in the inventory, he must prove the same; otherwise the judge is to give credit to the inventory, being lawfully made. *Swinb.* 228.

And in equity, although the not exhibiting an inventory is not conclusive

conclusive evidence of a sufficiency of assets, yet it is a violent presumption; and the court always inclines strongly against an executor or administrator; since he may at any time relieve himself by an inventory, if he finds a deficiency of assets. 1 *Vezey*.

75.

But as to the value of the goods upon the appraisement, it is not conclusive, nor very much regarded at the common law; for if it is too high, it shall not be prejudicial to the executor or administrator; and if it be too low, it shall be no advantage to him: but the very value found by the jury, when it comes in question whether the executor hath fully administered, or hath assets or not, is that which is binding. *Wentw. Execut.*

83, 4.

IN VENTRE SA MERE, *in his mother's womb*, is, where a woman is with child at the time of her husband's death, which child, if born, would be heir to the land of the husband. And the law hath consideration of such child, on account of the apparent expectation of his birth. For a devise to an infant *in ventre sa mere* is good by way of future executory devise. And where a daughter comes into land by descent, the son born after shall oust her and have the land. 3 *Co.* 61.

INVESTITURE, is the giving possession of lands by actual seisin. The ancient feudal investiture was, where the vassal on the descent of lands was admitted in the lord's court, and there received his seisin, in the nature of a renewal of his ancestor's grant, in the presence of the rest of the tenants: but, in after-times, entering on any part of the lands, or other notorious possession, was admitted to be equivalent to the formal grant of seisin and investiture. 2 *Black.* 209.

The manner of grant was by words of pure donation, *have given and granted*: which are still the operative words in our modern infeodations or deeds of feoffment. This was perfected by the ceremony of corporal investiture, or open and notorious delivering of possession in the presence of the other vassals. *Id.* 53.

But a corporal investiture being sometimes inconvenient, a symbolical delivery of possession was in many cases anciently allowed; by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to the occupancy of the land itself. Among the Jews, the ceremony was, a man plucked off his shoe and gave it to his neighbour. Among the ancient Goths and Swedes, the witnesses extended the cloak of the buyer, whilst the seller cast a clod of the land into it. With our Saxon ancestors, the delivery of a turf was a necessary solemnity. And to this day, the conveyance of many of our copyhold estates is made from the seller to the lord, or his steward

ard, by delivery of a rod or verge, and then from the lord to the purchaser by a re-delivery of the same, in the presence of a jury of tenants. 2 *Black.* 313.

INVOICE, a particular account of merchandize, with its value, customs, charges, and the like, sent by a merchant to his factor or correspondent in another country.

JOCALIA, jewels, or ornaments for women, which they peculiarly call their own property.

JOINDER IN ACTION, is coupling or joining of two in a suit or action against another. *F. N. B.*

JOINDER IN DEMURRER, is an issue joined in matter of law. It confesses the fact to be true, as stated by the opposite party, but denies that, by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a sufficient excuse. The opposite party avers it to be sufficient, which is called a joinder in demurrer; and then the parties are at issue in point of law. 3 *Black.* 314.

JOINDER OF ISSUE. An issue of fact, is where the fact only, and not the law, is disputed. And when he that denies or traverses the fact pleaded by his antagonist, has tendered the issue, thus, "and this he prays may be inquired of by the country," or, "and of this he puts himself upon the country," it may be immediately subjoined by the other party, "and the said *A. B.* doth the like." Which done, the issue is said to be joined; both parties having agreed to rest the fate of the cause upon the truth of the fact in question. 3 *Black.* 315.

JOINT ACTIONS. In personal actions, several wrongs may be joined in one writ; but actions founded upon a tort, and a contract, cannot be joined, for they require different pleas and different process. 1 *Keb.* 847. 1 *Vent.* 336.

JOINTENANTS are, as if a man was seised of certain lands or tenements, and infeoffeth two, three, or more, to have and to hold to them and their heirs, or leases to them for term of their lives, or for the term of another's life, by force of which feoffment or lease they are seised, these are jointenants. *Litt. sect.* 277.

So also a jointenancy may be made by fine, recovery, bargain and sale, release, confirmation, or otherwise, except only by descent; whereas an estate in co-parcenary is always by descent, and an estate in common is always by several titles. 1 *Inst.* 18.

It is the nature of jointenancy, that he who surviveth shall have the whole. As if there be three jointenants in fee simple, and one hath issue and dieth; yet they which survive shall have the whole tenements, and the issue shall have nothing. And if the second jointenant hath issue and dieth, yet the third which surviveth shall have the whole tenements to him and his heirs for ever. But otherwise it is of coparceners; for if there be

three coparceners, and before any partition made, one of them hath issue and dieth, that which belonged to her shall descend to her issue; and if she died without issue, that which belonged to her shall descend to her coheirs, so as they shall have this by descent, and not by survivor, as jointenants shall have. *Litt. sect.* 280.

And survivor holdeth place regularly as well between jointenants of goods and chattels in possession, or in right, as jointenants of inheritance or freehold. As if a horse be given to two, he who surviveth shall have the horse only. *1 Inst.* 182.

But for the encouragement of husbandry and trade, it is held that stock on a farm, though occupied jointly, and also stock in a joint undertaking, by way of partnership in trade, shall always be considered as common, and not as joint property; and there shall be no survivorship therein. *2 Black.* 399.

Jointenants must have one and the same *interest*; one jointenant cannot be intitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other tenant in tail. *2 Black.* 181.

They must also have an unity of *title*: their estate must be created by one and the same act or grant; it cannot arise by descent or act of law, but merely by purchase or acquisition by the act of the party. *Ibid.*

There must also be an unity of *time*: their estates must be vested at one and the same period, as in case of a present estate made to two persons, or a remainder in fee after a particular estate; in either case they are jointenants of this present estate, or this vested remainder. *Ibid.*

Also there must be an unity of *possession*; they each of them have the entire possession, as well of every parcel, as of the whole. They have not, one of them a seisin of one half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each hath an undivided moiety of the whole, and not the whole of an undivided moiety. *2 Black.* 182.

So livery of seisin to one is livery of seisin to them both; the entry of one is the entry of them both; rent reserved to be paid to one, shall enure to them both. But by construction of the statute of *Westminster*, 2. c. 22. one jointenant may have an action of waste against the other; and by the 4 *An. c.* 16. jointenants may have actions of account against each other. *2 Black.* 182, 3.

Jointenants must jointly implead, and be jointly impleaded by others; which property is common to them and coparceners. *1 Inst.* 180.

Jointenants may make partition, or one party may by the statute of the 31 *H. 8. c.* 1. and 32 *H. 8. c.* 32. compel the other to make partition; which must be by deed: that is to say, all the parties

parties must by deed actually convey and assure to each other the several estates, which they are to take and enjoy separately
2 *Black.* 324.

And by the 8 & 9 *W. c.* 31, an easier method of carrying on the proceedings on a writ of partition, of lands held either in jointenancy, parcenary, or tenancy in common is marked out, than had been provided by the common law. 2 *Black.* 189.

If one jointenant alienes and conveys his estate to a third person, the jointenancy is severed, and turned into tenancy in common; though, till partition made, the unity of possession continues. But a devise of one's share by will is no severance of the joint estate: for the will doth not take effect till after the death of the testator, and by such death the right of the survivor hath accrued, and is already vested. 2 *Black.* 185, 6.

A JOINTURE, strictly speaking, signifies a joint estate, limited to both husband and wife; but, in common acceptation, it extends also to a sole estate, limited to the wife only, and may be thus defined: *viz.* a competent livelihood of freehold for the wife of lands and tenements, to take effect, in profit or possession, presently after the death of the husband; for the life of the wife at least. 2 *Black.* 137.

By the statute of the 27 *H. 8. c.* 10. if a jointure be made to the wife, it is a bar of her dower, so as she shall not have both jointure and dower. And to the making of a perfect jointure within that statute six things are to be observed: 1. Her jointure is to take effect presently after her husband's decease. 2. It must be for the term of her own life, or greater estate. 3. It must be made to herself, and to no other for her. 4. It must be made in satisfaction of her whole dower, and not of part of her dower. 5. It must either be expressed or averred to be in satisfaction of her dower. 6. It may be made either before or after marriage. 1 *Inst.* 32.

A jointure hath a great advantage over dower in one respect: the jointress may enter without any formal process; whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower. 2 *Black.* 139.

Notwithstanding her dower or jointure, the wife shall have all her chattels real, and bonds again, unless her husband altered the property in his life-time: also her proportion of chattels real and personal, upon an administration and distribution, if the husband dies intestate. 1 *Inst.* 351.

JOKELET, *yokelet*, a little farm, such as requires a small yoke of oxen to till it.

JOUR, *Fr.* a day. So *journal*, a day-book, or diary. *Journeyman*, a person in trade who works for another by the day.

IPSO FACTO, in the ecclesiastical law, is a censure of ex-

communication immediately incurred for divers offences: but this is not to be so understood as to condemn any person without a lawful trial; but he must first be found guilty in the proper court, and then the law gives this judgment.

IRELAND. At the time of the conquest of *Ireland* by king *Hen. 2.* the Irish were governed by what they called the Brehon law, so styled from the Irish name of judges, who were denominated Brehons; but king *John*, in the twelfth year of his reign, introduced the English laws: and the Irish method of passing acts of parliament was then nearly the same as in *England*. But in the tenth year of *Hen. 7.* Sir *Edward Poynings* being then lord deputy, certain statutes were made (which from him were called *Poynings' laws*), one of which enacts, that before any parliament be summoned or holden, the chief governor and council of *Ireland* shall certify to the king the considerations and causes thereof, and the articles of the acts proposed to be passed therein; and that after the king in his council of *England* shall have considered, approved, or altered the said acts or any of them, and certified them back under the great seal of *England*, and shall have given licence to summon and hold a parliament, then the same shall be summoned and held; and therein the said acts so certified, and no other, shall be proposed, received, or rejected.—But the usage now is, that bills are often framed in either house, under the denomination of heads for a bill or bills; and in that shape they are offered to the consideration of the lord lieutenant and privy council; who, upon such parliamentary intimation, or otherwise upon the application of private persons, receive and transmit such heads, or reject them without any transmission, to *England*. 1 *Black.* 99.

Where a debt is contracted in *England*, and a bond is taken for it in *Ireland*, it shall carry Irish interest; for it must be considered as referable to the place where it is made: but if it were a simple contract debt only, it ought to carry English interest, the variation of place in this case making no difference. 2 *Atk.* 382.

Justices of the peace in *England* may transmit a person offending against the Irish law, in order to his being sent over. *Str.* 848.

ISSUE, is a single, certain, and material point *issuing* out of the allegations and pleas of the plaintiff and defendant; consisting regularly of an affirmative and negative, to be tried by a jury. 1 *Injl.* 126.

It is twofold; *general*, and *special*:

The *general* issue is, what traverses, thwarts, and denies at once the whole declaration, without offering any special matter whereby to evade it; and it is called the general issue, because by importing an absolute and general denial of what is alleged in the declaration,

claration, it amounts at once to an issue; that is, a fact affirmed on one side, and denied on the other: as when, to a trespass, the defendant pleads not guilty. 3 *Black.* 305.

Special, is that whereby the defendant doth not wholly deny the charge alleged against him, but means to palliate the charge and apprise the court and the opposite party of the nature and circumstances of the defence; as, in assault and battery, where the defendant pleads, that the plaintiff struck first. *Id.*

But of late, the courts in some instances, and the legislature in many more, have permitted the *general issue* to be pleaded, and allowed the *special matter* to be given in evidence at the trial. *Id.* 305, 6.

A *feigned issue*, is that whereby an action is brought for a *feigned cause*, by consent of the parties, to determine some disputed right, without the formality of pleading, and thereby to save much time and expence in the decision of a cause. 3 *Black.* 452.

JUDGMENT, is the sentence of the law, pronounced by the court, upon the matter contained in the record. And it may be given in the four following respects: 1. Upon default; as if the defendant puts in no plea at all to the plaintiff's declaration. 2. By confession; where the defendant acknowledges the action, which is often done by consent of both parties, with a stay of execution till a certain time, to save charges, where the action is just; as in case of an action of debt, it is usual for a debtor (in order to strengthen a bond creditor's security) to execute a warrant of attorney to confess a judgment; which judgment, when confessed, is conclusive. 3. Upon demurrer; as when the defendant in an action of debt pleads a bad plea in bar, and the plaintiff demurs in law upon it, and the court gives judgment for the plaintiff to recover his debt, costs, and damages. But if it were in an action on the case, a writ of inquiry of damages must be awarded before judgment on the demurrer. 4. On trial of the issue; where the court gives damages without writ of inquiry. *Wood. b. 4. c. 4.* 3 *Black.* 397.

And as in an action on the case, so a judgment in trespass, covenant, or the like, is not a perfect judgment until writ of inquiry of damages taken out and executed upon it, of which notice is to be given to the defendant, and of the time of execution. But in an action of debt, it is a perfect judgment as soon as signed, and there needs no writ of inquiry. 2 *Lill. Abr.* 105.

Judgments are either *interlocutory* or *final*:

Interlocutory judgments are such as are given in the middle of a cause, upon some plea, proceeding, or default, which is only intermediate, and doth not finally determine or complete the suit; as upon dilatory pleas, where the judgment in many cases is, that the defendant shall answer over; that is put in a more substantial plea. *Id.* 396.

Final judgments are such as at once put an end to the action,

by declaring that the plaintiff hath either intitled himself, or hath not, to recover the remedy he sues for. 3 *Black.* 398.

By the statute of frauds, 29 C. 2. c. 3. judgments, as against purchasers of lands *bona fide* for valuable consideration, shall relate only to the time they were signed, and not (as before the said act) to the first day of the term, or the day of the return of the original, or filing the bail; and writs of execution of the defendant's goods shall bind the property only from the time that the writ is delivered to the sheriff; who shall, upon receipt of the writ, indorse the time when he received it.

And for the better discovery of judgments in the courts at *Westminster*, there is a particular method of entering the same directed by the 4 & 5 *W. c.* 20. And no judgment, not so entered, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestors, testators, or intestates estates.

The course for one to acknowledge a judgment for debt is, for him that doth acknowledge it, to give a general warrant of attorney to any attorney, or to some particular attorney of that court where the judgment is to be acknowledged, to appear for him at his suit, against the party who is to have the judgment acknowledged unto him, and thereupon to confess judgment for the sum demanded, together with costs of suit.

In the *Easter* term, 15 C. 2. it was ordered by the court of king's bench, that an officer shall not take any warrant to confess a judgment of any person in his custody, unless an attorney for the defendant is present, and subscribes his name to such warrant. 3 *Salk.* 212.

And, *E.* 4 G. 2. the court taking notice of great inconveniences following from holding a warrant to confess judgment by one in custody to be good if any attorney (though for the opposite party) was present, made a rule, that, for the future, there shall be an attorney present on the behalf of the defendant. *Str.* 902.

An action of covenant brought, and an interlocutory judgment that he shall recover; before final judgment, the defendant dies, and his executor confesses a judgment to a bond creditor; he may plead this in bar to a *scire facias* on the action of covenant. 2 *Atk.* 386.

JUNCARE, to strew rushes; as was of old the custom of accommodating churches, and the very bed-chamber of princes.

JUNCARIA, a place where rushes grow. 1 *Inst.* 5.

JURATIS, *jurati*, (jurats,) are in nature of aldermen for the government of many corporations.

JURIDICAL

JURIDICAL DAYS, days in court, on which the law is administered.

JURISDICTION, is an authority or power which a man hath to do justice in causes of complaint brought before him. The courts and judges at *Westminster* have jurisdiction all over *England*; and are not restrained to any county or place: but all other courts are confined to their particular jurisdictions; which, if they exceed, whatever they do is erroneous. 2 *Lill. Abr.* 120.

There are three sorts of inferior jurisdictions: 1. To *hold pleas*, which is the lowest, and the party may either sue there, or in the king's courts. 2. The *cognizance of pleas*; and by this, a right is vested in the lord of the franchise to hold pleas, and he is the only person that can take advantage of it, by claiming his franchise. 3. An *exempt jurisdiction*; as where the king grants to some city, that the inhabitants shall be sued within their city, and not elsewhere. 3 *Salk.* 79.

Inferior jurisdiction cannot be intended, but they must be properly set out. *Bur. Mansf.* 2244.

On a plea to the jurisdiction, it must be shewn what other court has jurisdiction. 1 *Vez.* 202.

JURIS UTRUM, is a writ that lies for the succeeding incumbent of a benefice, to recover the lands or tenements belonging to the church, which were aliened by his predecessor: and it is so called, in like manner as most of the other writs in the register, from certain words in the writ respecting the special matter for which the writ is brought.

JURORS:

1. *Antiquity of trial by jury.* Trial by jury is the Englishman's birthright; and is that happy way of trial, which, notwithstanding all revolutions of times, hath been continued beyond all memory to this present day; the beginning whereof no history specifies, it being contemporary with the foundation of this state, and one of the pillars of it both as to age and consequence. *Trial per pais*, 3.

2. *How many to be returned.* Upon a grand jury there may be, and usually are, more than 12; but if there be twelve assenting, though others dissent, it is not necessary for the rest to agree: but, upon a trial by a petit jury, it can be by no more, nor less, than 12, and all assenting to the verdict. 2 *Hale's Hist.* 161.

3. *By whom to be returned.* Generally, the return of jurors belongs to the office of the sheriff; but if the sheriff be not an indifferent person, as if he be a party in the suit, or be related either by blood or affinity to either of the parties, he is not then trusted to return the jury; but the *venire* shall be directed to the coroners of the county. If any exception lies to the coroners, the *venire* shall be directed to two clerks of the court, or two persons of the county named by the court, and sworn; and these two, who are called

called *elisors*, or electors, shall, indifferently, name the jury ; and their return is final, no challenge being allowed to their array. 3 *Black.* 354.

4. *Summons.* Every summons of jurors shall be made by the sheriff or his officer, six days before at least ; in *Wales* eight days ; and in the counties palatine, fourteen days ; shewing to the person summoned, the warrant under seal of the office ; and if he is absent, the officer shall leave under his hand notice thereof with some person inhabiting in his dwelling house. 7 & 8 *W. c.* 32.

5. *Special jury.* Special juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him : he is, in such cases, upon motion in court, and a rule granted thereupon, to attend the prothonotary, or other proper officer, with his freeholders' book, and the officer is to take indifferently 48 of the principal freeholders, in the presence of the attornies on both sides ; who are each of them to strike out 12, and the remaining 24 are returned upon the panel. By the statute 3 *G. 2. c.* 25. either party is intitled, upon motion, to have a special jury struck upon the trial of any issue, as well at the assises as at bar ; he paying the extraordinary expence, unless the judge will certify (in pursuance of the statute 24 *G. 2. c.* 18.) that the cause required such special jury. 3 *Black.* 357.

6. *Common jury.* A common jury is one returned by the sheriff, according to the directions of the statute 3 *G. 2. c.* 25. which appoints that the sheriff shall not return a separate panel for every separate cause, but one and the same panel for every cause to be tried at the same assises, containing not less than 48 jurors, nor more than 72 ; and that their names, being written on tickets, shall be put into a box or glass, and when each cause is called, 12 of these persons whose names shall be first drawn out of the box, shall be sworn of the jury. *Id.* 358.

7. *Jury of view.* In case a view of the place in question shall be thought necessary by the court, six or more of the jurors returned, to be agreed on by the parties, or named by a judge or other proper officer of the court, shall be appointed by special writ of *habeas corpora* or *distringas*, to have the matters in question shewed to them by two persons named in the writ ; and then such of the jury as have had the view, or so many of them as appear, shall be sworn on the inquest, previous to any other jurors. 4 *An. c.* 16. 3 *G. 2. c.* 25.

8. *Challenge.* Challenge of jurors is of two kinds ; either to the *array*, by which is meant the whole jury as it stands *arrayed* in the *panel*, or little square *pane* of parchment on which the jurors names

names are written; or to the *polls*, by which are meant the several particular persons or *heads* of the array. 1 *Inst.* 156. 158.

Challenge to the *array*, is in respect to the bias, partiality, or default of the sheriff, coroner, or other officer that made the return. If the sheriff or other officer be of kindred to either party, or if any one or more of the jury be returned at the denomination of either party, this is a good cause of challenge to the array. 1 *Inst.* 156.

Challenge to the *polls*, is in respect of particular jurors; as, if such juror be interested in the cause, if he hath taken money of either party, if he hath been convicted of an infamous offence, and in a variety of other instances.

Where the challenge against a juror is in respect of partiality, the validity thereof shall be referred to the determination of *triers*, whose office it is to decide whether the juror be favourable or unfavourable. If the challenge be made before any jurors are sworn, the court shall chuse the triers; if two are sworn, they shall try; and if they try one indifferent, and he be sworn, then he and the two triers shall try another; and if another be tried indifferent and he be sworn, then the two triers cease, and the two that are sworn on the jury shall try the rest. The trier's oath is, "You shall well and truly try, whether *A. B.* stand indifferent between the parties to this issue: So help you God." 1 *Inst.* 158. 1 *Salk.* 152.

If the array be challenged, it lies in the discretion of the court how it shall be tried; sometimes it is done by two coroners, and sometimes by two of the jury returned. 2 *Hale's Hist.* 275.

A juror may himself be examined on oath of *voir dire*, (*veritatem dicere*,) with regard to such causes of challenge as are not to his dishonour or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage. 1 *Inst.* 158.

In *criminal* cases, or at least in *capital* ones, a *peremptory* challenge is allowed to the prisoner without shewing any cause: but this peremptory challenge shall not be allowed to the king; for it is provided by the 33 *Ed. 1. ff.* 4. that he who challenges a juror for the king, shall shew cause, and the truth thereof shall be inquired into by the court. However, it is held, that the king need not assign his cause of challenge till all the panel is gone through, and unless there cannot be a full jury without the persons so challenged. In case of treason or felony, the prisoner, by the common law, might peremptorily challenge 35, which was under the number of three juries; and in case of treason, the law continues so still; but in case of murder and other felonies, the statute 22 *Hen. 8. c.* 23. reduced the number to 20; but if the party challenges above that number, he shall not have judgment of death, but his challenge shall be over-ruled, and

and he shall be put upon his trial. 2 *Haw.* 413. 2 *Hale's Hist.* 270.

9. *Tales.* If by means of challenges, or other cause, a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a *tales*: that is to say, a supply of *such* men as are returned on the first panel, in order to make up the deficiency. These *tales-men* (*tales de circumstantibus*) may be returned of the persons present in court; and, at *nisi prius*, they shall be returned out of the other panels returned to serve at the same assises. 7 & 8 *W. c.* 32.

10. *Verdict.* After the evidence given upon the issue, the jury ought to be kept together, without meat or drink, fire or candle, unless by permission of the judge, till they are all unanimously agreed: if they eat or drink, or have any eatables about them, without consent of the court, and before verdict, it is fineable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict: also, if they speak with either of the parties or their agents, after they are gone from the bar, or if they receive any fresh evidence in private, or if to prevent disputes they cast lots for whom they shall find; any of these circumstances will intirely vitiate the verdict. 3 *Black.* 375.

After they are agreed, they may, in causes between party and party, if the court be risen, give a *private* verdict to the judge out of court; and then they may eat and drink; and the next morning in open court they may either affirm, or alter, their private verdict, and that which is given in court shall stand. 1 *Inst.* 227.

Sometimes, if there arises in the case any difficult matter of law, the jury will find a *special* verdict, wherein they state the naked facts as they find them to be proved; concluding, conditionally, that if upon the whole matter the court shall be of opinion that the plaintiff had cause of action, then they find for the plaintiff; if otherwise, then for the defendant. 3 *Black.* 377.

Another method of finding the matter specially, is when the jury find a verdict for the plaintiff, subject nevertheless to the opinion of the judge, or the court above, on a *special case* stated by the counsel on both sides, with regard to a matter of law; which has this advantage over a special verdict, that it is attended with much less expence, and obtains a speedier decision; but it has this disadvantage, that if either of the parties is dissatisfied with the judgment of the court or judge upon the point of law, they are precluded hereby from the benefit of a writ of error. 3 *Black.* 378.

But in both these instances, the jury may, if they think proper, take upon themselves to determine, at their own hazard, the complicated question of fact and law; and, without either special verdict, or special case, may find a verdict absolutely either for the plaintiff or defendant. *Id.*

In *criminal* cases, which touch life or member, the jury cannot give

give a *private* verdict; but they may give a *special* verdict, if they think fit, setting forth all the circumstances of the case, whether (for instance) on the facts stated, it be murder, manslaughter, or no crime at all. But, if they give a general verdict, and it be apparently wrong, or contrary to the direction of the judge, yet they are not punishable for it by the judge; but the court of king's bench hath sometimes set aside a verdict which found a prisoner guilty, contrary to evidence, and ordered a new trial; but in no case hath a new trial been granted when the prisoner was acquitted.

JUS PATRONATUS, is a commission from the bishop, directed usually to his chancellor and others of competent learning; who are to summon a jury of six clergymen, and six laymen, to inquire into and examine who is the rightful patron of a church. And this is, when the church is become litigious by the presentation of two several patrons of their clerks to avoid church within the six months. In this case, the bishop may, if he pleases, suspend the admitting either the one clerk or the other, and suffer lapse to incur, without awarding a *jus patronatus*; but upon request of either party, patron, or clerk, he must award it: and then, if he admits the clerk according to the verdict found, and certificate of the commissioners, he secures himself from being a disturber, though the right in a *quare impedit* shall be afterwards found for the other. 3 *Black.* 246.

JUSTICES OF THE PEACE, are persons appointed by the king's commission to keep the peace; unto which office is annexed a power to hear and determine offences.

The estate sufficient to qualify a justice of the peace, must be 100*l.* a year, clear of all deductions; of which he must make oath before he acts.

He must also, before he acts, take the oath of office; which is usually done before some persons in the country, by virtue of a *dedimus potestatem* out of chancery.

Sheriffs, coroners, and attorneys, may not act as justices of the peace.

The power, office, and duty of this magistrate, extends to an almost infinite number of instances, specified in some hundreds of acts of parliament, and every year accumulating.

The commission of the peace doth not determine by the death of the king, nor until six months after, unless sooner determined by the successor: but, before his death, the king may determine it, or may put out any particular person; which is most commonly done by a new commission, leaving out such person's names.

JUSTICE-SEAT, is the highest court of the forest, being always holden before the chief justice *in eyre*, or chief itinerant judge, *capitalis justiciarius in itinere*, or his deputy, to hear and determine all trespasses within the forest, and all claims of franchises, liberties, and privileges, and all pleas and causes whatsoever

soever therein arising. It may also proceed to try presentments made in the inferior courts of the forest, and to give judgment upon the convictions that have been made in the swainmote courts. It may be held every third year. This court may fine and imprison, being a court of record; and a writ of error lies to the court of king's bench. 2 *Black.* 72.

JUSTICIES, is a writ directed to the sheriff to do justice in a plea of trespass *vi et armis*, or of any sum above 40s. in the county court; of which he hath not cognizance by his ordinary power. It is in the nature of a commission to the sheriff; and is not returnable. 4 *Inst.* 266.

JUSTIFICATION, *justificatio*, is a maintaining or shewing good reason in court why one did such a thing which he is called to answer. *Broke.*

K I D

KAIAGE, toll money paid for loading or unloading goods at a key or wharf.

CALENDAR MONTH, consists of 30 or 31 days, (except *February*, which hath but 28, and in leap-year 29 days,) according to the kalendar; twelve of which months make a year. 16 *C. 2. c. 7.* 24 *G. 2. c. 23.* 25 *G. 2. c. 30.*

KARL, *Sax.* a servant or person employed in husbandry. Hence the place where they inhabited was often denominated *Carleton*: so *huscarl*, a household or domestic servant.

KEELAGE, a privilege to demand money for the bottom of ships resting in a port or harbour.

KIDEL, a dam or open wear in a river, with a loop or narrow cut in it, accommodated for the laying of wheels or other engines to catch fish. 2 *Inst.* 38.

KIDNAPPING, is the forcible abduction or stealing away of man, woman, or child, from their own country, and sending them into another; which, by the civil law, was punished with death, and undoubtedly is a very heinous and grievous crime, as it robs the king of his subject, banishes a man from his country, and may, in its consequences, be productive of the most cruel and disagreeable hardships; and therefore, by our law, is punishable by fine, imprisonment, and pillory. And also the statute 11 & 12 *W. c. 7.* though principally intended against pirates, hath a clause that extends to prevent the leaving of such persons abroad, as are thus kidnapped, or spirited away; by enacting, that if any captain of a merchant vessel shall (during his being abroad) force

force any person on shore, or wilfully leave him behind, or refuse to bring home all such men as he carried out, if able and desirous to return, he shall suffer three months imprisonment.

KING. By statute 35 *Hen. 8. c. 3.* the king's style and title were declared to be, "*Henry the eighth, by the grace of God, king of England, France, and Ireland, defender of the faith, and of the church of England, and also of Ireland, in earth the supreme head.*" And the same are enacted to be and continue for ever united and annexed to the imperial crown of this realm. Which last words [of the church of *England*, and also of *Ireland*, in earth the supreme head], are what seem to be understood in the abbreviated style of the king, as it is now commonly expressed, "*defender of the faith, and so forth.*"

By one of the acts of settlement of the crown at the revolution, 1 *W. c. 6.* it is required, that every king or queen who shall succeed to the imperial crown of this realm, shall, at their respective coronation, take the following oath, to be administered by one of the archbishops or bishops.

The archbishop shall say, *Will you solemnly promise and swear, to govern the people of the kingdom of England and the dominions thereunto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same?* The king shall say, *I solemnly promise so to do.*

Archbishop: *Will you, to your power, cause law and justice in mercy to be executed in all your judgments?* The king shall answer, *I will.*

Archbishop: *Will you, to the utmost of your power, maintain the laws of God, the true profession of the gospel, and protestant reformed religion, established by law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges, as by law do or shall appertain to them, or any of them?* The king shall answer, *All this I promise to do.* After this, laying his hand upon the holy gospels, he shall say, *The things which I have here before promised, I will perform and keep; So help me God:* and shall then kiss the book.

And by 1 *W. sess. 2. c. 2.* Whereas the late king *James* the second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom;

1. By assuming and exercising a power of dispensing with, and suspending of laws, and the execution of laws, without consent of parliament:

2. By committing and prosecuting divers worthy prelates, for humbly petitioning to be excused from concurring to the said assumed power:

3. By issuing and causing to be executed a commission under the

the great seal, for erecting a court called, *The court of commissioners for ecclesiastical causes* :

4. By levying money for, and to the use of the crown, by pretence of prerogative, for other time, and in other manner, than the same was granted by parliament :

5. By raising and keeping a standing army within this kingdom in time of peace, without consent of parliament, and quartering soldiers contrary to law :

6. By causing several good subjects, being protestants, to be disarmed, at the same time when papists were both armed and employed, contrary to law :

7. By violating the freedom of election of members to serve in parliament :

8. By prosecutions in the court of king's bench, for matters and causes cognizable only in parliament ; and by divers other arbitrary and illegal courses :

9. And whereas of late years, partial, corrupt, and unqualified persons have been returned and served on juries in trials, and, particularly, divers jurors in trials for high treason, which were not freeholders :

10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects :

11. And excessive fines have been imposed, and illegal and cruel punishments inflicted :

12. And several grants and promises made of fines and forfeitures, before any conviction or judgment against the persons upon whom the same were to be levied :

All which, are utterly contrary to the known law, statutes, and freedom of this realm :

Therefore, the lords spiritual and temporal, and commons, in parliament assembled, do, for vindicating their ancient rights and liberties, declare,

1. That the pretended power of suspending laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.

3. That the commission for erecting the late court of commissioners for ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious.

4. That levying money for, or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner, than the same is or shall be granted, is illegal.

5. That it is the right of the subjects to petition the king ;
and

and all commitments and prosecutions for such petitioning, are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

7. That the subjects, which are protestants, may have arms for their defence, suitable to their conditions, and as allowed by law.

8. That election of members of parliament ought to be free.

9. That freedom of speech, and debates or pleadings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason, ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void.

13. And that, for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently.

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties.

By the articles of the union of the two kingdoms of *England* and *Scotland*, all papists, and persons marrying papists, are forever excluded from the imperial crown of *Great Britain*; and, in such case, the crown shall descend to such person being a protestant, as should have inherited the same, in case such papist, or person marrying a papist, were naturally dead. 5 *An. c.* 8.

KING'S BENCH, is the supreme court of common law in the kingdom; and is so called because the king used formerly to sit there in person, the style of the court being still *before the king himself*. It consists of a chief justice, and three other judges, who are, by their office, the principal coroners and conservators of the peace. 3 *Black.* 41.

This court keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom: it commands magistrates and others to do what their duty requires, in every case where there is no specific remedy: it protects the liberty of the subject, by speedy and summary interposition: it takes cognizance both of criminal and civil causes; the former, in what is called the crown side or crown office; the latter, in the plea side of the court. *Id.* 42.

On the plea side, it hath cognizance in all pleas by bill, for debt,

debt, detain, covenant, account, and of all actions on the case either upon promises, scandalous words, special nuisances, trover, and conversion, on penal statutes, and all other personal actions, against any person supposed to be in the custody of the marshal, as every one sued here is supposed to be. *Wood. b. 4. c. 1.*

The crown side takes cognizance of all treasons, felonies, misdemeanors tending to the breach of the peace, or oppression of the subject; and of all causes prosecuted by way of indictment, inquisition, or information. Into this office, indictments from all inferior courts may be removed by certiorari. Inquisitions of *felo de se*, and of homicide by misadventure, are certified hither of course. Hence also issue attachments for disobeying rules or orders. *Id.*

It is also a court of appeal; into which may be removed, by writ of error, all determinations of the court of common pleas, and of all inferior courts of record in *England*; and to which a writ of error lies also from the court of king's bench in *Ireland*: and from this court lies an appeal by writ of error into the house of lords, or the court of exchequer chamber, as the case may happen, according to the nature of the suit, and the manner in which it has been prosecuted. 3 *Black. 43.*

KING'S SILVER, otherwise called a *post fine*, is a sum of money paid to the king in the court of common pleas, for a licence granted to levy a fine of lands, tenements, or hereditaments; and this must be compounded for at the rate of ten shillings for every five marks of land; that is, three twentieth parts of the supposed annual value.

KNAVE, *Sax.* anciently a servant; as *scildknapa*, the servant who carried the knight's shield; his esquire, or armour bearer.

KNIGHT, is the next personal dignity after the nobility. Of knights there are several orders and degrees: the first in rank of precedence, are knights of the *garter*; instituted by king *Ed. 3.* in the year 1344. Next follows a knight *banneret*, who, by some statutes, is ranked next after barons; and his precedence, before the younger sons of viscounts, was confirmed to him by order of king *James* the first, in the tenth year of his reign: but in order to intitle himself to this rank, he must have been created by the king in person in the field, under the royal banner, in time of open war; otherwise, he ranks after *baronets*, who are next in order of precedency. Next follow knights of the *bath*, instituted by king *Hen. 4.* and revived by king *George* the first: they are so called from the ceremony of *bathing*, the night before their creation. The last order are knights *bachelors*, who though they are the lowest, yet are the most ancient order of knighthood; for we have an instance of king *Alfred's* confer-
ring

ring this order on his son *Atbelstan*. 1 *Black.* 403. These are sometimes called knights of the *chamber*, being such as are made in time of peace, and so called because knighted in the king's chamber, and not in the field. 2 *Inst.* 666.

Knights are in Latin called *equitis aurati: aurati*, from the gilt spurs they wore; and *equites*, because they always served on horseback.

They are also in our law called *milites*, because they formed a part, or indeed the whole, of the royal army, in virtue of their feudal tenures. 1 *Black.* 404.

KNIGHT'S FEE, was anciently so much inheritance in land, as was sufficient to maintain a knight; which, in the reign of king *Hen.* 2. being estimated at 20*l.* a year, may, by the continual decrease in the value of money, be now reckoned at about 400*l.* a year. Every man possessed of such estate was obliged to be knighted, and attend the king in his wars, or pay a pecuniary sum in lieu thereof, called *escuage*.

KNIGHT'S SERVICE. Upon the *Norman* conquest, all the lands in the kingdom were divided into knight's fees, in number above 60,000. And for every knight's fee, a knight (*miles*), or soldier, was bound to attend the king in his wars for 40 days in a year; in which space of time, before war was reduced to a science, the campaign was generally finished, and a kingdom either conquered or victorious. By this means the king had, without any expence, an army of 60,000 men always ready at his command. If a man held only half a knight's fee, he was only bound to attend 20 days, and so in proportion.

This tenure by knight's service drew after it, aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat.

But this personal service in process of time degenerated into pecuniary commutations or aids; and, at last, the military part of the feudal system was abolished at the restoration, by the statute of 12 *C.* 2. *c.* 24. 1 *Black.* 410. 2 *Black.* 62.

KNIGHTS HOSPITALIERS, were an order of knights that had their name from an *hospital* erected at *Jerusalem*, for the use of pilgrims coming to the holy land, and dedicated to *St. John Baptist*. They were afterwards called *knights of St. John of Jerusalem*. Their first business was to provide for and protect such pilgrims as came to that hospital. Afterwards, being driven out of the holy land, they settled chiefly at *Rhodes*; and were there called *knights of Rhodes*; and, after the loss of *Rhodes*, they came to *Malta*, where they now reside, and are therefore called *knights of Malta*. Divers of them came into *England* in the year 1100; and in process of time, they obtained so great wealth, and honours, and exemptions, that their superior was the

the first lay baron, and had a seat amongst the lords in parliament.

KNIGHTS OF THE SHIRE, were so called because anciently they were to be real knights; and still the form of the writ runs, that they be knights girt with the sword. But now by several statutes, notable esquires may be chosen; and their qualification is to be determined according to the value of the estate, which is not to be less than 600*l.* a year.

KNIGHTS OF THE THISTLE, are an order of knights in *Scotland*; who wear a green ribbon over their shoulders, and are otherwise honourably distinguished.

KNIGHTS TEMPLARS, were instituted in the year 1118, and were so called from having their first residence in some apartments adjoining to the temple at *Jerusalem*. Their employment was to guard the roads for the security of pilgrims in the holy land. They came into *England* pretty early in the reign of king *Stephen*; and increased so much in wealth, that they were thought dangerous, and too powerful: and in the year 1312, that order was dissolved.

L A C

LABEL, is a narrow slip of paper or parchment, affixed to a deed or writing hanging at or out of the same; and an appending seal is called a label. And in heraldry it is the badge of the eldest house or branch of a family.

LABOUR, is the foundation of property. *Bodily labour*, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein. 2 *Black.* 5.

LACE. By 3 *G. 3. c. 21.* & 5 *G. 3. c. 48.* no person shall import any lace, not made in *Great Britain*, on pain of 200*l.*, and forfeiture of the same, which may be seized by the officers of the customs; and persons in whose custody the same shall be found, or who shall sell or expose the same to sale, or conceal with intent to prevent the forfeiture thereof, shall be subject to the like penalty. And by 19 *G. 3. c. 49.* disputes between masters and their workmen in the bone and thread lace manufacture, may be determined by one justice of the peace.

LACHES, from the French *lascher*, *laxare*, or *lasche*, ignovous, idle; in our law signifies slackness, or negligence: and probably it may be an old English word; for when we say there is *laches* of

of entry, it is all one as if it were said, there is a *lack* of entry; and in this signification it is used in 1 *Inft.* 146. *Litt. f.* 136.

In the king there can be no laches or negligence, and therefore no delay will bar his right. 1 *Black.* 247.

No laches shall be adjudged in the heir within age; and regularly laches shall not bar either infants, or femes covert, for not entry or claim, to avoid descents: but laches shall be accounted in them for non-performance of a condition annexed to the state of the land. 1 *Inft.* 146.

LAGA, *Sax.* law: so *laghday*, a law day, or day when the courts are open. *Lageman*, a lawful man, as spoken of a juryman, or witness.

LAGAN, is where goods are *lying* or sunk in the sea, and tied to a cork or buoy in order to be found again.

LAIRWIFE, *lecherwite*, *legergeldum*, from *lecher* a whore-master, and *wite*, or *geld*, a tribute, was a fine anciently inflicted in the temporal courts for fornication or adultery, and paid to the king, or to the lord of the manor if recovered of his tenants in the court baron.

LAND, in legal signification, comprehends any ground, foil, or earth whatsoever; as meadows, pastures, woods, moors, waters, marshes, furze, and heath: it includes also messuages (that is, houses), tofts (that is, places where houses once stood), mills, castles, and other buildings; for in conveying the land, the buildings pass with it. 1 *Inft.* 4.

Water is considered under the notion of land, in respect only of the land that lies underneath it; and may be sued for under that name, as so many acres of land covered with water. 2 *Black.* 18.

Land hath an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cœlum*, is the maxim of the law, upwards; therefore no man may erect any building or the like, to overhang another's land: and downwards, whatever is in a direct line between the surface of any land, and the center of the earth, belongs to the owner of the surface, as is every day's experience in the mining countries. So that the word *land* includes not only the face of the earth, but every thing under it, or over it. *Id.*

LANDLORD and tenant. See DISTRESS.

LAND TAX hath succeeded into the place of the ancient fifteenths and subsidies; and the annual land tax acts are framed in many respects after the manner of the ancient subsidy acts.

We meet with the payment of *fifteenths* as far back as the statute of *magna charta*; in the conclusion whereof, the parliament grants to the king, for the concessions by him therein made, a fifteenth part of all their moveable goods.

This taxation was originally set upon the several *individuals*. Afterwards, to wit, in the eighth year of *Edward the third*, a certain sum was rated upon every town, by commissioners appointed in the chancery for that purpose, in like manner as commissioners are now appointed by the several land tax acts for carrying the said acts into execution; which commissioners rated every town at the fifteenth part of the value thereof at that time, and their taxation was recorded in the exchequer; and the inhabitants rated themselves proportionably for their several parts, to make up the general sum upon the whole township. This fifteenth amounted in the whole to 20,000*l.* or near thereabouts.

But as the necessities of government multiplied, and the values of things increased, this fifteenth was insufficient for the occasions of the public; and thereupon the number of fifteenths was augmented to two or three fifteenths. Which still proving defective, another and quite different taxation was superadded, namely, the *subsidy*; which was an aid to be levied of every subject of his lands or goods, after the rate of 4*s.* in the pound for lands, and 2*s.* 8*d.* for goods. And, accordingly in the ancient subsidy acts, there is first a grant of so many *fifteenths*, and then the grant of a *subsidy*.

These *fifteenths* were certain, as hath been said, from the time of the eighth of *Edward the third*; but the *subsidy* was uncertain, and amounted anciently to about 70,000*l.*; and a subsidy of the clergy at the same time (including the monasteries) was 20,000*l.* In the 8 *Eliz.* a subsidy amounted to 120,000*l.* In the 40 *Eliz.* it was not above 78,000*l.* Afterwards it fell to 70,000*l.*; and by reason of a loose and uncertain way of assessing the same, kept continually decreasing, until the parliament found it necessary to change the method of taxation; and, in the time of the long parliament, certain sums were fixed upon the several counties; which course of taxation still continues.

LAPSE, *lappus*, is a slip or departure of the right of presenting to a void benefice, from the original patron neglecting to present within six months next after the avoidance. Whence it is commonly said that such benefice is in lapse, or lapsed, whereunto he that ought to present hath omitted or slipped his opportunity. And, in such case, the patronage doth devolve from the patron to the bishop, from the bishop to the archbishop, and from the archbishop to the king.

The term or space in which title by lapse accrues successively is six months; which being of ecclesiastical cognizance, is to be computed, by the kalendar, at one half year, and not accounting twenty-eight days to the month; and the day on which the church becomes void, is not to be taken into the account. 2 *Inff.* 360.

If

If the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in : and if, upon lapse, the bishop doth not immediately collate his clerk, and the patron presents, though after the six months are lapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk. So if the bishop suffers the presentation to lapse to the archbishop, the patron has the same advantage, if he presents before the archbishop hath filled up the benefice. 2 *Black.* 277.

If the benefice becomes void by death, or cession through plurality of benefices, the patron is bound to take notice at his peril ; for these are matters of equal notoriety to the patron and ordinary : but in case of a vacancy by resignation, or canonical deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is presumed to be cognizant, here the law requires him to give notice thereof to the patron, otherwise he cannot take advantage of the lapse. 2 *Black.* 278.

There is no lapse from the king ; and therefore if the king neglect to fill up the vacancy, there is no remedy but by the ordinary sequestring the profits of the church, and appointing a clerk to serve the cure. *Gibf.* 770.

A donative doth not go in lapse ; but the ordinary may compel the patron by ecclesiastical censures to fill up the vacancy. But if the donative hath been augmented by the governors of queen *Anne's* bounty, it will lapse in like manner as presentative livings.

LAPSED LEGACY, is where the legatee dies before the testator ; or where a legacy is given upon a future contingency, and the legatee dies before the contingency happens. As if a legacy be given to a person when he attains the age of twenty-one years, and the legatee dies before that age ; in this case, the legacy is a lost or lapsed legacy, and shall sink into the residuum of the personal estate. 2 *Black.* 513.

LARCENY, *latrocinium*, is the felonious and fraudulent taking away of the personal goods of another ; which goods, if they are above the value of 12*d.* it is called *grand* larceny ; if of that value, or under, it is *petit* larceny : which two species are distinguished in their punishment, but not otherwise. 4 *Black.* 229.

To make the offence felony, there must be a *felonious intention* ; and therefore it shall not be imputed to a mere mistake or misanimadversion ; as where a person breaks open a door, in order to execute a warrant, which will not justify such a proceeding, for in such case, there is no felonious intention ; for it is the mind that makes the taking of another's goods to be felony, or a bare trespass only. The most common discovery of a felonious intent, is where the party doth it secretly, or being charged with the fact, denies it : but this is not the only criterion of

criminality; for in cases that may amount to larceny, the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent; therefore they must be left to the due and attentive consideration of the court and jury. 1 *H. H.* 509.

And as there must be a felonious intention, so also there must be an actual *taking*; for all felony includes trespass: from whence it follows, that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away. And from this ground it hath been holden, that one who finds the goods which I have lost, and converts them to his own use, with intent to steal them, is no felon; and much more one who has the actual possession of my goods by my delivery for a special purpose, as a carrier who receives them in order to carry them to a certain place; or a taylor who has them in order to make me a suit of cloaths; or a friend who is intrusted with them to keep for my use: these cannot be said to steal them by embezzling them afterwards. But if a carrier opens a pack, and takes out part of the goods, or a weaver who has received yarn to work, or a miller who has corn to grind, take out part thereof with intent to steal it, it is felony. 1 *Haw.* 89.

And there must be not only a *taking*, but also a *carrying away*. But to make it come within this description, any the least removing of the thing taken from the place where it was before, is sufficient for this purpose, though it be not quite carried off. And upon this ground, the guest, who having taken off the sheets from his bed, with an intent to steal them, carried them into the hall, and was apprehended before he could get out of the house, was adjudged guilty of larceny: so also was he, who having taken an horse in a close, with an intent to steal him, was apprehended before he could get him out of the close. 1 *Haw.* 93.

Also this felonious taking and carrying away must be of the *personal* goods of another. For if they favour any thing of the realty, it cannot be larceny by the common law: and therefore they ought not to be any way annexed to the freehold: therefore it is no larceny, but a bare trespass, to steal corn or grass growing, or apples on a tree; but it is larceny to take them being severed from the freehold; as wood cut, grass in cocks, stones dug out of the quarry, and this, whether they are severed by the owner, or even by the thief himself, if he sever them at one time, and then come again at another time and take them. 1 *Haw.* 93. But by special statutes, many things belonging to the freehold, being not merely personal goods, are brought within the offence of larceny, and made felony without benefit of clergy.

The law which fixes the boundary between grand and petty larceny, making it capital to steal above the value of 12*d.* is as
ancient

ancient as the reign of king *Edward* the first, at which time the sum of 12*d.* in silver, was equal to 3*s.* of our present money weight, and equal to 40*s.* or more, in the value of any thing to be purchased by it. And therefore, juries are usually instructed by the court to find the value, not according to the strict nominal value as it is with us at this day, but reasonably according to the ancient standard.

LARDARIUM, the larder or place where the lard or meat were kept. The tenants of several manors were bound to carry salt or other provisions from the place where they were purchased to the lord's larder. And *lardarium* seems to have been a rent paid by way of commuting for the said service. *Lardarius regis*, was the king's larderer, or clerk of the kitchen.

LASTAGE, a custom or duty for goods in a market or fair, sold by the *last*; as corn, wool, herrings, and such like.

LATHE, *leda*, *leth*, (Sax. *lathe*,) is a large part of a county, being an intermediate division between a shire and an hundred, containing (as in *Kent*) about three or four hundreds. In some of the ancient grants of immunities, was freedom from suit to the county, læth, and hundred courts; which *leth* court is probably no other than what is now, with a very little variation, called the *court leet*.

LATITAT, is a writ whereby a man is originally called to answer in a personal action in the king's bench; having its name upon a supposition that the defendant doth lurk and *lie hid*, and cannot be found in the county of *Middlesex* (in which the said court is holden), to be taken there, but is gone into some other county, and therefore requiring the sheriff to apprehend him in such other county. *F. N. B.* 78.

LATROCINUM. An immunity *de latrocino* was a privilege of non-attendance at the courts which had sole jurisdiction of robbery within such district.

LAVATORIUM, a laundry or place to wash in; applied to such a place in the porch or entrance of cathedral churches, where the priests and other officiating members were to wash their hands, before they proceed to the divine service.

LAUNDE, a *lawn*, or open field without wood.

LAW, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the law of nature and of nations. And it is a rule of action, which is prescribed by some superior, and which the inferior is bound to obey. *1 Black.* 38.

LAWING of dogs, is the cutting off the claws of the fore-foot of dogs in the king's forests, to prevent them from coursing and taking the deer.

LAW

LAW PROCEEDINGS of all kinds, are to be in the English language, 4 G. 2. c. 26. 5 G. 2. c. 27. Except known abbreviations and technical terms. 6 G. 2. c. 14.

LAW SPIRITUAL, *lex spiritualis*, is the ecclesiastical law, allowed by our laws where it is not against the common law, nor the statutes and customs of the kingdom; and, regularly, according to such ecclesiastical or spiritual laws, the bishops, and other ecclesiastical judges, proceed in causes within their cognizance. *Co. Litt.* 344.

LAWYER, is a counsellor, or one learned in the law.

LAZARET, a place appointed wherein quarantine is to be performed by vessels and persons coming from infected countries.

LEASES.

1. *Of leases in general, by the common law.*
2. *Of leases of bodies corporate and others, by statute.*

1. *Of leases in general, by the common law.*

1. A lease is properly a conveyance of any lands or tenements, (usually in consideration of rent, or other annual recompence,) made for life, for years, or at will; but always for a less time than the lessor hath in the premises: for if it be for the whole interest, it is more properly an assignment than a lease. 2 *Black.* 317.

2. In all leases there must be a lessor and lessee. He that demises or lets to farm, is the lessor (vulgarly called the landlord); and he unto whom it is demised or let, is the lessee, commonly called the tenant. *Wood. b. 2. c. 3.*

3. By the statute of frauds, 29 C. 2. c. 3. all interests of freehold, or terms for years, not put in writing, and signed by the parties or their agents authorized in writing, shall have no greater effect than as estates at will; except leases not exceeding three years from the making; whereof the rent reserved shall be two thirds of the value of the thing demised.

4. The words to make a lease are; *demise, grant, and to farm let.* 1 *Inst.* 45.

5. Regularly, in every lease for years, the term must have a certain beginning, and a certain end. But although there appear no certainty of years in the lease, yet if by reference it may be made certain, it sufficeth: as if *A.* lease his land to *B.* for so many years as *B.* hath in the manor of *Dale*, and *B.* hath then a term in the manor of *Dale* for ten years; this is a good lease by *A.* to *B.* of the land of *A.* for ten years. *Ibid.*

So if a man make a lease for twenty-one years, if such an one so long live, this is a good lease for years, although the life is uncertain. *Ibid.*

But if a parson make a lease of his glebe, for so many years as he shall be parson there, this cannot be made certain by any means;

means: for nothing is more uncertain than the time of death. But if he make a lease for three years, and so from three years to three years, so long as he shall be parson, this is a good lease for six years, if he continue parson so long; first for three years, and after that for three years, and for the residue uncertain. *Ibid.*

6. If a lease be made, bearing date (for instance) the 26th of *May*, to have and to hold for twenty-one years from the *date*, or from the *day* of the date, it shall begin on the 27th day of *May*; but if it be to have and to hold from the making thereof, or from *thenceforth*, it shall begin on the day on which it is delivered; for the words of the lease are not of any effect till the delivery. 1 *Inst.* 46.

So if the habendum be for the term of twenty-one years, without mentioning when it shall begin, it shall begin from the delivery, for there the words take effect. *Ibid.*

If the indenture of lease bear a date which is impossible, as on the 30th of *February*; if in this case the term be limited to begin from the date, it shall begin from the delivery, as if there had been no date at all. *Ibid.*

7. If a man reserve a rent generally, without shewing to whom it shall go, the same shall go to his heirs, because they have the reversion. 1 *Inst.* 47.

Yea, if he reserve a rent to him and his *executors*, yet his executors shall not have it, but it shall end by his death; for the rent is incident to the reversion. *Ibid.*

So if the rent be reserved to the lessor, his heirs and assigns, then shall all the assigns of the reversion enjoy the same. *Ibid.*

8. In a lease for years, there needs no livery of seisin to be made to the lessee; but he may enter when he will by force of the same lease. But in a lease for life, whereby a freehold passeth, there must be livery of seisin. *Litt. f.* 59.

2. Of leases of bodies corporate and others, by statute.

By the common law, many persons might make leases for years, or for life or lives, at their will and pleasure, which now cannot make them firm in law. And some persons may now make leases for years, or for life or lives, (observing due incidents), firm and good in law, which by the common law they could not do. And this, by virtue of divers acts of parliament, one of which is called the *enabling*, and the rest *disabling*, or restrictive, statutes. 1 *Inst.* 44.

Before these statutes, bishops, with confirmation of the dean and chapter, master and fellows of any college, deans and chapter, master or guardian of any hospital and his brethren, parson or vicar, with consent of the patron and ordinary, archdeacon, prebendary, or any other body politic, spiritual and ecclesiastical,

cal, observing the proper requisites, might have made leases for lives or years, without limitation or stint. And so might they have made gifts in tail, or estates in fee, at their will and pleasure; whereupon great decay of divine service and other inconveniences ensued; and therefore they were disabled and restrained by the said acts to make any such estate or conveyance. But there are excepted out of the said acts, leases for three lives or twenty-one years, under divers provisions and limitations. For at this day, there are three kinds of persons who may make leases for three lives or twenty-one years, viz. First, any person seised of an estate tail in his own right. Secondly, any person seised of an estate in fee simple, in right of his church. Thirdly, any husband and wife seised of any estate of inheritance in fee simple in the wife's right, or jointly with her. *Ibid.*

All these are made good by the statute of 32 H. 8. c. 28. which enableth them thereunto, and is therefore called the *enabling* statute. But to the making good of such leases by the said statute, several things are necessarily to be observed: As, 1. The lease must be by indenture; and not by deed poll, or by parol. 2. It must begin from the making, or day of the making, and not at any greater distance of time. 3. If there be any old lease in being, it must be first absolutely surrendered, or be within a year of expiring. 4. It must be either for twenty-one years, or three lives; and not for both. 5. It must not exceed the term of three lives, or twenty-one years, but may be for a shorter term. 6. It must be of lands and tenements most commonly letten for twenty years last past; so that if they have been let for above half the time (as eleven years out of the twenty), either for life, for years, at will, or by copy of court roll, it is sufficient. 7. The most usual and customary rent, for twenty years past, must be reserved yearly on such lease. 8. Such leases must not be made without impeachment of waste. 2 *Black.* 319.

But a parson and vicar are excepted out of this statute, and therefore as to this matter they continue as they were before; and, consequently, if either of them make a lease for three lives, or twenty-one years, it must also be confirmed by patron and ordinary. 1 *Inst.* 44.

Next follows the *disabling* statute, 1 *El.* c. 19. (made for the benefit of the successor,) which enacts, that all grants, by archbishops and bishops (including even those confirmed by the dean and chapter), other than for the term of twenty-one years or three lives from the making, or without reserving the usual rent, shall be void. But concurrent leases, if confirmed by the dean and chapter, are held to be valid within this statute provided they do not exceed (together with the lease in being) the term permitted by the act. 2 *Black.* 320.

Next comes the statute 13 *El.* c. 10. explained and enforced
by

by the 14 *El. c. 11.* & 14. 18 *El. c. 11.* and 43 *El. c. 29.* which extend the restrictions laid by the 1 *El. c. 19.* on bishops, to certain other inferior corporations, both sole and aggregate. From laying all which together, we may collect, that all colleges, cathedrals, and other ecclesiastical or eleemosynary corporations, and all parsons and vicars, are restrained from making any leases of their lands, unless under the following regulations : 1. They must not exceed twenty-one years, or three lives, from the making. 2. The customary rent, or more, must be yearly reserved thereon. 3. Houses in corporations, or market towns, may be let for forty years, provided the lessee be bound to keep them in repair. 4. Where there is an old lease in being, no concurrent lease shall be made, unless where the old one will expire within three years. 5. No lease shall be made without impeachment of waste. *Ibid.*

Concerning these restrictive statutes, there are two observations to be made. First, that they do not, by any construction, enable any persons to make such leases as they were by common law disabled to make : therefore, a parson or vicar, though he is restrained from making longer leases than for twenty-one years, or three lives, even *with* the consent of patron and ordinary, yet is not enabled to make any lease at all, so as to bind his successor, *without* obtaining such consent. Secondly, that though leases contrary to these acts are declared void, yet they are good against the *lessor* during his life, if he be a sole corporation ; and are also good against an aggregate corporation so long as the head of it lives, who is presumed to be the most concerned in interest ; for the act was intended for the benefit of the successor only ; and no man shall make an advantage of his own wrong. *Ibid.*

With regard to college leases, by the 18 *El. c. 6.* one third of the old rent shall be reserved in wheat at *6s. 8d.* a quarter, or malt at *5s.* ; or the lessees shall pay for the same according to the price that wheat and malt shall be sold for, in the market next adjoining to the respective colleges, on the market day before the rent becomes due.

By several statutes, if any beneficed clergyman be absent from his cure above eighty days in any one year, all leases made by him of the profits of such benefice shall be void except in the case of licensed pluralists, who may demise the living on which they are non-resident to their curates only. 2 *Black. 322.*

LEASE AND RELEASE, is a conveyance of right or interest in lands or tenements, which in law amounts to a feoffment. 1 *Inst. 207.*

It was invented to supply the place of livery of seisin, and is thus contrived : A *lease*, or rather bargain and sale, upon some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or purchaser, which vests in the said purchaser

fer the use of the term for a year; and then the statute of uses, 27 H. 8. c. 10. immediately transfers the uses into possession. He, therefore, being thus in possession, is capable of receiving a release of the freehold and reversion; and, accordingly, the next day, a release is granted to him. 2 Black. 339.

In the lease for a year, or any such term, there must be the words *bargain and sell* for money; and five shillings, or any other sum, though never paid, is a good consideration, whereupon the lessee or bargainee is immediately in possession without actual entry. If only the words *demise, grant, and to farm let*, are used, in that case the lessee cannot accept a release of the inheritance, until he hath actually entered, and is in possession. 2 Lill. Abr. 435.

LEATHER. By several statutes, regulations are made for the tanning and manufacturing of leather; and by the 27 G. 3. c. 13. a duty is laid upon all hides and skins imported, and drawbacks allowed on the exportation thereof. And also several duties are imposed on hides and skins tanned in *Great Britain*, of what kind soever, as set forth in schedules annexed to the said act. And by the 28 G. 3. c. 37. further regulations are made respecting the said duties, which are to be under the management of the officers of excise.

LECHERWITE, *lairwite*, a fine on lechers; that is, on fornicators, or adulterers; which was anciently assessed in the temporal courts, and paid to the king.

LECTURERS, in several churches in *London* and other places, are appointed as assistants to the rectors or vicars. They are commonly chosen by the vestry, or chief inhabitants, and are usually the afternoon preachers. There are also one or more lecturers in most of the cathedral churches; and many lectureships have likewise been founded by the donation of private persons.

By the act of uniformity, 13 & 14 C. 2. c. 4. lecturers are to be licensed by the ordinary; and every lecturer, upon the first lecture day in every month, shall, before his lecture, read the common prayers and service for that day, on pain of being disabled: and if he shall preach any lecture during such disability, he shall suffer three months imprisonment in the common gaol.

LEET (*leth, letbe, latbe,*) is of *Saxon* original, and seemeth to be no other than the court of the *latbe*, as the county court is that of the *county*. For in ancient times, the counties were subdivided into lathes, rapes, wapentakes, hundreds and the like. And the sheriff twice a year performed his *tourn*, or perambulation, for the execution of justice throughout the county. Afterwards, this power of holding courts was granted to divers great men within certain districts. And from hence these courts, holden within particular parts of the county, have descended unto

unto

unto us without variation, under the name of the *leet*, *leth*, or *lathe* courts.

The court leet is a court of record, having the same jurisdiction within a particular precinct, which the sheriff's tourn hath in the county.

For the leet, or view of frankpledge, was by the king, for the ease of the people, divided and derived from the tourn; who did grant to the lords, to have the view of the tenants and resiants within their manors, so as that they should have the same justice that they had before in the tourn, done unto them at their own doors, without any charge or loss of time. 2 *Inst.* 71.

The intention hereof for keeping the king's peace was, that every freeman at his age of twelve years, (except peers, clergymen, and tenants in ancient demesne,) should in the leet, if he were in any leet, take the oath of allegiance to the king; and that pledges or sureties should be found for his truth to the king, and to all his people, or else to be kept in prison. *Id.* 73.

It is not necessary, that a juryman in the leet should have any qualification by estate, but any person happening to be present, or riding by the place where it is holden, may, for want of jurors, be compelled by the steward to be sworn. 2 *Haw.* 69.

The constables of common right are to be chosen and sworn in the leet or tourn. *Id.* 62.

A court leet is so far intrusted with the keeping of the peace within its own precinct, that the steward of it may by recognizance bind any person to the peace who shall make an affray in his presence, sitting the court; or may commit him to ward, either for want of sureties, or by way of punishment, without demanding any sureties of him, in which case he may afterwards impose a fine according to his discretion. 2 *Haw.* 4.

This court hath cognizance of a great number of offences, both by the common law, and by statute; as, for instance, tipping in alehouses; assaults, whereby bloodshed ensues; bakers; common barators; bawdy houses; destroyers of ancient boundaries; brewers; butchers; estrays, waifs, and treasure trove; hedge breakers; neglectors of hue and cry; inholders; millers; common nuisances; want of stocks and common pound; neglecting watch and ward; and many others by particular statutes. *Wood. b. 4. c. 1.*

The lord of the leet ought to have a pillory and tumbrel; and for want thereof, he may be fined and his liberty seized. But the stocks are to be provided at the charge of the town. *Id.*

The lord of common right may distrain for a fine or amercement in the leet, and may sell the distress, but he cannot imprison for it; and this is the only court that can fine and not imprison. *Id.*

The jurors in the leet may receive indictments of felony, but they

they cannot hear and determine them, but must send them to the gaol delivery, if the offenders be in custody; or remove them by certiorari into the king's bench, that process may be made upon them to outlawry. 2 *Hale's Hist.* 71.

But the business of the leet hath declined for many years, and is now mostly devolved on the quarter sessions.

LEGACY.

1. *Legacy, what.*
2. *Lapsed legacy.*
3. *Legacy, how recoverable.*
4. *In what case to bear interest.*
5. *Abatement on deficiency of assets.*
6. *Payment to a feme covert.*
7. *Child's legacy in the hands of the parent.*

1. *Legacy, what.* A legacy is a bequest or gift of goods and chattels by testament; and the person to whom it is given is styled the *legatee*, or sometimes the *legatary*. There is also a *residuary legatee*, who is the person to whom the surplus or *residue* of the estate is given, after payment of the debts and particular legacies.

2. *Lapsed legacy.* If the legatee dies before the testator, the legacy is a lost or lapsed legacy, and shall sink into the residuum; insomuch, that if the testator by his will bequeath his lands and tenements to a person *and his heirs*, yet if such person die before the testator, his *heirs* shall not recover the land, because the devisee was not in being when the will should take effect. *Swin.* 35. 560.

If the legatary *survive* the testator, and die before the legacy becomes due, the legacy shall lapse or not lapse according to the special designation by the words of the will. If the legacy be given to one generally, *to be paid* or *payable* at the age of twenty-one, or any other age, this is such an interest vested in the legatee, that his executor or administrator may sue for and recover it; for it is *debitum in presenti*, though *solvendum in futuro*, the time being annexed to the payment, and not to the legacy itself: so if the legacy be made to carry *interest*, though the words, *to be paid*, or *payable*, be omitted, it shall be an interest vested. But if a legacy be given to one *at* twenty-one, or *if* or *when* he shall attain the age of twenty-one, and the legatee dies before he attains that age, the legacy is lapsed. So where the legacy is to arise out of a real estate; this shall not go to the representative of the legatee, but shall sink in the inheritance for the benefit of the heir, as much as if it was a portion provided by a marriage settlement. *Law of Te.* 242.

3. *Legacy, how recoverable.* The legatary may not take the goods without the executor's consent; for it may be, the executor hath not assets besides to pay the testator's debts. But in case of a
devise

devise of lands, the devisee may enter without the assent of the executor ; and if the heir at law shall enter before him, the devisee may enter and eject him. 1 *Inst.* 111.

An action at law doth not lie against an executor for a legacy, unless he promise to pay it upon good consideration ; for legacies are only to be recovered in the spiritual court, or in the courts of equity. *T. L.*

But if the legacy is payable out of the *land*, or out of the *profits* of the land, an *action on the case* lies at common law. *Sid.* 443. *Salk.* 223. And a legatee may maintain an action of debt at common law against the *owner* of the *land*, out of which the legacy is to be paid ; and since the statute of wills gives him a right, by consequence he shall have an action at law to recover it. 2 *Salk.* 415.

4. *In what case to bear interest.* Where a legacy is bequeathed to be paid divers years after the testator's death, this difference is to be observed : if the day were given in favour of the legatee, being an infant, who could not safely receive it any sooner, then he shall have the profit ; but if the respite was in favour of the executor, then the legatee shall have the bare legacy without interest. *Wentw. Exec.* 352.

More particularly, 1. If one gives a legacy charged upon land, which yields rents and profits, and there is no time of payment mentioned in the will, the legacy shall carry interest from the testator's death, because the land yields profits from that time. 2. But if a legacy be given out of a personal estate, and no time of payment mentioned in the will, this legacy shall carry interest only from a year after the death of the testator. 3. If a legacy be given, charged upon a dry reversion, it shall carry interest only from a year after the death of the testator, a year being a convenient time for sale. 4. If a legacy be given out of a personal estate, consisting of mortgages carrying interest, or of stocks yielding profits half yearly ; it seems in this case the legacy shall carry interest from the death of the testator. 5. If a legacy be paid into court, and the legatee hath notice of it, so that it is his fault not to pray to have the money, or that the money should be put out, the legatee in such case shall lose the interest from the time that the money was brought into court ; but if the money was put out, the legatee shall have the interest, which the money put out by the court did yield. 2 *P. Will.* 26.

5. *Abatement on deficiency of assets.* In case of a deficiency of assets, all the general legatees must abate proportionably, in order to pay the debts ; but a specific legatee (of a piece of plate, a horse, or the like) is not to abate at all, or allow any thing by way of abatement, unless there be not sufficient without it. In like manner, if the legatees have been paid their legacies, they are afterwards bound to refund a rateable part, in case debts come

in, more than sufficient to exhaust the residuum after the legacies paid. 2 *Black.* 513.

But if the executor had at first enough to pay all the legacies, and afterwards, by his wasting the assets, occasions a deficiency, the legatee who has recovered his legacy, shall have the advantage of his legal diligence, which the other legatees neglected by not bringing their suit in time. *Id.*

6. *Payment to a feme covert.* A legacy bequeathed to a feme covert to her sole and separate use is good, and may be paid to her exclusive of her husband; but if it be bequeathed to her generally, the husband shall have it; and if paid to her, the executor shall pay it over again. 1 *Vern.* 261.

7. *Child's legacy in the hands of the parent.* A legacy in the hands of the father, given to his children by a relation or other person, shall not be diminished by the father, because he is obliged to maintain his own children. 3 *Atk.* 399.

By divers late statutes, certain stamp duties are imposed on receipts for legacies, which vary in proportion to the amount of the legacies.

LEGATE, the pope's nuncio or ambassador; of whom there are three kinds: 1. *Legati a latere*; those are cardinals, sent by the pope *a latere*; that is, from his own immediate presence. 2. *Legati nati*, legates born; and of this kind was anciently the archbishop of *Canterbury*, who had a perpetual legatine power annexed to his archbishopric. 3. *Legati dati*, legates given; and these are such as have authority from the pope by special commission.

LEGITIME, was the legal portion of the wife and children out of the husband's or father's effects, which he could not devise from them by will, nor the ordinary distribute in case of intestacy, nothing remaining for the will or administration to operate upon, but what was called the *death's* (or *deadman's*) part.

LETTER. By statute 9 *G. c.* 22. and 27 *G. 2. c.* 15. if any person shall send any letter, without any name subscribed thereto, or signed with a fictitious name, demanding money, venison, or other valuable thing, or threatening to kill or murder any of his majesty's subjects, or to burn their houses, outhouses, barns, stacks of corn or grain, hay or straw, he shall be guilty of felony without benefit of clergy.

And by 30 *G. 2. c.* 24. all persons who shall send or deliver any letter or writing, with or without a name subscribed thereto, or signed with a fictitious name, threatening to accuse any person of any crime punishable by law with death, transportation, pillory, or any other infamous punishment, with intent to extort from him any money or other goods, shall be punished at the discretion of the court, by fine and imprisonment, pillory, whipping, or transportation for seven years.

LETTER

LETTER OF ATTORNEY, is a writing of any person authorising another in his *turn* or *stead* to do any lawful act ; as, to give seisin of lands, receive debts, or such like.

LETTER OF CREDIT, is where a merchant or correspondent writes a letter to another, requesting him to credit the bearer with a certain sum of money.

LETTER OF LICENCE, is an instrument or writing made by creditors to a man that has failed in his trade, allowing him longer time for the payment of his debts, and protecting him from arrests in going about his affairs ; giving him leave to resort freely to his creditors, or to any others, and to compound debts, and such like.

LETTER OF MARQUE, is an authority given to make reprisals for reparation of depredations committed by the subjects of a foreign state.

LETTERS CLOSE, *litera clause*, close letters, are grants of the king, specially distinguished from *letters patent*, in that the letters close, being not of public concern, but directed to particular persons, are closed up and sealed ; whereas the letters patent, or open letters, being directed to all the king's subjects in general, are not sealed up, but left open for public inspection.

LETTERS PATENT, or grants of the king, are matter of public record ; for no freehold may be given to the king, nor derived from him, but by matter of record. And to this end, a variety of offices are erected, communicating in a regular subordination one with another, through which all the king's grants must pass, and be transcribed and enrolled, that the same may be narrowly inspected by his officers, who will inform him if any thing contained therein is improper or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, or any thing besides, are contained in *charters* or *letters patent* ; that is, open letters, *litera patentes* ; so called, because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom ; and are usually directed or addressed by the king to all his subjects at large. And therein they differ from certain other letters of the king, sealed also with his great seal, but directed to particular persons, and for particular purposes ; which, therefore, not being proper for public inspection, are *closed* up and sealed on the outside, and are thereupon called *writs close*, *litera clause* ; and are recorded in the *close rolls*, in the same manner as the others are in the *patent rolls*. 2 Black. 346.

Grants or letters patent must first pass by *bill*, which is prepared by the attorney and solicitor general, in consequence of a warrant from the crown, and is then signed, that is, superscribed at the top, with the king's own *sign manual*, and sealed with his *privy signet*, which is always in the custody of the principal secretary of state ; and then sometimes it immediately passes under

the great seal, in which case the patent is subscribed in these words, *per ipsum regem*, by the king himself; otherwise the course is, to carry an extract of the bill to the keeper of the *privy seal*, who makes out a writ or warrant thereupon to the chancery, so that the sign manual is the warrant to the *privy seal*; and the *privy seal* is the warrant to the great seal: and, in this last case, the patent is subscribed *per breve de privato sigillo*, by writ of *privy seal*. *Id.*

But there are some grants which only pass through certain offices, as the admiralty or treasury, in consequence of a *sign manual*, without the confirmation of either the *signet*, the *great*, or the *privy seal*. *Id.* 347.

LEVANT AND COUCHANT, (*levantes et cubantes*), is where cattle have been so long upon the ground, as they may have had time to lie down and rise up to feed; which, in general, is held to be one night at least. 3 *Black.* 9.

LEVARI FACIAS, is a writ of execution, directed to the sheriff, commanding him to *levy* the plaintiff's debt on the lands and goods of the defendant, whereby the sheriff may seize all his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff. 3 *Black.* 417.

But of this writ little use is now made; the remedy by a writ of *elegit*, which takes possession of the lands themselves, being much more effectual. *Id.*

LEVITICAL DEGREES, are degrees of kindred within which persons are prohibited to marry; as set forth in the eighteenth chapter of *Leviticus*.

LEVY, *levare*, to raise, as to levy money, to levy a fine, so to erect a fence, to set up hay in cocks (*levare fœnum*).

LEWDNESS, is properly punishable in the ecclesiastical court; yet the offence of keeping a bawdy house comes also under the cognizance of the temporal law, as a common nuisance, not only in respect of its endangering the public peace, by drawing together dissolute and debauched persons, but also in respect of its apparent tendency to corrupt the manners of both sexes. 3 *Inst.* 205. 1 *Haw.* 196.

And in general, all open lewdness grossly scandalous, is punishable upon indictment at the common law. 1 *Haw.* 7.

And offenders of this kind are punishable not only by fine and imprisonment, but also by such infamous punishment as to the court in discretion shall seem proper. 1 *Haw.* 196.

In ancient times, the king's courts, and especially the leets, had power to inquire of and punish fornication and adultery; and it appeareth often in the book of *Domesday*, that the king had the fines assessed for those offences which were assessed in the king's courts, and could not be inflicted in the court christian. 2 *Inst.* 488.

And

And these fines were called *lecherwite*, *legerwite*, or *legergeldum*, *wite* and *gelt*, or *geld*, in the *Saxon*, signify a tribute, fine, or amerciamment; and *leger* importeth a bed, from *lignan* to lie down, which in divers parts of *England* is still pronounced *lign*: and these again, as also the Gothic *lign*, the German *lign*, the Danish *lign*, the Belgic *lign*, and the Latin *lectus*, (to shew the cognation of the languages of *Europe*, and of the western *Asia*,) from the Greek word *λεχος*; and this again from the Hebrew or Chaldee *lachath*, or *lecheth*, which signify to lie down; as *lachan*, or *lechen*, in the same languages, expresseth a harlot or concubine; unto which fountain may also be referred our Anglo-Saxon word *lecher* (wherein the Saxons pronounced the *ch* hard, as the letter *x*); as also the Latin *leccator*; and the Greek word *λεχος*, which denoteth a woman in child-bed.

LEY, Fr. law: so also, in many places, it signifies land laid down from arable to meadow or pasture. So the termination *ley*, *lee*, *lay*, at the end of the name of a place, signifies an open field of meadow or pasture; as *Woolsey*, *Bletchingley*, *Overley*.

LIBEL, *libellus famosus*, is a malicious defamation of any person, and especially a magistrate, made public either by printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, or ridicule. The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. 4 *Black.* 150.

The communication of a libel to any one person, is a *publication* of it in the eye of the law; and, therefore, the sending an abusive private letter to a man is as much a libel as if it were openly printed; for it equally tends to a breach of the peace. *Id.*

The *punishment* of a libel is either by *indictment* at the suit of the king, or by *action* on the case by the party injured, in order to obtain a satisfaction in damages.

The *judgment* upon an indictment is, fine, and such corporal punishment as the court in its discretion shall inflict; regarding the quantity of the offence, and the quality of the offender: and in this case, it matters not whether the facts charged in the indictment be true or false; for in a settled state of government, the party grieved ought to complain for any injury done to him, in the ordinary course of law, and not by any means to revenge himself either by libeling or otherwise: and therefore, the defendant, on an indictment for publishing a libel, is not allowed to allege the truth of it by way of justification; but in the remedy by action on the case, which is to repair the party in damages for the injury sustained, the defendant may, as in case of an action for slander, justify the truth of the facts; for if the

charge be true, the plaintiff has received no private injury, and hath no ground to demand a compensation for himself, whatever offence it may be against the public peace; and therefore, upon a civil prosecution, the truth of the accusation may be pleaded in bar of the action. 5 Co. 125. 4 Black. 150.

LIBEL IN THE ECCLESIASTICAL COURT, is the declaration or charge drawn up in writing, on the part of the plaintiff; unto which the defendant is obliged to answer.

LIBERAM LEGEM. In the ancient trial by battel, if either party became recreant, or yielded and submitted, he was condemned to lose his *liberam legem*; that is, to become infamous, and not be accounted *liber et legalis homo*, and never after to be put upon a jury, or admitted as a witness in any cause. 3 Black. 340.

LIBERTIES AND FRANCHISES: These are synonymous terms, and their definition is a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. The kinds of them are various, and almost infinite. 2 Black. 37.

LIBERTY, is a privilege held by grant or prescription, by which men enjoy some benefit beyond the ordinary subject. But in a more general signification, it is said to be "a power of doing whatever the laws permit." In a state of nature, liberty consists in a power of acting as one thinks fit, without any restraint or controul, unless by the law of nature. But man, when he enters into society, finds it necessary to submit to divers restrictions and regulations of his natural liberty, for the sake of mutual assistance and defence. And these restrictions and regulations are called human laws; the obedience whereunto is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain them. Political or civil liberty, therefore, is no other than natural liberty, so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public. Hence we may collect, that the law, which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind. But every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, are a degree of tyranny, and destructive of liberty. In this kingdom, the idea and practice of political liberty hath been carried to very high perfection, and can only be lost or destroyed by the folly or demerits of those who are in possession of it; the legislature, and of course the laws of *England*, being peculiarly adapted to the preservation of this inestimable blessing, even in the meanest subject. Very different from the modern constitutions of other states on the continent of *Europe*; and from the general genius of the imperial law, which in general are calculated to vest an arbitrary and despotic

despotic power of controlling the actions of the subject, in the prince, or in a few grandes. And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave, or a negro, the very moment he lands in *England*, falls under the protection of the laws, and so far becomes a freeman; though the master's right to his service may possibly still continue.

The absolute rights of every Englishman (which, taken in a political and extensive sense, are usually called their liberties), as they are founded on nature and reason, so they are co-eval with our form of government, though subject at times to fluctuate and change, their establishment (excellent as it is) being still human. At some times, we have seen them depressed by overbearing and tyrannical princes; at others, so luxuriant as to tend even to anarchy, which is a worse state than tyranny itself. But the vigour of our free constitution hath always delivered the nation from these embarrassments: and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties hath settled to its proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.

First, by the great charter of liberties, which was obtained, sword in hand, from king *John*; and afterwards, with some alterations, confirmed in parliament by his son king *Henry* the third; which charter contained very few new grants; but, as *Sir Edward Coke* observes, was for the most part declaratory of the principal grounds of the fundamental laws of *England*. Afterwards, by the statute called *confirmatio chartarum*, whereby the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void; and sentence of excommunication to be denounced against all that by word, deed, or counsel, act contrary thereto, or in any degree infringe it. Next, by a multitude of subsequent corroboratory statutes (*Sir Edward Coke* reckons 32) from *Ed.* 1. to *Hen.* 4. Then, after a long interval, by the *petition of right*, which was a parliamentary declaration of the liberties of the people, assented to by king *Charles* the first in the beginning of his reign; which was closely followed by the still more ample concessions made by that unhappy prince to his parliament, before the fatal rupture between them; and by the many salutary laws, particularly the *habeas corpus* act, passed under *Charles* the second. To these succeeded the *bill of rights*, or declaration delivered by the lords and commons to the prince and princess of *Orange*, *Feb.* 13, 1688, and afterwards enacted in parliament, when they became king and queen; which declaration concludes in these remarkable words; "and they do claim, demand, and
" insist upon all and singular the premises, as their undoubted

“rights and liberties.” And the act of parliament itself recognizes them to be the true, ancient, and indubitable rights of the people of this kingdom. Lastly, these liberties were again asserted at the commencement of the present century in the *act of settlement*, whereby the crown was limited to his present majesty’s illustrious house, and some new provisions added for the better securing our religion, laws, and liberties; which the statute declares to be “the birth-right of the people of *England*, according to the ancient doctrine of the common law.” 1 *Black.* 125.

LIBRATE, a quantity of land, containing four bovates or oxgangs; which oxgangs were as much as one yoke of oxen could reasonably cultivate in one year.

LICENCE, is a power or authority given to a man to do some lawful act; and is a personal liberty to the party to whom given, which cannot be transferred over, unless it be made to a man and his assigns. 12 *Hen.* 7. 25.

There may be a parol license, as well as by deed in writing; but if it be not for a certain time, it passes no interest. 2 *Nelf. Abr.* 1123. And if there be no certain time in the licence, as if a man license another to dig clay in his land, but doth not say for how long, the licence may be countermanded; though if it be until such a time, it cannot. *Poph.* 151.

LICENTIA CONCORDANDI, is that licence for which the king’s silver is paid on passing a fine.

LICENTIA SURGENDI, is a liberty or space of time given by the court to a *tenant*, to arise out of his bed who is essoined upon account of sickness (*de mala recti*) in a real action; and it is also the writ whereby the tenant obtaineth this liberty. And the law in this case is, that the tenant may not arise or go out of his chamber, until he hath been viewed by knights thereto appointed, and hath a day assigned him to appear: the reason whereof is, that it may be known whether he caused himself to be essoined deceitfully or not; and if the demandant can prove that he was seen abroad before the view or licence of the court, he shall be taken to be deceitfully essoined, and to have made default *Bract. b. 5. Fleta. b. 6. c. 10.*

LIEN, is a French word used in our law, and signifies *binding*. A *personal lien* is a bond or covenant which affects the *person*: a *real lien* binds the lands; as a judgment, statute, or recognizance.

LIEU, *locus*, place; as where one thing is done in lieu, or in the place or stead of another. So *lieu comus (cognitus)* is a place known and certain. *Lieutenant*, (*locum tenens*), a deputy, or one that supplies the place of another.

LIFE ESTATES :

1. Estates for life are of two kinds; either such as are created by the act of the parties, as by deed or grant; or such as are

are created by operation of law, as estates by curtesy or dower. 2 *Black.* 120.

Estates for life, created by deed or grant, are where a lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one; in any of which cases, he is styled tenant for life; only, when he holds the estate by the life of another, he is usually called tenant *pur autre vie*; that is, for another's life. *Ibid.*

2. Estates for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate. As if one grants to *A.* the manor of *Dale*, this makes him tenant for life. For though, as there are no words of inheritance, or heirs, mentioned in the grant, it cannot be construed to be a fee; it shall however be construed to be as large an estate, as the words of the donation will bear, and therefore an estate for life. Also, such a grant at large, or a grant for term of life generally, shall be construed to be an estate for the life of the grantee, in case the grantor hath authority to make such grant; for an estate for a man's own life is more beneficial, and of a higher nature, than for the life of any other; and the rule of law is, that all grants are to be taken most strongly against the grantor, unless in the case of the king. 2 *Black.* 121.

3. A *devise* of an estate to one, without saying *and to his heirs*, shall be understood to be an estate in fee, if a sum of money is to be paid out of it; otherwise it may happen, that it shall be a prejudice to the devisee, for he may die before he shall be reimbursed out of the estate: but otherwise it is, if the charge be made payable only out of the annual profits; for then he shall not pay any thing until he hath received it. *Bur. Mansf.* 1623.

A *devise* of lands to one for life, and to the heirs of his body, unites the two estates, so as to make the first taker tenant in tail. But where it is to one for life, and after his death, to the issue of his body, there is no instance where it hath been so construed. 2 *Atk.* 265. 444.

4. Estates for life will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life which may determine upon future contingencies before the life, for which they are created, expires; as if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and such like cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone: yet, while they subsist, they are reckoned estates for life; because, the time for which they will

will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. 2 *Black.* 121.

5. The incidents to an estate for life are principally the following; which are applicable not only to that species of tenants for life, which are expressly created by deed, but also to those which are created by act and operation of law :

(1.) To every tenant for life, the law, as incident to his estate, without provision of the party, gives three kinds of estovers, viz. housebote, that is, wood for building and fuel; ploughbote, for husbandry; and haybote, for hedging. And these estovers must be reasonable. These the lessee may take upon the land demised, without any assignment, unless he be restrained by special covenant. 1 *Inst.* 41.

(2.) Tenant for life shall not be prejudiced by any sudden determination of his estate; because such determination is contingent and uncertain: therefore, if a tenant for his own life sows the land, and dies before harvest, his executors shall have the emblements or profits of the crop; for the estate was determined by the act of God. So if a man be tenant for the life of another, which other person dies after the corn is sown, the tenant for life shall have the crop. But if an estate for life be determined by the tenant's own act, as by forfeiture for waste committed, or where a tenant holds during widowhood, and marries again; in these, and similar cases, the tenants having thus determined the estate by their own acts, shall not be intitled to receive the crop. This doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit. 2 *Black.* 122.

(3.) The under-tenant or lessee of an estate for life shall have the same indulgence as his lessor; and, in cases where the lessor determines the estate by his own act, yet the lessee shall not be prejudiced thereby: as in the case of a woman that holds during her widowhood, her taking husband is her own act, and therefore deprives her of the crop; but if she leases her estate to an under-tenant, who sows the land, and she then marries, this, her act, shall not deprive the tenant of his crop, who is a stranger, and could not prevent her. 2 *Bl. ck.* 123.

(4.) The lessees of tenants for life had at the common law one unreasonable advantage; for, at the death of their lessors, the tenants for life, these under-tenants might, if they pleased, quit the premises, and pay no rent to any body for the occupation of the land since the last rent day: to remedy which, it is enacted by the 11 *G. 2. c.* 19. that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a rateable proportion of rent, from the last day of payment to the death of such lessor.

(5.) Te-

(5.) Tenant for life is obliged to keep down the interest. The whole estate indeed is liable in respect of creditors; but between tenant for life, and him in reversion, the tenant for life is only obliged. 3 *Atk.* 201. 1 *Vez.* 93.

If the principal shall be discharged, then the tenant for life shall pay one third thereof, and the reversioner the other two thirds. 3 *Atk.* 201.

LIGAN, is where mariners, in danger of shipwreck, cast goods out of the ship; and because they know they are heavy and sink, tie them to a cork or buoy, that they may find and have them again. These, so long as they continue upon the sea, are under the jurisdiction of the admiralty; if cast away upon the land, they are under the jurisdiction of the common law, under the denomination of wreck.

LIGHTS. Stopping lights of an house is a nuisance for which an action will lie, if the house is an ancient house, and the lights ancient lights. But stopping a prospect is not; being only a matter of delight, and not of necessity. 3 *Salk.* 247.

LIGNAGIUM, the right which a man has to the cutting of fuel in woods; and sometimes it is taken for a tribute, or payment due for the same.

LIMITATION OF ACTIONS :

1. By the 32 *H. 8. c. 2.* "No person shall sue or maintain any writ of right, or make any prescription, title, or claim, to or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments, of the possession of his ancestor or predecessor, or declare any further seisin or possession thereof, but only within sixty years next before." *f. 1.*

Writ of right.] In every complete title to lands, two things are necessary, the possession and the right. Where the possession is severed from the right, the law anciently provided this writ of right; which in its nature is the highest writ in the law, and lieth only of an estate in fee simple, and not for him who hath a less estate. 3 *Blackst.* 176.

Where a person that hath no right hath taken possession of lands, the law hath provided that the legal owner may enter upon him without any formal process. But if the intruder had made an alienation of the land, or it had descended to his heir, in that case the legal owner could not enter upon him, but was driven to his writ of entry to gain possession; because, until the contrary be proved, the law will rather presume the right to be in the heir whose ancestor died seised, than in one who has no such presumptive evidence to urge in his own behalf. But after there had been more than two descents, or two conveyances, the legal owner, though he had both the right of possession and of property, was not allowed this possessory action of a writ of entry, but

but was driven to his WRIT OF RIGHT, a long and tedious remedy, to punish his neglect in not sooner putting in his claim; for after so long an acquiescence, the law presumes, either that the disseisor had a good right originally, or since his entry hath procured a sufficient title, and therefore will not suffer him to be disturbed without inquiring into the absolute right of property. And by this statute of limitation, the said claim is restricted to the term of sixty years; so that the possession of lands in fee simple uninterruptedly for sixty years, is an absolute title against all the world. 3 Blackst. 196.

But this kind of action by writ of right, as also the possessory actions by writ of entry, assise, formedon, and the like, although indeed they are not so absolutely antiquated as to be out of force, yet they are nearly out of use; there being but very few instances, for more than a century now last past, of prosecuting any real action for land by any of this kind of writs. The forms are indeed preserved in the practice of common recoveries; but they are forms, and nothing else; and the title of lands is now usually tried upon actions of ejectment or trespass. 3 Blackst. 197.

By the 1 Mar. sess. 2. c. 5. the aforesaid statute of 32 H. 8. c. 2. shall not extend to any writ of right of advowson, quare impedit, assise of darrein presentment, or jure patronatus. And the reason is, because it may happen that the title to an advowson may not come in question, nor the right have opportunity to be tried within sixty years.

Also the statute extends not to a demand for tithes; for that these are not of the nature of those demands intended to be barred by the statutes of limitation. 15 Fin. 107.

In like manner, the said statute doth not extend to services, which, by common possibility, may not happen or become due within sixty years, as to cover the hall of the lord, or to attend on him when he goeth to war, or the like; nor to a rent created by deed, nor to a rent reserved upon any particular estate, for in the one case the deed is the title, and in the other the reservation. 1 Inst. 115. a.

With respect to the king; by the 21 J. c. 2. & 9 G. 3. c. 16. the king shall not claim or demand any right or title in any manors, lands, or other hereditaments, (other than liberties and franchises,) by reason of any title accrued within sixty years next before commencing the action; but the subject may hold the same against all grants, suggestions of concealment, or other defective title. But this not to bar any remainder or reversion in the crown.

2. By the said statute of 32 H. 8. c. 2. "No person shall sue or maintain any assise of mort-ancestor, cosinage, ayel, writ of entry, or other possessory action real, of the seisin of his ancestor,

"tore,

"tors, in lands; and either of their seisin, or his own, in rents, " suits, and services; but only within fifty years next before." *Bl. B.* 3. c. 10.

Affise of mort-ancestor, cofnage, ayle.] The word *affise* is derived from the Latin *affideo*, to sit together; and it signifies originally, the jury who try the cause, and sit together for that purpose. A writ of *affise*, is a real action for recovering the possession of lands, and differeth in nothing from a writ of *entry*, save only, that a writ of *entry* *disproves* the title of the defendant, by shewing the unlawful commencement of his possession; and an *affise* *proves* the title of the plaintiff merely by shewing his or his ancestor's possession.

The remedy by writ of *affise* is applicable to two species of injury by dispossession, *viz.* *abatement*, and *novel disseisin*. *Abatement*, is where a person dies seised, and before the heir or devisee enters, a stranger who has no right makes entry, and takes possession. If the abatement happened upon the death of the demandant's father or mother, brother or sister, uncle or aunt, nephew or niece, the remedy is by an *affise of mort d'ancestor*, or the death of one's ancestor. If it happened on the death of one's grandfather or grandmother, then an *affise of mort d'ancestor* doth no longer lie, but a writ of *ayle*, or *de avo*; if on the death of the great grandfather or great grandmother, then a writ of *besayle*, or *de proavo*; but if it mounts one degree higher, to the *tresayle*, or grandfather's grandfather, or if the abatement happened upon the death of any collateral relation, other than those before mentioned, then it is called a writ of *cofnage*, or *de consanguineo*.

An *affise of novel*, (new or late) *disseisin*, is an action of the same nature with an *affise of mort d'ancestor*, and differs only in the form and manner of proceeding.

But all actions of this kind, as is aforesaid, are now almost entirely out of use. 3 *Bl.* 197.

3. By the same act of 32 *H.* 8. c. 2. "No person shall sue " or maintain any action real for any lands or other hereditaments, of his own seisin or possession, above thirty years next before." *f.* 4.

And if, upon traverse, in any of these kinds of actions, he cannot prove seisin or possession within such respective times, he shall be for ever barred. *f.* 6.

For the law favours possession as an argument of right; and inclines rather to long possession without shewing any deed, than to an ancient deed without possession. 2 *Inst.* 118.

4. By the 21 *J.* c. 16. "All writs of *formedon in descender*, " *formedon in remainder*, and *formedon in reverter*, of any manors, " lands, tenements, or other hereditaments, shall be brought " within twenty years next after the title accrued, and not af-

"ter :

“ter : and no person shall make entry into any lands, tenements,
 “or hereditaments, but within twenty years next after his title
 “accrued ; and, in default theteof, he shall be utterly disabled
 “from such entry.” *f. 1.*

“But this shall not extend to infants, femes covert, persons
 “*non compos mentis*, imprisoned, or beyond the seas ; provided
 “that they bring their action, or make entry, within ten years
 “after the impediment removed.” *f. 2.*

Formedon.] Upon an alienation by tenant in tail, whereby the estate tail is discontinued, and the remainder or reversion is, by failure of the particular estate, displaced and turned into a mere right, the remedy is by action of *formedon*, *secundum formam docti*, reciting the form of the gift ; which is in the nature of a writ of right, and is the highest action that tenant in tail can have ; for he cannot have an absolute writ of right : which is confined only to such as claim in fee simple. The statute distinguishes the writ of *formedon* into three species :—A writ of *formedon in the descender* lieth where a gift in tail is made, and the tenant in tail aliens the lands intailed, or is disseised of them, and dies ; in this case, the heir in tail shall have this writ of *formedon in the descender*, to recover these lands so given in tail against him who is then the actual tenant of the freehold. A *formedon in the remainder* lieth where a man gives lands to another for life, or in tail, with remainder to a third person in tail, or in fee ; and he who hath the particular estate dieth without issue inheritable, and a stranger intrudes upon him in remainder, and keeps him out of possession ; in this case, the remainder man shall have his writ of *formedon in the remainder*. A *formedon in the reverter* lieth where there is a gift in tail, and afterwards, by the death of the donee without issue of his body, the reversion falls in upon the donor, his heirs, or assigns ; in such case, the reversioner shall have this writ to recover the lands. 3 *Blackf.* 192.

But these writs of *formedon* also are now antiquated, and in most cases, where the entry is lawful, men chuse to recover their possessions by *ejectment*, which is impliedly comprehended within the statute ; for, as twenty years is the time of limitation in any writ of *formedon*, consequently twenty years is also the limitation in every action of *ejectment* ; for no *ejectment* can be brought but where the claimant is intitled to enter on the lands, and no entry can be made by any person unless within twenty years after his right shall accrue. *Id.* 197.

By the 10 & 11 *W. c.* 14. no *fine* or *common recovery*, nor any judgment in any real or personal action, shall be reversed for any error or defect therein ; unless the writ of error, or suit, be commenced within twenty years ; and in case of being incapacitated

tated as above, then within five years after such incapacity removed.

If, after an ouster of the rest, one *tenant in common*, or *jointenant*, continues in possession of the whole for twenty years, it is a bar. 2 *Atk.* 632.

If a man has had possession of lands for twenty years without interruption, and then another gets possession, the person dispossessed (though plaintiff) may bring his ejection; for a possession of twenty years is like a descent, which takes away the entry, and gives a right of possession, which is sufficient to maintain an ejection. 2 *Salk.* 421.

Where there is a *trust* for payment of debts, it is established in equity, that this will revive debts which have been barred by the statute. 3 *Atk.* 107.

If the debtor by *will* directs the payment of all his debts, this revives a debt barred by the statute. *Cha. Prac.* 385.

The statute will not run as to a *legacy*; but it will run as to an *annuity*. 2 *Atk.* 71. And the reason why a *legacy* is out of the statute, is because it may be stopped till the debts are paid. 11 *Mod.* 44.

It is said to have been laid down as an invariable rule, if there be no demand for money due upon a *bond* for twenty years, that the judges will direct a jury to find it satisfied, from the presumption arising from the length of time. 2 *Atk.* 144. But in the case of *K. v. Stephens*, *M.* 31 *G.* 2. Lord *Mansfield* said, that there is no direct and express limitation of time when a bond shall be supposed to have been satisfied: the general time indeed is commonly taken to be about twenty years, but he had known Lord *Raymond* leave it to a jury upon eighteen years. *Bur. Mansf.* 434.

It is a rule in equity in relation to the redemption of a *mortgage*, by way of analogy to the statute of limitation, that after twenty years possession a mortgagee shall not be disturbed. 3 *Atk.* 313.

If a man makes a mortgage by way of collateral security for money due upon a bond, although the mortgagee be not in possession for twenty years and more, yet if the interest be paid upon the bond according to the agreement of the parties, it shall not be barred by the statute. *L. Raym.* 740.

In the *Winchelsea* causes, *M.* 7 *G.* 3. it was laid down as a rule by the court of king's bench, that informations in nature of a *quo warranto*, for displacing members of a corporation, or the like, shall be limited to twenty years; as being analogous to the limitation of writs of *formedon*, and entry into lands, and also of dormant bonds, writs of error, bills of review, redemption of mortgages, and proof of possession upon bringing ejections. *Bur. Mansf.* 1963.

5. By the aforesaid act of 21 *J. c.* 18. " All actions of trespass *quare clausum fregit*, all actions of *trespass*, *detinue*, *trover*, and *replevin*, all actions of *account*, and upon the *case*, (other than such accounts as concern the trade of merchandize, between merchant and merchant,) all actions of *debt* grounded upon any lending, or contract without specialty, (*that is, not being by deed, or under seal,*) all actions of debt for arrearages of *rent*, and all actions of *assault*, *menace*, *battery*, *wounding*, and *imprisonment*, shall be commenced within the time and limitation as followeth, and not after; that is to say, the said actions upon the *case*, (other than for *slander*,) and the said actions for *account*, and the said actions for *trespass*, *debt*, *detinue*, and *replevin*, and the said action for *trespass quare clausum fregit*, within six years after the cause of such action; and the said actions of *trespass* of *assault*, *battery*, *wounding*, or *imprisonment*, within four years, and the said action upon the *case* for *words*, within two years." *f. 3.*

" Provided, that if any person that shall be intitled to any such action of *trespass*, *detinue*, *action sur trover*, *replevin*, action of *accounts*, action of *debt*, action of *trespass* for *assault*, *menace*, *battery*, *wounding*, or *imprisonment*, action upon the *case* for *words*, shall be at the time of the cause of action within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned, or beyond the seas; such person may bring his or her action within the said respective times after such impediment shall be removed." *f. 7.*

Between merchant and merchant.] This extends only to merchants trading beyond the sea, and not to inland merchants. *Cba. Ca.* 152.

Also bills of exchange, and other transactions between merchants, are not excepted out of the statute, but only actions of account. And if the account is once stated, the statute after six years will run. *Show.* 341. *1 Mod.* 10.

Beyond the seas.] If the plaintiff be in *England* at the time the cause of action accrues, the time of limitation begins to run; so that if he, or (if he dies abroad) his executor or administrator, do not sue within six years, they are barred by the statute. *1 Will.* 134.

For when the six years are once begun, the statute runs over all mesne acts, as coverture, infancy, or an assignment by a bankrupt. *Str.* 550

Upon the aforesaid statutes, if in any suit the injury, or cause of action, happened earlier than the period expressly limited by law, the defendant may plead the statutes of limitation in bar; as, upon a promise of payment of money, the defendant may plead that

that he made no such promise within six years. *Blackst. B. 3. c. 10.*

But where a note is given for payment of an *annuity*, or for payment of money at a *future time*, or for payment of a sum of money by *instalments*; the defendant's pleading that he did not promise to pay within six years is bad; for he should have pleaded that the *cause of action* had not accrued within six years. For where the duty arises on a consideration executory, or for something to be done at a future time, it is not material when the promise was made, if the cause of action did accrue within the six years. 2 *Salk.* 422. 3 *Atk.* 71.

But where a promissory note is given for payment of money *upon demand*, this is a present duty; and thereupon the statute runs immediately, and doth not wait till demand shall be made. 12 *Mod.* 444. 15 *Vin.* 118.

Delivery of the *last goods* by a tradesman continues the action for what was due before. *Wood. b. 4. c. 4.*

Also, a conditional promise after the six years will take it out of the statute; as if a man promise to pay for the goods, if the plaintiff can prove the goods delivered. *L. Raym.* 421.

It is generally said, that an *acknowledgment* of a debt within the six years will not amount to a new promise, so as to bring it back out of the statute: but it is evidence of a promise. *L. Raym.* 422. 12 *Mod.* 224.

And in the case of *Lacon and Briggs*, in chancery, lord *Hardwicke* said, there must be a direct admission of a debt to take it out of the statute; and there have been several cases at law, where this hath not been held sufficient, unless it is likewise attended with an express promise to pay; but (he adds) this may be rather too hard. 3 *Atk.* 107.

The reason of the distinction seems to have been this: Acknowledgment of the debt is no more than what the statute supposes; for if there is no debt, there is nothing on which the statute can operate. For the statute doth not extinguish the debt, but only precludes the remedy after a certain limited time. But otherwise it is, in the case of payment of *interest* within the time limited: this is more than a bare acknowledgment; it is a payment of part of the debt; which supercedes any anterior promise, and draws after it the remaining part of the debt.

A *writ of latitat* taken out, and filed, and continued, is an avoidance of the statute; for it is a demand, and a good bringing of an action within the time. 1 *Lill. Abr.* 19. 3 *Salk.* 229.

But if it is not actually sued out till after the six years, although tested within the six years, it is not relevant, and shall have no retrospect to the fictitious date, for the statute having once

once run in truth and reality, shall not be overhauled and brought back by fiction. *Bur. Mansf.* 950.

And the party who sues out the *latitat*, must have a *non est investus* returned by the sheriff, and then he must enter the writ upon the roll, and afterwards file it; otherwise, the suing it out will not avail. And all the continuances must be entered, and so shewn to the court. 12 *Mod.* 578.

After commencement of the action, an acknowledgment of the debt will take it out of the statute; as ruled by Mr. Justice Noel on the circuit, and confirmed by the court of king's bench, in the case of Sir William Yea v. Fouraker, M. 1 G. 3. *Bur. Mansf.* 1099.

A bill in chancery is not a sufficient demand of the debt, so as to take it out of the statute. 1 *Atk.* 282. 2 *Atk.* 1.

LIMITATION OF ESTATE, in a legal sense, imports how long the estate shall continue, or is rather a qualification of a precedent estate; and if there be not a performance according to the limitation, it shall determine the estate without entry or claim; which a *condition* doth not. For there is a difference between a *limitation* and a *condition*. When an estate is expressly confined and limited by the words of its creation, that it cannot endure for any longer time, than till the contingency happens, upon which the estate is to fail; this is called a *limitation*; as when land is granted to a man so long as he is parson of such a church, or while he continues unmarried, or until out of the rents and profits he shall have raised such a sum; in such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries, or has raised the sum specified); and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But where an estate is granted expressly upon *condition* to be void when the grantee ceases to be parson of such a church, or marries, or hath raised out of the rents and profits such a sum, in such case, the law permits the estate to endure beyond the time when such contingency happens, unless the grantor, or his heirs or assigns, take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate. 2 *Black.* 155.

LINEN. By 24 G. 3. c. 41. every callico printer, and printer, painter, or stainer of silks, linens, cottons, or stuffs, shall take out a licence annually, from the officers of excise. And by 27 G. 3. c. 13. and 28 G. 3. c. 37. several duties are imposed upon all goods printed, stained, painted, or dyed, in *Great Britain*; except such as shall be dyed throughout of one colour only. And also, certain duties are imposed on the importation, and drawbacks allowed on the exportation thereof; as set forth in schedules annexed to the said act.

And

And by several statutes, regulations are made for the manufacturing and marking linen cloth, cottons, and callicoes made in *Great Britain*.

LITERA, Fr. *litiere* or *lictiere*, from the Latin *lectum*, a bed, signifies *litter*, or straw, now only used in stables for the bedding of horses; but, in ancient times beds were commonly made of it. Some manors were held of the king by the serjeanty of finding straw for the king's bedchamber, *inveniendi literam ad lectum regis*.

LITERARY PROPERTY. Authors have not, by the common law, the sole and exclusive copy-right remaining in themselves or their assigns in perpetuity, after having printed and published their compositions. But by the statute of 8 *An. c.* 19. it is secured to them for 14 years from the day of publishing; and after the end of fourteen years, the sole right of printing or disposing of copies shall return to the authors, if then living, for other 14 years. *Bur. Mansf.* 2409.

LITIGIOUS, is where a church is void, and two presentations are offered to the bishop upon the same avoidance; in which case, the church is said to become litigious; and if nothing further is done by either party, the bishop may suspend the admission of either of the clerks, and suffer a lapse to incur. 3 *Black.* 246.

LIVERY OF SEISIN, is a delivery of possession of lands, tenements, and hereditaments, unto one that hath right to the same; being a ceremony in the common law used in the conveyance of lands, where an estate of fee simple, fee-tail, or other freehold passeth. 1 *Inst.* 48.

And this, by the common law, is necessary to be made upon every grant of an estate of freehold in hereditaments corporeal, whether of inheritance or for life only. And this is one reason why a freehold cannot be made to commence *in futuro*, because actual possession is to be given, which must take effect at that instant, or not at all. 2 *Black.* 314.

Livery of seisin is thus performed: The feoffor or his attorney, together with the feoffee or his attorney, come to the land, and there, in the presence of witnesses, declare the contents of the feoffment, on which delivery is to be made. And then the feoffor doth deliver to the feoffee, all other persons being out of the ground, a clod, or turf, or a twig, or bough there growing, with words to this effect: "I deliver these to you, in the name of seisin of all the lands and tenements contained in this deed." But if it be of an house, the feoffor must take the ring or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others. And there must be as many liveries as there are lands in several counties. 2 *Black.* 315. And it is usual to indorse the livery of seisin

on the back of the deed, specifying the manner, place, and time, together with the names of the witnesses.

But in an exchange, a fine, devise, a surrender by custom, a lease and release, a bargain and sale by deed, indented and inrolled, (because the statute of uses, 27 *H. 8. c. 10.* gives the possession to the use,) a freehold may pass without livery. 1 *Inst.* 50.

Also, in hereditaments incorporeal, livery of seisin cannot be made, for they are not the object of the senses; and in leases for years, or other chattel interest, it is not necessary. In leases for years, indeed, an actual *entry* is necessary to vest the estate in the lessee; for the bare lease gives him only a right to enter; and when he enters in pursuance of that right, he is then, and not before, in the possession of his term. 2 *Black.* 314.

LOCAL ACTION, is an action restrained to the proper county, in opposition to a *transitory* action, which may be laid in any county at the plaintiff's discretion. In local actions, where possession of land is to be recovered, or damages for an actual trespass, or for waste, or the like, affecting land, the plaintiff must lay his declaration, or declare his injury to have happened in the very county and place that it really did happen: but in transitory actions, for injuries that may have happened any where, as debt, detinue, slander, and the like, the plaintiff may declare in what county he pleases, and then the trial must be in that county in which the declaration is laid; though if the defendant will make affidavit that the cause of action, if any, arose not in that, but in another county, the court will oblige the plaintiff to declare in the proper county. 3 *Black.* 294.

LONDON (custom of):

1. If a freeman of *London* dies intestate, his effects, after payment of his debts, are divided according to the ancient universal doctrine of the *pars rationabilis*. If he leaves a widow and children, his substance (deducting the widow's apparel, and furniture of her bedchamber) is divided into three parts; one of which belongs to the widow, another to the children, and the third to the administrator: if only a widow, or only children, they shall respectively, in either case, take one moiety, and the administrator the other; if neither wife nor child, the administrator shall have the whole. And this portion, or *deadman's part*, the administrator was wont to apply to his own use, till the statute 1 *Ja. 2. c. 17.* declared, that the same should be subject to the statutes of distribution. If she hath a jointure made to her before marriage, in bar of her customary part, yet she shall have her share of the deadman's part, under the statute of distribution, unless barred by special agreement. And if any of the children are advanced by the father in his life-time with any sum of money, (not amounting to their full proportionable part,) they shall bring their por-

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tion into hotchpot with the rest of the brothers and sisters, but not with the widow, before they are intitled to any benefit under the custom; but, if they are fully advanced, the custom intitles them to no farther dividend. 2 *Black.* 518.

2. In *London*, every day, except *Sunday*, is a market overt; and sales in the shops there for valuable consideration are good. 5 *Co.* 83.

3. By custom in *London*, where a feme covert useth any craft in the said city, on her sole account, wherewith the husband meddleth not, she shall be charged as a feme sole concerning every thing that touched her craft; and if the husband and wife shall be impleaded, the wife shall plead as a feme sole; and if she is condemned, she shall be committed to prison till she has made satisfaction; and the husband and his goods shall not be charged or impeached. *Bur. Mansf.* 1776.

And such feme covert sole trader is liable to a commission of bankruptcy: but the commission ought to be confined to matters in the way of her trade. *Id.* 1784.

If her husband becomes bankrupt, and afterwards she becomes bankrupt, the husband's assignees cannot take her effects; they belong to *her* assignees. And the question is not between husband and wife, but between his creditors and her creditors. *Id.*

4. Customs of *London*, if put in issue, are certified by the mayor and aldermen by the mouth of their recorder. *Id.* 249.

LORD, *dominus*, is a word or title of honour, diversely used, being attributed not only to those who are noble by birth or creation, otherwise called peers of the realm, and *lords of parliament*; but to such as are so called by the curtesy of *England*, as all the sons of a duke, and the eldest son of an earl; and to persons honourable by office, as the *lord chief justice*, and sometimes to a private person that hath the fee of a manor, and consequently the homage of the tenants within his manor, for by his tenants he is called *lord*. In this last signification, it is most used in our law books, where it is divided into lord *paramount*, or superior lord, and lord *mesne*, (*medius*,) middle, between the lord paramount and the tenant.

LORD'S DAY. All persons, not having reasonable excuse, shall resort to the *church* (or some congregation of religious worship allowed by the laws of this realm) on every *Sunday*; on pain of one shilling for every omission. 1 *El. c.* 2.

By several acts of parliament there are penalties inflicted upon persons exercising their *worldly calling* on the Lord's day.

King *James* the first, in the Book of *Sports*, 1618, declared the following games to be *lawful*, *viz.* dancing, archery, leaping, vaulting, *May-games*, *Whitsun-ales*, and *morris dances*; and allowed the same to be used on *Sundays* after evening service; but restraining all recusants from this liberty, and com-

manding each parish to use these recreations by itself; and prohibiting all *unlawful* games, bear baiting, bull baiting, interludes, and bowing by the meaner sort. And, by statute 1 C. c. 1. it is enacted, that there shall be no concourse of people out of their own parishes on the Lord's day, for any sport or pastime; or any bear baiting, bull baiting, interludes, plays, or other unlawful exercises and pastimes used by persons within their own parishes; on pain of 3s. 4d. for each offence.

Killing *game* on the Lord's day, incurs a forfeiture of 20*l.*, or not less than 10*l.* for the first offence; for the second offence 30*l.*, or not less than 20*l.*; and for every other offence 50*l.* To be recovered before the justices of the peace. 13 G. 3. c. 80.

By the 29 C. 2. c. 7. no *arrest* shall be made, nor *process* served on the Lord's day, (except for treason, felony, or breach of the peace,) but the service thereof shall be void. But this doth not extend to ecclesiastical process, as citations, or excommunications. *Gibf.* 371.

The hundred shall not be answerable for *robbery* committed on the Lord's day. 29 C. 2. c. 7.

The Lord's day is not a *judicial* day; therefore, when the return days are fixed on *Sunday*, (as it often happens,) yet the court never sits to receive the returns till the *Monday* following: for no proceedings can be had, or judgment given, or supposed to be given, on a *Sunday*. 3 *Black.* 278.

LOTTERIES, by 10 & 11 W. c. 17. are declared to be public nuisances; and all grants, patents, and licences, for such lotteries, to be against law. And the setting up of any lottery, is, by several acts of parliament, made punishable with very high penalties. But, for the public service of the government, lotteries are frequently established by particular statutes, and managed by special officers and persons appointed.

And by 27 G. 3. c. 1. all persons who shall publicly or privately set up, or keep, by himself or any other, any office or place for buying, selling, or dealing in lottery tickets, or shares thereof, without being licensed, shall be deemed rogues and vagabonds, and shall be punished as directed by 17 G. 2. c. 5.

LOWBELL, from the *Saxon law*, a flame of fire, is an invention of taking birds in the night with a *light* and a *bell*; by the sight and noise wherof, birds, sitting upon the ground, become stupified, and so are covered and taken with a net: which is, by the game acts, prohibited.

LUNATIC, is one that at certain times is deprived of the use of his understanding; and is so denominatèd, from his disorder being supposed to depend upon the change of the *moon*.

By the statute of *prerogativa regis*, 17 Ed. 2. c. 10. the king shall provide, in the case of lunatics, that their lands and tenements shall be safely kept without waste and destruction, and that they

they and their household shall live and be maintained competently with the profits of the same; and the residue, besides their sustentation, shall be kept to their use, to be delivered unto them when they come to their right mind, or otherwise to their executors or administrators.

The method of proving a man *non compos* is, by process out of chancery, from whence a commission issues to the sheriff, to inquire, by a jury, into the party's state of mind. And if he be found *non compos*, the lord chancellor usually commits the care of his *person* to some friend, who is then called his *committee*. But the next heir is seldom permitted to have the care of his person, because it is his interest that the party should die. But the heir is generally made the manager of his *estate*; because it is his interest to keep it in good condition. 1 *Black.* 305.

Any person may justify confining and beating his friend, being mad, in such manner as is proper in such circumstances. 1 *Haw.* 130. And the overseers of the poor, by the vagrant act, may confine lunatic vagrants.

The marriage of a lunatic, not being in a lucid interval, hath, by the late determinations, been adjudged to be void. But as it may be difficult to prove the exact state of the party's mind, at the actual celebration of the marriage, therefore the statute of 15 G. 2. c. 30. hath provided, that the marriage of lunatics, and persons under phrenzies, (if found lunatics under a commission,) before they are declared of sound mind by the lord chancellor, shall be totally void.

A conveyance to or by a lunatic is not absolutely void, but voidable; and the next heir may, after his death, take advantage of his incapacity and set it aside. 4 *Co.* 123. By 29 G. 2. c. 31. and 11 G. 3. c. 30. the guardians of lunatics may make leases under the direction of the court of chancery; and under the like direction, a lunatic may surrender or accept of a surrender of a lease in order to renew it.

In criminal cases, a lunatic is not chargeable for his own acts whilst under that incapacity. If there be any doubt whether he be *compos* or not, this shall be tried by an inquest of office to be returned by the sheriff; and if he be found *non compos*, this, as it excuses from the guilt, so also consequently from the punishment. But if he hath lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency. 1 *Haw.* 2.

If a man be *compos* when he commits a crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; and, if after judgment, he shall not be ordered for execution. 4 *Black.* 395.

If a person who wants discretion commit a trespass against the person or possession of another, he shall be compelled in a civil action to give satisfaction for the damage. 1 *Haw.* 2.

M A G

MAGNA CHARTA, the great charter of liberties granted first by king *John*, and afterwards with some alterations confirmed in parliament by king *Henry* the third. It is so called, either for the excellency of the laws therein contained, or because there was another charter called the *charter of the forest*, which was the less of the two; or in regard of the great wars and troubles in obtaining it. The said king *Hen.* 3. after it had been several times confirmed by him, and as often broken, at last, in the 37th year of his reign, confirmed it in the most solemn manner. He came into *Westminster-hall*, and, in the presence of the nobility and bishops, with lighted candles in their hands, *magna charta* was read; the king all that while laying his hand on his breast, and at last solemnly swearing "faithfully and inviolably to observe all things therein contained, as he was a man, a christian, a soldier, and a king." Then the bishops extinguished the candles, and cast them to the ground, and every one said, "Thus let him be extinguished, and stink in hell, who violates this charter." Upon which the bells were set a ringing, and all persons by their rejoicing approved of what was done. Afterwards, king *Ed.* 1. confirming this charter, in the 25th year of his reign, made an explanation of the liberties therein granted to the people; adding some, which are now called *articuli super chartas*; and in the confirmation he directed that this charter should be read twice a year to the people, and sentence of excommunication to be constantly denounced against all that by word, or deed, or counsel, shall act contrary thereto, or in any degree infringe it. And afterwards, *Sir Edward Coke* observes, that it was confirmed by upwards of thirty subsequent corroboratory statutes. This charter, besides redressing many grievances incident to feudal tenures, which were of no small moment at that time, provided for the protection of the subject against other oppressions, then frequently arising from unreasonable amercedments, from illegal distresses or other process for debts or services due to the crown, from the tyrannical abuse of the prerogative and pre-emption. It fixed the forfeiture of lands for felony, in the same manner as it still remains; it established the testamentary

testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children; it laid down the law of dower, as it hath continued ever since. In matters of public police and national concern, it enjoined an uniformity of weights and measures; gave new encouragement to commerce, by the protection of merchant strangers; and forbade the alienation of lands in mortmain. With regard to the administration of justice, besides prohibiting all denials, or delays of justice, it fixed the court of common pleas at *Westminster*, that the suitors might be no longer harrassed with following the king's person in all his progresses; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assizes to be taken in the proper counties, and establishing annual circuits: it directed the regular awarding of inquests for life or member; and regulated the time and place of holding the inferior tribunals of justice, the county court, sheriff's tourn, and court leet. It confirmed and established the liberties of all the cities, boroughs, towns, and ports of the kingdom. And, lastly, (which alone would have merited the title that it bears, of the *great charter*;) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his equals, or the law of the land. 4 *Black.* 423.

MAIDEN RENT, was a sum of money paid to the lord on the marriage of his tenant's daughter, said to be in recompence of the custom of the lord's lying with the bride the first night after marriage. Others suppose it to have been a fine for licence to marry a daughter.

MAIHEM. See **MAYHEM.**

MAILE, in *French*, is a small piece of money; and in 9 *Hen.* 5. silver half-pence here were termed mailes. In a large acceptation, the word *maile* signifies a rent in general, paid either in money, corn, cattle, or other goods, as geese maile, cow maile, and the like; and in *Scotland*, maile is still the common name for rent. White maile, white rents, vulgarly called quit rents, were rents paid in silver, and thereby distinguished from work-day rents, cummin-rents, corn-rents, and the like. Black maile or black rents, seem properly to have been rents paid in cattle; but, more largely taken, they seem to have been used to denote all rents not paid in silver, in contradistinction to the blanch farms or white rents.

MAIM, is such a hurt of any part of a man's body, whereby he is rendered less able in fighting, either to defend himself, or annoy his adversary. For the limbs of every subject are under the safeguard and protection of the law, to the end a man may serve his king and country, when occasion shall be offered.

1 *Inst.* 127.

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The cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye, or foretooth, or castrating him, are said to be maims; but the cutting off his ear, or nose, were not esteemed maims at the common law, because they do not weaken, but only disfigure him. 1 *Haw.* 111.

By the statute 22 & 23 C. 2. c. 1. if any person, on purpose and by lying in wait, shall cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any person, with intent to maim or disfigure him; he shall be guilty of felony without benefit of clergy. If the maim comes not within any of the descriptions of this act, yet it is indictable at the common law, and may be punished by fine and imprisonment; or an appeal may be brought for it at the common law, in which the party injured shall recover his damages; or he may bring an action of trespass, which kind of action hath now generally succeeded into the place of appeals, in smaller offences not capital. 2 *Haw.* 157.

MAINOUR, (*main-avoir*, Fr.) is when a thief is apprehended in the very fact, *having* the thing stolen in his hand or possession. This was anciently called *handhabhend*, and sometimes *backterend*, as a bundle or fardel on his back. 2 *Inst.* 188.

Anciently, if one guilty of darceny had been freshly pursued and taken with the *manner*, and the goods so found upon him had been brought into the court with him, he might be tried immediately without any indictment; and this is said to have been the proper method of proceeding in those manors which had the franchise of *infangthefe*, but seems to be altogether obsolete at this day. 2 *Haw.* 211

MAINPERNORS, (*mainceptores*), are those persons to whom a man is delivered out of custody or prison, on their becoming bound for his appearance; which, if he do not, they forfeit their recognizances.

MAINPRISE, (*manuceptio*, a taking into the hand, from the French *main*, a hand, and *pris*, taken,) signifies taking a man into friendly custody who might otherwise be committed to prison, upon security given for his appearance at a time and place assigned. He is supposed to go at large, and to be at his own liberty, under no possibility of being confined by his mainpernors or sureties, as in the case of bail. *Wood. b. 4. c. 4.*

The difference between bail and mainprise is this; that mainpernors are only sureties, who, in case the person doth not appear, (though he was never arrested or in prison,) are to forfeit their recognizances: but bail is a custody; for no man is bailed but he that is under an arrest or in prison; and therefore the bail may retake the prisoner, if they doubt he will fly, and detain him or deliver him up to a justice of the peace, who ought

ought to commit the prisoner in discharge of the bail, or put him to find new sureties. *Hale's Pl.* 96.

There is also a *writ of mainprise*, directed to the sheriff, (either generally, when a man is imprisoned for aailable offence, and bail hath been refused; or specially when the offence or cause of commitment is not properlyailable below,) commanding him to take sureties for the prisoner's appearance, and to set him at large. 3 *Black.* 128.

MAINTENANCE, (*manu tenere*,) is an unlawful taking in hand or upholding of quarrels or suits, to the disturbance of common right: and it is twofold; either *in the country*, as where one assists another in his pretensions to certain lands by taking or holding the possession of them for him by force or subtilty, or where one stirs up quarrels in the country in relation to matters wherein he is no way concerned; or in the *courts of justice*, where one officiously intermeddles in a suit depending in any such court, which no way belongs to him, by assisting either party with money, or otherwise, in the prosecution or defence of any such suit. 1 *Haw.* 249.

Of this second kind of maintenance there are three species: 1. Where one maintains another, without any contract to have part of the thing in suit; which generally goes under the common name of *maintenance*. 2. Where one maintains one side to have part of the thing in suit; which is called *champerty*. 3. Where one laboureth a juror; which is called *embracery*. *Id.*

Persons guilty of maintenance are not only liable to an action at the suit of the party grieved, wherein they shall render such damages as shall be answerable to the injury done to the plaintiff; but also they are indictable as offenders against public justice, and adjudged thereupon to such fine and imprisonment as the court shall award, according to the circumstances of the offence. 1 *Haw.* 255.

MALICE, when spoken of in relation to the crime of murder, is not to be understood in so restrained a sense as to signify only a spite or malevolence to the deceased person in particular, but, more largely, an evil design in general, the dictate of a wicked, depraved and malignant heart. It is of two kinds; *express* or *implied*. *Malice express* is, when one, with a sedate, deliberate mind, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. *Malice implied* is various; as when one voluntarily kills another without any provocation, or where one wilfully poisons another; in such like cases, the law implies malice, though no particular enmity can be proved. 4 *Black.* 158.

MALT.

MALT. By the 12 *An. st.* 1. *c.* 2. no malt shall be imported, on forfeiture of the same, and the value thereof.

And, by the same statute, a duty is imposed on all malt made in *England* from barley or other grain; which duty hath been continued by annual acts ever since.

And by the 27 *G. 3. c.* 13. a further duty is imposed on all malt made in *England* or *Scotland*; or made in *Scotland*, and brought into *England*. And allowances are to be made on malt exported, as set forth in schedules annexed to the act.

And by the 24 *G. 3. c.* 41. a licence is required to be taken out annually, by every maker of malt for sale, from the offices of excise.

MAN, *Isle of*, is a distinct territory from *England*, and is not governed by our laws; neither doth any act of parliament extend to it, unless it be particularly named therein. It was formerly a subordinate feudatory kingdom, subject to the kings of *Norway*; then to the kings of *England*; afterwards to the kings of *Scotland*; and then again to the crown of *England*; and was finally granted, by king *James* the first, to *William Stanley* earl of *Derby*, and the heirs male of his body, with remainder to his heirs general; which grant was confirmed by act of parliament, with a restraint of the power of alienation by the said earl and his issue male. On the death of *James* earl of *Derby* in the year 1735, the male line of earl *William* failing, the duke of *Atbol* succeeded to the island, as heir general by a female branch. In the mean time though the title of king had long been disused, the earls of *Derby*, as lords of *Man*, had maintained a sort of royal authority therein; which being found inconvenient for the purposes of public justice, and for the revenue, (it affording a commodious asylum for debtors, outlaws, and smugglers,) authority was given to the treasury, by statute 12 *G. c.* 28. to purchase the interest of the then proprietors for the use of the crown; which purchase was at length completed in the year 1765, and confirmed by the statutes 5 *G. 3. c.* 26. & 39. whereby the whole island, and all its dependencies, (except the landed property of the *Atbol* family, their manerial rights and emoluments, and the patronage of the bishopric and other ecclesiastical benefices,) are unalienably vested in the crown, and subjected to the regulations of the British excise and customs. 1 *Black.* 105.

MANBOTE, a compensation or recompence for homicide; for in ancient time almost all offences might be compensated for money.

MANDAMUS, is a writ issuing in the king's name out of the court of king's bench, and directed to any person, corporation, or inferior court of judicature, commanding them to do some particular thing therein specified, as appertaining to their office and duty. 3 *Black.* 110.

It

It is a high prerogative writ, of a most extensively remedial nature. It lies to compel the admission or restoration of the party applying, to any office or franchise of a public nature, whether spiritual or temporal; it lies for the production, inspection, or delivery of public books and papers; for the surrender of the regalia of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an infinite number of other purposes: more particularly, it lies to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed: for it is the peculiar business of the court of king's bench, to superintend all other inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers, with which the crown or legislature have invested them; and this, not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice. *Id.*

The writ is grounded on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below; whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made, (except in some general cases, where the probable ground is manifest,) directing the party complained of to shew cause why a writ of mandamus should not issue; and if he shews no sufficient cause, the writ itself is issued, at first in the alternative, either to do this, or signify some reason to the contrary; to which a return or answer must be made at a certain day. And if the inferior judge, or other person to whom the writ is directed, returns or signifies an insufficient reason, then there issues, in the second place, a *peremptory* mandamus, to do the thing absolutely; to which no other return will be admitted, but a certificate of perfect obedience, and the execution of the writ. *Id.* 311.

If the inferior judge, or other person, makes no return, or fails in his respect and obedience, he is punishable for his contempt by attachment. But if he at first returns a sufficient cause, although it should be false in fact, the court of king's bench will not try the truth of the fact upon affidavits, but will for the present accept the return, and proceed no further on the mandamus. But then the party injured may have an action against him for his false return, and (if found to be false by the jury) shall recover damages equivalent to the injury sustained; together with a *peremptory* mandamus to do his duty. *Id.*

Or, for a more speedy redress, the party prosecuting the mandamus may, on the first return to the mandamus, plead to or traverse all or any of the material facts in the said return: to which the person making the return shall reply, take issue, or demur; and such further proceedings may be had thereupon in
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all respects, as if the person prosecuting the mandamus had brought his action upon the case for a false return. 9 *An. c.* 28.

Where there are cross mandamuses, as to admit different persons to one and the same office, they must both be obeyed; for it is without prejudice to the right of either claimant, for a mandamus gives no right: it only brings the matter into a course of trial. *Bur. Mansf.* 1422.

MANNER. See MAINOUR.

MANOR, *manerium, à manendo*, because the usual residence of the owner, was a district of ground, held by lords or great personages, who kept in their own hands so much land as was necessary for the use of their families, which were called *terre dominicales*, or demesne lands, being occupied by the lord, or *dominus manerii*, and his servants. The other lands they distributed among their tenants, which the tenants held under divers services. The residue of the manor, being uncultivated, was termed the lord's waste, and served for common of pasture to the lord and his tenants. Manors were formerly called *baronies*, as they still are *lordships*: and each lord or baron was empowered to hold a domestic court, called the *court-baron*, for redressing misdemeanors and nuisances within the manor, and for settling disputes of property among the tenants. 2 *Black.* 90.

MANSLAUGHTER, is such killing of a man, as happens either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all. There is no difference between murder and manslaughter, but that murder is upon malice forethought, and manslaughter upon a sudden occasion. As if two meet together, and striving for the wall, the one kills the other, this is manslaughter and felony. And so it is, if they had upon that sudden occasion gone into the field and fought, and the one had killed the other, this had been but manslaughter and no murder; because all that followed was but a continuance of the first sudden occasion, and the blood was never cooled till the blow was given. This offence is within the benefit of clergy, but the offender shall be burned in the hand, and forfeit all his goods and chattels. 3 *Inst.* 55.

MANSTEALING, or kidnapping, is the forcible abduction, or the stealing away, of man, woman, or child, from their own country, and sending them into another. By the ancient Jewish law, and by the civil law, this crime is punished with death; but by the common law of *England*, the punishment thereof doth not extend unto death; but the offender being found guilty, is liable to be fined, imprisoned, and pillored, at the discretion of the court. 4 *Black.* 249.

MANUMISSION, was the freeing of a slave out of bondage; and was so denominated from the master's taking him by the hand

hand before the sheriff in the county court, and delivering him, or letting him go at liberty, with a declaration that it is his will that the slave shall thence go free.

MARCHERS, or LORDS MARCHERS, were the keepers or wardens of the *marches* or boundaries of the kingdom between *England* and *Scotland*, and *England* and *Wales*; so denominated from the word *marche*, a limit. They had courts of *marche*, wherein they tried causes of different kinds, and especially offences against the public peace, which went by the general name of *marche treason*.

MARINARIUS, a mariner or seaman: and *marinarius capitaneus*, was the admiral or warden of the ports; which offices were commonly united in the same person: the word *admiral*, not coming into use till the latter end of the reign of king *Edward* the first; before which time, the king's letters ran thus: *Rex capitaneo marinariorum et ejusdem marinarius, salutem*.

MARISCUS, a marsh, or fenny ground.

MARITAGIUM, *marriage*, was the privilege which the lord anciently had of giving a female heir, being his tenant, in marriage; in order to support the feudal services.

MARKET. See **FAIR**.

MARQUE and REPRISAL. When the subjects of one state are oppressed and injured by those of another, and justice is denied by that state to which the oppressor belongs, letters of *marque* and *reprisal* (words in themselves synonymous, and signifying a taking in return) are grantable by the law of nations, in order to seize the bodies or goods of the subjects of the offending state, until satisfaction be made, wherever they happen to be found. To which purpose it is declared by the statute 4 *Hen. 5. c. 7.* that if any subjects of the realm are oppressed in time of truce by any foreigners, the king will grant *marque* in due form, to all that feel themselves grieved. And, on complaint to the keeper of the privy seal, he shall make to the party complainant, *letters of request* under the *privy seal*. And if, after such request of satisfaction made, the party required doth not make, in convenient time, due restitution or satisfaction to the party grieved, the lord chancellor shall make him out *letters of marque* under the *great seal*. And by virtue of these, he may attack and seize the property of the aggressor nation, without hazard of being condemned as a robber or pirate. 1 *Black. 258.*

MARQUESS, is a title of honour, above an earl, and next below a duke. His office, when he first received this denomination, was to guard the frontiers and limits of the kingdom, which were called the *marches*, from the Teutonic word *marche*, a limit; as were the *marches* of *England* and *Wales*, whilst they continued hostile countries.

MARRIAGE:

MARRIAGE :

1. Of marriage there are several disabilities : One is upon account of *kindred* ; either by consanguinity, which is a relation by blood ; or by affinity, which is a relation by marriage. But marriages within the degrees prohibited, are not *ipso facto* void, but only voidable by sentence of divorce in the spiritual court. And after the death of either of the parties, the courts of common law will not suffer the spiritual court to declare such marriages to have been void, so as to bastardize the issue. 1 *Black.* 434.

By the civil law, first cousins are allowed to marry, but by the canon law, both first and second cousins (which was in order to make dispensations more frequent) are prohibited. Therefore, where it is vulgarly said, that first cousins may marry, but second cousins cannot, probably this arose by confounding these two laws. But, by the law of *England*, it is lawful for both first and second cousins to marry.

2. Another disability is a *prior marriage*, or having another husband or wife living ; in which case, the second marriage is actually void, without any declaratory sentence. 1 *Black.* 436.

3. Another disability is *want of age*. In which case, if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect ; and when either of them comes to those respective ages, they may disagree, and declare the marriage void. But, if at such age of consent, they agree to continue together, they need not be married again. If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion, he may disagree as well as she may ; for, in contracts, the obligation must be mutual, both must be bound or neither ; and so it is on the contract when the wife is of years of discretion, and the husband under. *Id.*

4. Formerly another disability was a *pre-contract*, either *per verba de presenti*, or *per verba de futuro*. A contract *per verba de presenti*, was deemed a valid marriage, and the parties might have been compelled in the spiritual court to celebrate it in the face of the church. But now, by the 26 G. 2. c. 33. no marriage is valid that is not celebrated in some parish church, or public chapel, unless by dispensation from the archbishop of *Canterbury*. It must also be preceded by publication of banns, or by licence from the spiritual judge. *Id.* 439.

And by the statute of frauds and perjuries, 29 C. 2. c. 3. no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, unless the agreement or some memorandum or note thereof be in writing, and signed by the party to be charged therewith.

5. Another

5. Another incapacity arises from want of *consent* of parents or guardians ; to which purpose, it is enacted by the 26 G. 2. c. 33. that all marriages solemnized by *licence*, where either of the parties, not being a widower or widow, shall be under the age of twenty-one, without the consent of the father if living, or guardian, or mother, (where there is no guardian,) if living, and unmarried, otherwise, of a guardian appointed by the court of chancery, shall be void. And in case of *banns* published, where either of the parties is under age, if the parent or guardian shall publicly declare, or cause to be declared, at the time and place of publication, his dissent to the marriage, such publication shall be void.

6. Another incapacity is want of *reason* : without a competent share of which, no contract can be binding. Therefore, the marriage of idiots, and of lunatics, (unless under the direction of the court of chancery,) is totally void. 1 *Black.* 438.

7. In all cases where banns have been published, the marriage shall be solemnized in one of the churches or chapels where the banns were published ; and in case of licence, it shall be solemnized in one of the churches or chapels where one of the parties hath been usually resident for four weeks next before. 26 G. 2. c. 33.

But by a general clause in the said act, nothing therein shall extend to *Scotland* ; nor to any marriages amongst the people called Quakers, or Jews, where both the parties are Quakers or Jews respectively ; nor to any marriages beyond the seas.

In the case of *Robinson and Bland*, M. 1 G. 3. lord *Mansfield* (arguendo) said, "It has been laid down at the bar, that a marriage in a foreign country must be governed by the laws of that country where the marriage was had ; which, in general, is true. But the marriages in *Scotland*, of persons going from hence for that purpose, were instanced by way of example. These may come under a very different consideration ; according to the opinion of *Huberus*, p. 33. and other writers. No such case hath yet been litigated in *England*, except one, of a marriage at *Ostend* ; which came before lord *Hardwicke*, who ordered it to be tried in the ecclesiastical court. But the young man came of age, and the parties were married over again ; and so the matter was never brought to a trial." *Bur. Mansf.* 1079.

But in *Buller's Law of Nisi Prius*, p. 113. there is a short note of a case wherein this point was afterwards determined, upon an appeal to the delegates ; viz. *Compton and Bearcroft*, 1 Dec. 1768. The appellant and respondent, being both *English* subjects, and the appellant being under age, ran away without the consent of her guardian, and were married in *Scotland* ; and, on a suit brought in the spiritual court to annul the marriage, it was holden that the marriage was good.

8. By

8. By several statutes a penalty of 100*l.* is inflicted for marrying any persons without banns or licence. But by the 26 G. 2. c. 33. if any person shall solemnize matrimony without banns or licence obtained from some person having authority to grant the same, or in any other place than a church or chapel where banns have been usually published, unless by special licence from the archbishop of *Canterbury*, he shall be guilty of felony, and transported for fourteen years; and the marriage shall be void.

9. The lawfulness of marriage is to be tried by the bishop's certificate, upon an issue, *whether accoupled in lawful matrimony*; as in a writ of dower, or other writ brought in the temporal courts. But whether a woman is the wife of such a person, is triable by a jury upon such an issue. 1 *Inst.* 134.

10. Of *divorce*, or separation of the parties, there are two kinds; the one total, the other partial: the one *a vinculo matrimonii*, from the band of matrimony; the other *a mensa et thoro*, being merely from cohabitation. 1 *Black.* 440.

The total divorce, *a vinculo*, must be from some cause of impediment existing before the marriage, as in the case of consanguinity; and in this the marriage is declared null, as having been absolutely unlawful *ab initio*. And the issue of such marriage as is thus entirely dissolved, are bastards. 1 *Black.* 440.

Divorce *a mensa et thoro*, from bed and board, is when the marriage is just and lawful in itself, but from some supervenient cause it becomes improper for the parties to live together, as in case of cruel usage or adultery in either of the parties. *Id.*

But for adultery, divorces *a vinculo matrimonii* have of late years been frequently granted by act of parliament, and the parties allowed to marry again. *Id.* 441.

11. In case of divorce *a mensa et thoro*, the law allows *alimony*, or maintenance, to the wife, out of her husband's estate, at the discretion of the ecclesiastical judge. This is sometimes called the *estovers*, for which, if he refuses payment, there is (besides the ordinary process of excommunication) a writ at common law *de estoveriis habendis*, in order to recover it. But in case of elopement, and living with an adulterer, the law allows her no alimony; for as that amounts to a forfeiture of her dower after his death, it is also a sufficient reason why she should not be partaker of his estate when living. 3 *Black.* 94.

MARSHALSEA court, was originally held before the steward and marshal of the king's house, and was instituted to administer justice between the king's domestic servants, that they might not be drawn into other courts, and thereby the king lose their service. It held plea of all trespasses committed within the verge of the court, where only one of the parties is in the king's domestic service, in which case, the inquest shall be taken by a jury of the

the country; and of all debts, contracts, and covenants, where both of the contracting parties belong to the royal household, and then the inquest shall be composed of men of the household only. Afterwards king *Charles* the first erected a new court of record, called the *curia palatii*, or *palace court*, to be held before the steward of the household, and knight marshal, and the steward of the court, or his deputy, with jurisdiction to hold plea of all manner of personal actions whatsoever, which shall arise between any parties within twelve miles of his majesty's palace of *Whitehall*. The court is now held once a week, together with the ancient court of marshalsea, in the borough of *Southwark*: and a writ of error lies from thence to the court of king's bench. But if the cause is of any considerable consequence, it is usually removed on its first commencement, together with the custody of the defendant, either into the king's bench or common pleas, by a writ of *habeas corpus cum causa*. And as to matters of inferior consequence, the business of the court hath of late years been much reduced, by the new courts of conscience erected in the environs of *London*. 3 *Black.* 76.

MARSHALSEA prison, belonging to the court of king's bench. By the 43 *Eliz. c. 2.* & 11 *G. 2. c. 20.* the justices of the peace yearly, in *Easter* sessions, shall set down what sums shall be sent out of every county or place corporate, for the relief of the poor prisoners of the king's bench and marshalsea prisons, so as there be sent out of every county 20*s.* at the least to each of the said prisons.

MARTIAL LAW. Anciently, preparatory to an actual war, the kings of this realm, by advice of the constable and marshal, were used to compose a book of rules and orders, for the due governance and discipline of their officers and soldiers, together with certain penalties on the offenders; and this was called *martial law*. But in truth and reality, this was not a law, but something indulged rather than allowed as a law; the necessity of government, order, and discipline in an army, being that only which could give to those laws any countenance and encouragement. *Hale's Hist. of the Com. Law,* 38, 9.

But now the military are ordered and governed by the annual acts of parliament against mutiny and desertion, and by articles of war framed by his majesty from time to time, in pursuance of the power given unto him by the said acts.

MASTER. See **SERVANT.**

MAUNDAY THURSDAY, *mandati dies*, the day next before *Good Friday*, wherein is commemorated and practised the command of our Saviour in washing the feet of the poor, or doing other acts of humility.

MAYHEM, or *maibem*, signifies a maim or wound, and consists in violently depriving another of the use of a member, pro-

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per for his defence in fight. This is a battery, attended with this aggravating circumstance, that thereby the party injured is for ever disabled from making so good a defence against future external injuries, as he otherwise might have done. Amongst these defensive members are reckoned not only arms and legs, but a finger, an eye, and a foretooth, and also some others: but the loss of one of the jaw-teeth, the ear, or the nose, is not *mayhem* at common law, as they can be of no use in fighting. 3 *Black.* 121.

MAYOR, *mujor*, is the chief magistrate in a city or town corporate; who hath under him aldermen, common council, and officers of divers kinds.

Though a man be mayor of a corporation, it doth not follow that he is a justice of the peace; for there must be a particular grant in the charter: and, in several of the ancient corporations, there were mayors long before the institution of the office of a justice of the peace.

But although he be not a justice of the peace by charter, yet there are many cases wherein he hath the same power given unto him by particular statutes; as in the case of convicting an offender for swearing, drunkenness, and such like.

MEASURE, is a certain quantity or proportion of any thing. There are three different measures, one for wine, one for beer and ale, and one for corn. In the measure of wine; 8 pints make a gallon, 8 gallons a firkin, 16 gallons a kilderkin, half barrel, or rundlet; 4 firkins a barrel, 2 barrels a hoghead, 2 hogheads a pipe, 2 pipes a tun.—In corn measure; 8 pounds or pints of wheat make a gallon, 2 gallons a peck, 4 pecks a bushel, 4 bushels a sack, and 8 bushels a quarter.—In other measure; 3 barley corns in length make an inch, 12 inches a foot, 3 feet and 9 inches an ell, 16 feet and an half a perch, poll, or rod.

MEDICINES. By the 25 G. 3. c. 79. a duty is imposed on medicines, (as set forth in a schedule annexed to the act,) the compounding or mixing whereof is unknown, and in which the person compounding or vending the same, claims some secret art.

And every person uttering or vending such medicines, shall take out a licence annually from the stamp office.

MEDIETAS LINGUÆ, is a jury or inquest impanelled, where one of the parties to a suit is an alien; consisting of one half denizens, and the other half aliens, if so many be forthcoming in the place. But where both parties are aliens, the jury shall all be denizens. Also this doth not hold in treasons; aliens being very improper judges of the breach of allegiance: nor in the case of *Egyptians*, under the statute of 22 *Hen.* 8. c. 10.

MELIUS

MELIUS INQUIRENDUM, is a writ that lies for a second inquiry, where partial dealing is suspected; and particularly of what lands or tenements a man died seized, on finding an office for the king. So a *melius inquirendum* shall be awarded out of the king's bench, where the coroner's inquisition is unsatisfactory.

MEMORY, time of, is ascertained by our law, from the time of the transmigration of king *Richard* the first to the holy land. And any custom may be destroyed by evidence of its non-existence, in any part of that long period from the reign of king *Richard* the first to the present time. 2 *Black.* 31.

MENIAL SERVANT, (from *mania*, the walls of a castle, house, or other place,) a domestic servant, who lives under his master's roof.

MERCHANT, (*mercator*,) is one that trades in *wares* of any kind; and is not restricted to those only who traffic in the way of commerce, by importation or exportation. 1 *Salk.* 445.

Merchants have a particular system of customs, called the custom of merchants, or *lex mercatoria*; which custom, however different from the general rules of the common law, is yet ingrafted into it, and made a part thereof; being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions. And the judges are to take notice of it, without requiring witnesses to prove it. 1 *Black.* 75. *Burrow Mansf.* 1669.

By *magna charta* it is provided, that all merchants (unless publicly prohibited before-hand) shall have safe-conduct to come into and tarry in *England*, for the exercise of merchandize, without any unreasonable imposts, except in time of war; and, if a war breaks out between our country and theirs, they shall be attached (if in *England*) without harm of body or goods, till the king, or his chief justiciary, be informed how our merchants are treated in the land with which we are at war; and if ours be secure in that land, they shall be secure in ours. But in time of war, no subject of a nation with whom we are at war can, by the law of nations, come into the realm, nor can travel himself upon the high seas, or send his goods or merchandize from one place to another, without danger of being seized by the king's subjects, unless he hath letters of safe-conduct, which by divers ancient statutes were to be granted under the great seal; but now passports, under the king's sign manual, or licences from his ambassadors abroad, are usually obtained, and are allowed to be of equal validity. 1 *Black.* 260.

MERCHENLAGE, was the law of the ancient kingdom of *Mercia*, in the counties next adjoining to *Wales*; as the *Saxonlage* was the law introduced into this kingdom by the Saxons, and the *Danelage* was that introduced by the Danes. And from these seem

partly to be derived that which is now known by the name of the common law. 4 *Black.* 412.

MERCHET, *merchetum*, was a pecuniary payment to the lord, in compensation of his privilege of lying with his tenant's wife the first night after marriage. This custom prevailed in *Scotland* until abolished by king *Mulcolm* the third. And perhaps from hence arose the close affinity and connection in the clanships; forasmuch as the eldest child might have a sort of presumptive right to look upon the lord as his or her father: and so the whole clan might esteem themselves as kindred one with another. In the northern parts of *England* also, it is said, this custom was in use; and seems to have been carried by the ancient Britons into *Wales*, and from them to have received its denomination: the sum paid to the lord, upon the marriage, being called in the British language *gwabr-merched*, the maid's fee.

MERGER, to *sink*; as when a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately *merged*; that is, sunk or drowned in the greater. Thus, if there be tenant for years, and the reversion in fee simple descends to, or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person, in one and the same right; therefore, if he who has the reversion in fee, marries the tenant for years, this is no merger; for he has the inheritance in his own right, and the term of years in the right of his wife. 2 *Black.* 177.

MESNE lords, are those who hold lordships or manors under some superior lord, who is called the lord paramount. When the great barons, who held of the king as their superior lord, granted out portions of their lands to inferior persons, they became also lords with respect to those inferior persons, as they were still tenants with respect to the king; and thus, partaking of a middle nature, they were called *mesne*, or middle lords: the tenants held of them immediately, and mediately of the king. 2 *Black.* 59.

There is also a *writ of mesne*, which lies where the tenant is distrained by the superior lord, for the rent or service of the mesne lord, who ought to acquit him to the superior lord; in which case, if the mesne lord appear not, he shall lose the service of the tenant, and the tenant shall immediately become tenant to the chief lord: also in such case, the tenant may by writ recover damages, and the mesne lord be compelled to pay the rent and do the services. *T. L.*

MESNE PROCESS, is sometimes put in contradistinction to *original* process, and in that sense it signifies an intermediate process, which issues pending the suit, upon some collateral interlocutory matter, as to summon juries, witnesses, and the like:
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sometimes it is put in contradistinction to *final* process, or process of execution; and then it signifies all such process as intervenes between the beginning and end of a suit. 3 *Black.* 279.

MESSUAGE, is properly a dwelling-house, with some adjacent land assigned to the use thereof.

MEI'HEGLIN, an old British drink made of honey.

MICEL GEMOT, the great council or assembly of the realm, sometimes called the *witena gemot*, or assembly of wise men; in after times denominated the parliament.

MILES, a soldier, is particularly applied in our law to the order of knighthood; because the knights formed the most considerable part of the royal army, in virtue of their tenure; one condition whereof was, that every one who held a knight's fee (which in *Henry* the second's time amounted to 20*l.* a year) was obliged to be knighted, and attend the king in his wars, or make fine for his non-compliance.

MILITIA. The number of private militia men throughout the kingdom (exclusive of the city of *London*, the *Tower hamlets*, and the *Cinque ports*) is 30,440, who are under the direction of the lieutenants of the several counties, appointed by his majesty; which lieutenants are to appoint deputy lieutenants and commission officers; unto whom the justices of the peace in many respects shall be assistant.

Which militia are to be trained and exercised twenty-eight days in every year; during which time, the provisions, in any of the acts against mutiny and desertion, shall be in force, with respect to the officers and private men; yet so as not to extend to life or limb.

And in case of invasion or actual rebellion, they may be drawn out into actual service, and put under the command of such general officers as his majesty shall appoint; but not to be carried out of the island of *Great Britain* upon any account whatsoever.

MILL. The toll of a mill must be regulated by custom; and if the miller takes more than the custom, it is extortion: but if it is a new mill, there the miller is not restrained to any certain toll; but they who will have their corn ground there, must comply with the miller's demand; and whatsoever he takes, it is not extortion, because it is the voluntary agreement of the parties. *L.*

Regm. 149.

In some manors; the tenants owe suit and service to the lord's mill; the foundation whereof seems to have been, that the lord erected the mill for the use of his tenants, and for their convenience, on condition that, when erected, they shall all grind their corn there only: in which case, if they withdraw their suit, the lord may have an action, and recover damages. And a new erected house within the precinct, is within the custom of mill-

ture ; and none may grind elsewhere, but in case of excessive toll, or that the grist cannot be ground in convenient time. *Hardr.* 177.

By the common law, *tithe* is due of mills : but it is only a personal tithe, and payable out of the clear grain, after all manner of charges and expences deducted. *2 P. Will.* 463.

By the *9 G. 3. c. 29.* if any person or persons, riotously and tumultuously assembled, shall demolish or pull down, or begin to demolish or pull down, any wind saw mill, or other wind-mill, or any water-mill or other mill, or any of the works thereto belonging ; or if any person shall wilfully or maliciously burn or set fire to any such mill, he shall be guilty of felony, without benefit of clergy.

MINES :

1. By the old common law, if gold or silver be found in mines of base metal, according to the opinion of some, the whole was a royal mine, and belonged to the king ; though others held that it only did so, if the quantity of gold or silver was of greater value than the quantity of base metal : but now, by the statutes of *1 W. c. 30.* and *5 W. c. 6.* this difference is made immaterial ; it being enacted, that no mine of copper, tin, iron, or lead, shall be deemed a royal mine, notwithstanding gold or silver may be extracted from them in any quantities : but that the king, or persons claiming royal mines under his authority, may have the ore of any mine, (other than tin ore, in the counties of *Devon* and *Cornwall*,) paying to the proprietor of the mine, within thirty days after the ore shall be laid upon the bank, and before the same shall be removed from thence ; for all copper ore washed and made clean and merchantable, *16l.* a tun ; tin ore, *40s.* a tun ; iron ore, *40s.* a tun ; lead ore, *9l.* a tun. And, in default of payment, the owner may dispose thereof.

2. If a man hath land, in which there is a mine of coals or the like, and maketh a lease of the land, without mentioning any mines ; the lessee, for such mines as were open at the time of the lease made, may dig and take the profit thereof : but he cannot dig for any new mine, which was not open at the time of the lease made, for that would be adjudged waste. *1 Inst.* 54.

3. Coal mines by name are rateable to the poor, by the *43 El. c. 2.* but other mines are not : and the reason of the difference seems to be, that coals are a more certain produce, being not attended with so much hazard as the other. *Bur. Mansf.* 1341.

4. If a person breaks up mines which he ought not to do, or threatens to break them up, this is a reason for applying to a court of equity for an injunction. *2 Atk.* 182.

Digging mines in glebe lands is not waste : otherwise no mines in glebe lands could ever be opened. *1 Lev.* 107.

5. If

5. If any person shall wilfully set on fire any mine, pit, or delph of coal, or cannel coal, he shall be guilty of felony, without benefit of clergy. 10 G. 2. c. 32.

6. If any person shall divert or convey any water into any coal work, with design to destroy or damage the same, he shall pay to the party grieved treble damages. 13 G. 2. c. 21.

7. If any person shall wilfully or maliciously set fire to, burn, demolish, pull down, or otherwise destroy or damage any fire engine, or other engine erected for draining water from collieries, or for drawing coals out of the same; or for draining water from any mine of lead, tin, copper, or other mineral; or any bridge, waggon way, or trunk, erected for conveying coals from any coal mine, or staith for depositing the same; or any bridge or waggon way erected for conveying lead, tin, copper, or other mineral from any such mine; or cause or procure the same to be done; he shall be guilty of felony, and transported for seven years.

MINIMENTS, or *muniments*, (from *munio*, to defend,) are the evidences and writings concerning a man's possession or inheritance, whereby he is enabled to defend the title of his estate. *T. L.*

MINSTREL, in the laws against vagrants, signifies an itinerant musician, wandering about the country in a state of strolling and idleness. Anciently it was usual for lords and great men to retain minstrels in their own houses, but they were not permitted to go abroad. By an act 14 *El. c. 5.* all common players in interludes, and minstrels, not belonging to any baron of this realm, or person of higher degree, wandering abroad, and not having the licence of two justices, were to be deemed rogues and vagabonds. Afterwards, in subsequent vagrant acts, the licence by the justices was left out. And by one of *Cromwell's* ordinances in 1656, it was more explicitly declared, that if any person or persons, commonly called fidlers, or minstrels, should be taken playing, fidling, and making music, in any inn, ale-house, or tavern, or proffering themselves, or intreating any persons to hear them to play or make music; every such person should be adjudged a rogue, vagabond, and sturdy beggar. And minstrels are prohibited by the present vagrant act, 17. G. 2. c. 5. But there hath been all along an exception of the heirs or assigns of *John Dutton* of *Dutton* in the county of *Chester*, Esquire, concerning their privilege of licensed minstrels within that county.

MISADVENTURE, when applied to homicide, is, where a man is doing a lawful act, without intent of hurt to another, and death casually ensues. As where a labourer being at work with a hatchet, the head flies off, and kills one who stands by; or, where a person, qualified to keep a gun, is shooting at a mark,

mark, and undesignedly kills a man; for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure; for the act of correction was lawful: but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder; for the act of immoderate correction is unlawful. 4 *Black.* 182.

MISCONTINUANCE, is where a suit is continued by an improper process. In every action, whether civil or criminal, the process ought to be continued from day to day, from its commencement to its conclusion, without any the least gap or chasm; and the suffering any such gap or chasm is called a *discontinuance*; and the continuing of the suit by improper process, as by a *capias* instead of a *distringas*, or giving the parties an illegal day, is properly called a *miscontinuance*. And as a cause is *discontinued*, where either nothing is done to continue it, or nothing but what is void in law; so it is properly said to be *miscontinued*, where it is continued amiss, or by an erroneous and not void continuance. 2 *Haw.* 299.

MISDEMEANOR, in its usual acceptation, is applied to all those crimes and offences for which the law hath not provided a particular name; and it may be punished, according to the degree of the offence, by fine, or imprisonment, or both.

MISE, is a word of art appropriated to a writ of right; so called because both parties have put themselves upon the mere right, to be tried by grand assise or by battel; so as that which in all other actions is called an issue, in a writ of right in that case is called a *mise*: but if a collateral point is to be tried in a writ of right, it is called an issue. It is derived of the word *missum*, for that the whole cause is put upon this point. It is also taken for expences, as *mise et custagia*. And sometimes it signifieth a customary grant to the king or lord marchers of *Wales* by their tenants at their first coming to their lands. 1 *Inst.* 294. 2 *Inst.* 528.

MISNOMER, is the using one name for another.—In cases of misnomer, where there is an original issued against a man, or a bill of indictment exhibited against him, by a wrong christian name; if proceedings were had upon that writ or indictment, they could not finally affect him. If he was to be arrested by process upon such writ or indictment, he might have an action of trespass and false imprisonment against the officer; nay, if he made opposition, and killed him, it would be but manslaughter. But notwithstanding all this, to prevent any possible danger to this man's liberty or property, though he could not effectually

effectually be hurt by it, the law allows him time to come in and plead that misnomer to the writ or bill, and it shall abate for that reason, and the defendant not be put to answer, though he is in court. *Str.* 156.

Regularly, it is requisite that a purchaser be named by the name of baptism and his surname, and that special heed be taken to the name of baptism, for that a man cannot have two names of baptism, as he may have divers surnames. Yet in some cases, though the name of baptism be mistaken, the grant is good. Thus a *wife* is a good name of purchase, without a christian name; and so it is, if a christian name be added and mistaken, as *Em* for *Emelyn*. So if lands be given to *Robert* earl of *Pembroke*, where his name is *Henry*, or to *George* bishop of *Norwich*, where his name is *John*; for in these and the like cases there can be but one of that dignity or name. And therefore such a grant is good, albeit the name of baptism be mistaken. 1 *Inff.* 3.

If the defendant omits to plead a misnomer, he may be taken in execution by the wrong name. *Str.* 1218.

If there be a corporation aggregate, as mayor and commonalty, dean and chapter, the mayor or dean need not be named by his christian name, because that such a corporation standeth in lieu both of the christian name and surname. 2 *Inff.* 666.

A grant to one who is an esquire, by the name of such an one knight, is void; because knight is part of the name of a man, as much as his christian name. *L. Raym.* 303.

A bastard, after he hath gained a name by reputation, may purchase by his reputed name. 1 *Inff.* 3.

A woman was indicted by the name of *Elizabeth Newman*, alias *Judith Hancock*, and it was quashed for that reason; because a person cannot have two christian names. *L. Raym.* 562.

MISPLEADING. If in pleading any thing be omitted which is essential to the action or defence; as if the plaintiff doth not merely state his title in a defective manner, but sets forth a title that is wholly defective in itself; or if to an action of *debt* the defendant pleads *not guilty*, instead of *nil debet*; this mispleading is fatal, and cannot be cured by verdict. 3 *Black.* 395.

MISPRISION, (a term derived from the old French *mespris*, a neglect or contempt,) is generally understood to be of all such high offences as are under the degree of capital, but nearly bordering thereon: and it is said, that a misprision is contained in every treason and felony whatsoever; and that, if the king so please, the offender may be proceeded against for the misprision only. 4 *Black.* 119.

Misprision of *treason* consists in the bare knowledge and concealment of treason, without any degree of assent thereto; for any assent makes the party a principal traitor. This concealment

ment becomes criminal, if the party apprized of the treason doth not, as soon as conveniently may be, reveal the same to a magistrate. *Id.* 120.

Misprison of *felony* is also the concealment of a felony which a man knows, but never assented to; for, if he assented, this makes him either principal or accessary. And the punishment of this, in a public officer, by the statute 3 *Ed. 1. c. 9.* is imprisonment for a year; in a common person, imprisonment for a less, discretionary, time; and, in both, fine and ransom at the pleasure of the court. *Id.* 121.

MISUSER, is an abuse of any liberty or benefit. A charter of a corporation may be forfeited by misuser; so also an office, either public or private; as if a judge takes a bribe, or a park-keeper kills deer without authority. 2 *Black.* 153.

MITTIMUS, is a writ for removing and transferring records from one court to another: and is also a precept in writing, under the hand and seal of a justice of the peace, directed to the gaoler, for the receiving and safekeeping of an offender, until he is delivered by law. 2 *Inst.* 590.

MIXT TITHES, are those which arise not immediately from the ground, but from things immediately nourished by the ground; as by means of goods depastured thereupon, or otherwise nourished with the fruits thereof; as colts, calves, lambs, chickens, milk, cheese, eggs.

MODUS DECIMANDI is, when lands, tenements, or some annual certain sum, or other profit, hath been given, time out of mind, to a parson and his successors, in full satisfaction and discharge of tithes in kind in such a place. 2 *Co.* 47. For which, see TITHES.

MOIETY, is the half of any thing.

MOLENDINUM, a mill, *secta ad molendinum*, is a writ that lies, where a man, by usage, time out of mind, hath ground his corn at the mill of a certain person, and afterwards goeth to another mill with his corn, thereby withdrawing his suit to the former; and this writ lies especially for the lord against his tenants, who hold of him to do suit at his mill. But now remedy in this and the like cases is commonly turned into an action upon the case.

MONETAGIUM, a mintage, or privilege of minting or coining money. It also signified a certain tribute paid by the tenants every third year, to such of the lords as had the privilege of coinage. For anciently divers lords of manors, and others, had the privilege of coining money; but this was usually done by special grant from the king, or by prescription, which supposes one; and therefore was derived from, and not in derogation of, the royal prerogative. Besides that they had only the profit of the coinage, and not the power of instituting either, the
impression

imprefſion or denomination, but had uſually the ſtamp ſent them from the exchequer. 1 *Black.* 277.

MONEY, is ſaid to be the common meaſure of all commerce throughout the world, and conſiſts principally of three parts; the material whereof it is made, being gold or ſilver; the denomination or intrinsic value, given by the king, by virtue of his prerogative: and the king's ſtamp thereon, for as wax is not a ſeal without a print, ſo metal is not money without an imprefſion. 1 *Inf.* 207. 1 *Hale's Hiſt.* 188.

In order to fix the value, the weight and fineneſs of the metal are to be taken into conſideration. When a given weight of gold and ſilver is of a given fineneſs, it is then of the true ſtandard, and called ſterling metal; and of this ſterling metal all the coin of the kingdom muſt be made, by the ſtatute 25 *Ed.* 3. ſ. 5. c. 13. And no perſon can be enforced to take in payment any money but of gold or ſilver, except of ſums under ſixpence. And by the ſtatute 14 *G.* 3. c. 42. no tender of payment in ſilver money, exceeding 25l. at one time, ſhall be a ſufficient tender in law, for more than its value by weight, at the rate of 5s. 2d. an ounce. 1 *Black.* 278. 2 *Inf.* 577. 1 *Hale's Hiſt.* 195.

The king may, by his proclamation, legitimate foreign coin, and make it current money of this kingdom, according to the value impoſed by ſuch proclamation; and therefore both *Engliſh* money, coined by the king's authority, and foreign money made current by proclamation, are within the denomination of lawful money of *England*. But of this latter ſort there is none at preſent in *England*; *Portugal* money being only taken by conſent, as approaching neareſt to our ſtandard, and falling in tolerably well with our diviſions of money into pounds and ſhillings; but no perſon is obliged to take it. 1 *Hale's Hiſt.* 192. 1 *Black.* 278. 4 *Black.* 89.

Any piece of money coined is of value according to the proportion it bears to other current money, and that without proclamation. And though there is no act of parliament or order of ſtate for *guineas* as they are taken, yet being coined at the mint, and having the king's imprefſion, they are lawful money, and current at the value for which they were coined. In legal proceedings, they ſhould be deſcribed as *pieces of gold called guineas, of ſuch a value.* 5 *Mod.* 7. *Carth.* 255.

Money paid into court is, where the defendant partly confeſſes the action, and pleads a tender, or offers payment, of what he acknowledges to be due. In which caſe, he uſually pays into the hands of the proper officer of the court as much as he acknowledges due to the plaintiff, together with the coſts hitherto incurred, (but if he pleads a tender before the action brought, then without coſts,) in order to prevent the expence of any farther proceedings. If, after the money paid in, the plaintiff proceeds

proceeds in his suit, it is at his own peril ; for, if he doth not prove more due than is so paid into court, he shall be nonsuited and pay costs to the defendant ; but he shall still have the money so paid in, for that the defendant has acknowledged to be his due.

3 *Black.* 304.

MONKS, from *monus, solus*, were originally persons that led a solitary life, having retired from the world by reason of the persecutions which attended the first ages of the church, and lived in deserts and places most private and unfrequented, in hopes to find that peace and comfort among beasts which were denied them amongst men. And this being the case of some very extraordinary persons, their example gave so much reputation to retirement, that the practice was continued, when the reason ceased which first began it. And after the empire became christian, instances of this kind were numerous ; and those whose security had obliged them to live separately and apart, became afterwards united into societies, and the places where they agreed to live together under certain rules and orders were called *monasteries*.

MONOPOLY, is a licence or privilege allowed by the king, for the sole buying, selling, making, working, or using of any thing ; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before. These monopolies were carried to an enormous height during the reign of queen *Elizabeth*, and in the former part of the reign of king *James* the first, but were in a great measure remedied by the statute 21 *Ja. c. 3.* which declares such monopolies to be contrary to law and void ; except as to patents, not exceeding the grant of 14 years, to the authors of new inventions, and some other particular exceptions : and monopolists are punished with forfeiture of treble damages and double costs, to those whom they attempt to disturb ; and if they procure any action, brought against them for these damages, to be stayed by any extrajudicial order, other than of the court wherein it is brought, they incur a *præmunire*. 4 *Black.* 159.

MONTH. There are in common use two ways of calculating months, either as *lunar*, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year ; or, as *calendar* months, of unequal lengths, commencing on the first day of the calends of each month, whereof in a year there are only twelve. A month in law is a lunar month, or twenty-eight days, unless otherwise expressed ; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease for twelve months is only for forty-eight weeks ; but if it be for a twelve-month, in the singular number, it is good for the whole year. 2 *Black.* 141.

But

But in ecclesiastical matters, as in case of the lapse of livings, or the time for bringing prohibitions, the rule for the calendar months is observed. 3 *Att.* 346.

MONUMENT, or tombstone, in a church or church-yard, descends to the heir, in nature of an heir loom. And if any person takes away or defaces the same, he is liable to an action from the heir. And if any one steals the shroud of a dead body, it is felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral. 2 *Black.* 429.

MOOR GAME. Besides the general penalties for destroying the game, it is enacted by the 13 G. 3. c. 55. that no person shall kill, sell, buy, or have in his possession any heath fowl, called *black game*, between Dec. 10. and Aug. 20. nor any grouse, commonly called *red game*, between Dec. 10 and Aug. 12. on pain of forfeiting, for the first offence, not exceeding 20*l.* nor less than 10*l.*; for the second and every subsequent offence, not exceeding 30*l.* nor less than 20*l.*

And by the 13 G. 3. c. 18. if any person shall kill any moor game or heath game in the night time, or on a *Sunday* or *Christ-mas-day*, he shall incur the like forfeiture for the first and second offence, and for the third offence he shall forfeit 50*l.*

MORT D'ANCESTOR. An assise of *mort d'ancestor* is a writ that lieth where, after the decease of a man's immediate ancestor, as where his father, mother, brother, sister, uncle, aunt, nephew, or niece, die seised, a stranger abateth; in which case, if the demandant proves these particulars, and that he is the next heir, he will have judgment to recover possession. 1 *Inst.* 159. a.

But this course of proceeding is seldom used; the remedy being rendered now more easy by ejectment.

MORTGAGE :

1. *Mortgage, what.*
2. *Of the estate which the mortgagee hath in the premises.*
3. *Mortgage a personalty.*
4. *Of purchasing in a prior incumbrance.*
5. *Of proportioning between tenant for life and the remainder man.*
6. *Of re-entry on payment or tender.*
7. *Account to be made by the mortgagee.*
8. *Of the equity of redemption*
9. *Of foreclosure.*

1. *Mortgage, what.*

ESTATES held in *vadio*, in *gage*, or pledge, are of two kinds; *vivum vadium*, or living pledge; and *mortuum vadium*, dead pledge, or *mortgage*.

Vivum

Vivum vadium, or living pledge, is when a man borrows a sum of money of another, and grants him an estate to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case, the land or pledge is said to be living; it subsists and survives the debt; and, immediately on the discharge of it, results back to the borrower. 2 Black. 157.

He that mortgages or pawns, is called the *mortgagor*; and he to whom the mortgage or pawn is made, is call the *mortgagee*

Mortuum vadium, a dead pledge, or *mortgage*, (which is much more common than the other,) is, where a man borrows of another a specific sum, and grants him an estate in fee, on condition that if he, the mortgagor, shall repay to the mortgagee the said sum on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, that the mortgagee shall reconvey the estate to the mortgagor; in this case, the land which is so put in pledge is, *by law*, in case of non-payment at the time limited, for ever dead and gone from the mortgagor; and the mortgagee's estate in the land is then no longer conditional, but absolute. *Ibid.*

But as it was formerly a doubt, whether by taking such estate in fee it did not become liable to the wife's dower and other incumbrances of the mortgagee, (though that doubt has been long ago over-ruled by the courts of equity,) it is therefore become usual to grant only a long term of years, by way of mortgage, with condition to be void on repayment of the mortgage money: which course hath been since continued, principally because, on the death of the mortgagee, such term becomes vested in his personal representative, who alone is entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be. *Ibid.*

As a man may make a feoffment in fee in mortgage, or a lease for a term of years, so he may make a gift in tail, or a lease for term of life in mortgage. *Litt. sect. 333.*

If a man mortgageth his goods, chattels, and debts for a valuable consideration, and the mortgagee permits the mortgagor to keep possession, and to have the ordering, selling, and disposing thereof, this is fraudulent against creditors; and if the mortgagor becomes bankrupt, the mortgagee shall only come in for his proportionable share under the commission: for the mortgagee of goods moveable and things in action is the true owner thereof; and therefore they ought to be delivered to him as much as they may or possibly can be; that is to say, by delivering the goods themselves specifically, or the key of the warehouse wherein they are, with the possession thereof, and by delivering the muniments, books, and writings relating

to the things in action, and enabling the mortgagee to reduce the same into possession by action or suit. 1 *Wils.* 260.

If a copyholder in fee surrenders to the use of the mortgagee in fee, and before presentment in the lord's court becomes bankrupt, though this surrender is void in law for want of a presentment, yet the surrender binds the land in equity, and the assignee of the bankrupt shall not be in a better case than the bankrupt himself, who was by this surrender bound in equity. 2 *Salk.* 449.

2. *Of the estate which the mortgagee hath in the premises.*

A MORTGAGEE is esteemed in possession on executing the mortgage deed; and if the mortgage money be not paid, whereby the land is forfeited, he may bring ejectment without actual entry. 2 *Lil. Abr.* 203.

The mortgagee, with regard to the inheritance, is a trustee for the mortgagor till a foreclosure. 2 *Bac. Abr.* 83. 1 *Atk.* 605.

Where the mortgagee of a leasehold estate hath not covenanted, that he will procure the *lives* to be filled up, the mortgagee may do it; and on adding the expence of renewal to the principal of the mortgage, it shall carry interest. 3 *Atk.* 4.

Where the mortgagor, being in possession, commits *waste*, he may be restrained by injunction; for the whole estate is a security.—So if the mortgagee cuts down timber, and doth not apply the money arising from the sale, in sinking the interest and principal, the mortgagor may have an injunction to stay waste. 3 *Atk.* 210. 723.

A mortgagee cannot present on an *avoidance* of a church, because it doth not lessen his debt. 9 *Mod.* 2. 3 *Atk.* 559.

If a mortgagor, retaining the possession, levies a *fine* to a second mortgagee; this shall not bar the first mortgagee.—So a fine levied by the mortgagee, and five years non-claim, will not bar the mortgagor of his equity of redemption. 1 *Lev.* 272. 1 *Vern.* 152.

A mortgagor in possession is not liable to account for the rents and profits to the mortgagee; for he ought to take the legal remedy to get into possession. 3 *Atk.* 244.

Where a mortgage is assigned with the concurrence of the mortgagor, the interest paid to the mortgagee by the assignee shall be taken as principal, and carry interest; but where it is assigned without the consent of the mortgagor, the assignee must take it only upon the same terms with the assignor. 3 *Atk.* 271.

3. *Mortgage a personalty.*

If there is a mortgage in fee, and two descents cast, and there is more due on it than the value of the land, and though the

the mortgagor says he will not redeem; yet it shall go to the executor, and not to the heir, the equity of redemption not being foreclosed nor released. 2 *Vern.* 367.

If the heir of the mortgage forecloses the mortgagor, yet the land shall go to the executor, unless the heir thinks fit to pay him the mortgage money; and then he may have the benefit of the mortgage. 2 *Vern.* 67.

So a devise of all a man's goods and mortgages to his executors is a good devise, and will pass all the lands mortgaged. *Cra. Car.* 37.

For the estate in land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the statute of frauds; and the assignment of the debt will draw the land after it. *Bur. Mansf.* 978.

If a man mortgage lands, and covenants to pay the money, and dies, the personal estate of the mortgagor shall, in favour of the heir, be applied to exonerate the mortgage: so it is if there was no covenant, if the mortgagor had the money; because it was his debt, and he is bound to make it good, though the land be a defective security. 2 *Salk.* 449.

But this exoneration shall not be allowed, unless there be personal assets sufficient to pay all legacies; for the mortgagee shall be paid out of the land if there be not personal assets to pay the legacies: and if by such payment assets fall short, the legatees may make such mortgagee refund. 2 *Salk.* 450.

Also, this exoneration shall not be allowed to a devisee of lands; as where lands were mortgaged, and afterwards devised to *A.* for life, remainder to *B.* in fee, and the deviser makes *A.* executor, and leaves assets sufficient to pay the debts. *B.* prayed that the assets might go to the payment of the mortgage. But the court took a difference between heir and devisee; that though the heir shall be relieved in such case, yet the devisee shall not; and decreed, that the tenant for life and remainder man should each pay their respective proportions in order to redeem. 1 *Cha. Ca.* 271.

4. Of purchasing in a prior incumbrance.

If lands are thrice mortgaged, the third mortgagee may buy in the first incumbrance to protect his own mortgage; and he shall hold against the second mortgagee, if such second mortgagee do not satisfy him the money he paid on the first, and also his own money which he lent on the last mortgage. 2 *Ventr.* 338. *Str.* 689.

And the reason is, because the legal estate is in the first mortgagee, and the court will not take away that benefit from him, provided

provided he had no notice of the second at the time he bought in the third. 2 *Atk.* 53.

For the courts of equity never protect purchasers of prior incumbrances, but where such purchasers came in for a valuable consideration without notice of a mesne incumbrance. 2 *Ventr.* 339.

In like manner, a second mortgagee may protect himself, by purchasing an old judgment or statute precedent to the first mortgage; and shall not be impeached in equity, but upon payment of all that is due to him in both respects. 2 *Lill. Abr.* 206. 2 *Vern.* 160. 279.

Where the mortgagee has a bond likewise from the mortgagor, the mortgagor in his life-time may redeem the mortgage, without paying off the bond debt; otherwise it is as to the heir at law, because the moment he redeems the estate, it shall be assets in his hands; and for this reason the court compels him to discharge the bond as well as the mortgage. 2 *Atk.* 53.

A bond may likewise be tacked to a judgment; and the reason is, because the judgment creditor, by virtue of an *elegit*, may bring an ejection, and hold upon the extended value: and as he has the legal interest in the estate, the court will not take it from him. 2 *Atk.* 53.

If a man hath two real estates, and mortgages both to one person, and afterwards only one of them to a second mortgagee, who had no notice of the first; the court, in order to relieve the second mortgagee, will direct the first to take his satisfaction out of the estate only which is not mortgaged to the second mortgagee, if that is sufficient to satisfy the first mortgage, even though the estates descend to two different persons. For it is a rule in equity, that if a creditor hath two funds, he shall take his satisfaction out of that fund on which another creditor hath no charge. 2 *Atk.* 446.

5. Of proportioning between the tenant for life and remainder man.

TENANT for life, out of the annual profits, must keep down the interest: and it is now settled, that, in order to redeem, the tenant for life must pay one third, and the remainder man, or reversioner, two thirds. 1 *Vern.* 70. *Cha. Ca. King.* 30.

A *jointress*, paying off the mortgage, shall hold over, till she and her executors are repaid with interest. 1 *Vern.* 214. 1 *Cha. Ca.* 271.

The *widow* of a mortgagor shall not be debarred of her dower and right, unless she legally joined with her husband in the mortgage, or otherwise lawfully barred herself from such her dower or right. 4 & 5 *W. c.* 16. f. 4.

6. Of re-entry on payment or tender.

If the mortgagor die before the day of payment, his heir may pay or tender the money; and if the mortgagee refuse to receive it, the heir may enter. Also, the executor or administrator of the mortgagor may pay or make tender. 1 *Inst.* 205, 6.

Although a convenient *time* before sunset be the last time given to the mortgagor to tender, yet if he tender it to the person of the mortgagee at any time of the day of payment, and he refuseth it, the condition is saved for that time. 1 *Inst.* 206.

And he may tender the money in purses or bags, without shewing or telling the same; for he doth that which he ought; namely, to bring the money in purses or bags, which is the usual manner of carrying money; and then it is the part of him that is to receive it, to put it out and tell it. 1 *Inst.* 208.

If no *place* is mentioned in the mortgage deed, at which the money shall be paid, it is not sufficient for the mortgagor to tender it upon the land, but he must seek the mortgagee, if he be then in any other place within the realm of *England*. But otherwise it is of a rent issuing out of land; for, in that case, it is sufficient that the rent be tendered upon the land out of which it issues. 1 *Inst.* 210.

But if the mortgagee be out of the realm of *England*, the mortgagor is not bound to seek him, or to go out of the realm unto him; and for that the mortgagee is the cause that the mortgagor cannot tender the money, the mortgagor shall enter into the land, as if he had duly tendered it according to the condition. 1 *Inst.* 210.

The mortgagee refusing to receive his money upon tender after forfeiture, shall lose his interest from the tender. 1 *Chs. Ca.* 29.

If the mortgagee, before the day of payment, makes his executors and dies, and his heir entereth into the land as he ought; the mortgagor ought to pay the money, at the day appointed, to the *executor*, and not to the heir unless the condition be, that the mortgagor shall pay the money to the mortgagee, or his heirs; and then it shall be paid to the heir accordingly. *Litt. sect.* 339.

And here note, that the executor doth more represent the person of the testator, than the heir doth that of the ancestor; for though the executor be not named, yet the law appoints him to receive the money; but so doth not the law appoint the heir, unless he be named. 1 *Inst.* 209, 210.

But if the condition be, to pay the money to the mortgagee, his heirs or executors, then the mortgagor hath his election to pay it either to the heir or executor. *Id.* 210.

If

If it be to pay the money to the mortgagee, his *heirs or assigns*, the mortgagor ought to pay it to the heir and not to the executor: for the executor in this case is not an *assign* in law; because, by being made executor, the estate is not assigned over to him. *Id.* 210.

But if the mortgagee actually assigns the estate over, the mortgagor in this case may pay the money to the first mortgagee or the second mortgagee at his election: and if the first mortgagee dies, the mortgagor may pay the money either to the heir of the first mortgagee, or to the second mortgagee; for the law will not enforce the mortgagor to take knowledge of the second mortgage, nor of the validity thereof, but at his pleasure, and the first mortgagee and his heirs are expressly named in the condition. *Id.*

A mortgagee may refuse to part with the title deeds till his money is paid; but ought not to deny an inspection of the deeds in his hands, when he hath notice to be paid off. 2 *Atk.* 332.

The mortgage money being paid, the mortgagor sued to have the mortgage deed delivered up to him, but not allowed; because then the mortgagor may charge the mortgagee for the profits past. *Toth.* 229.

And if the mortgage deed were given up, this is not sufficient to restore the estate, but there must be a re-conveyance; whereas the giving up a bond is in law an extinguishment of the debt. 1 *Salk.* 157. 1 *Atk.* 520.

By the 7 *G. 2. c. 20.* in actions at law or ejectments concerning mortgages, no suit in equity being then depending to foreclose or redeem such mortgage, the mortgagor, on tender, or payment into court, of principal, interest, and costs, shall be discharged; and by rule of court, the mortgagee may be compelled to surrender or re-convey.

7. Account to be made by the mortgagee.

A MORTGAGEE in possession is not obliged to lay out money any further than to keep the estate in necessary repair; but if he has expended any sum in supporting the mortgagor's title where it has been impeached, he may add this to the principal, and it shall carry interest. 3 *Atk.* 518.

A mortgagee shall not be allowed for his trouble in receiving the rents of the estate himself; but if an estate lies at such a distance as obliges him to employ a bailiff to receive them, what he paid to the bailiff shall be allowed. 3 *Atk.* 518.

Generally, though interest is in arrear when the mortgage is paid off, a mortgagee shall not have interest for that interest. 2 *Atk.* 332.

A proviso in a mortgage deed, that if interest shall be behind
I i s for

for six months, it shall then be accounted principal and carry interest, is void; for to make interest principal, it is requisite that interest be first grown due; and after that, an agreement concerning it may make it principal. 2 *Salk.* 449.

For an agreement to turn interest upon a mortgage into principal, must be done fairly, and is generally upon the advance of fresh money. 2 *Atk.* 331.

In taking an account from the mortgagee, of the rents and profits of the estate after he has come into possession of it, the court commonly directs annual rents to be made; but not so, in an account of personalty. 2 *Atk.* 410.

8. *Of the equity of redemption.*

THOUGH a mortgage be forfeited, and thereby the estate absolutely vested in the mortgagee at the common law; yet a court of equity will consider the real value of the tenements compared with the sum borrowed. And if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem the estate, paying to the mortgagee his principal, interest, and costs. This reasonable advantage, allowed to the mortgagors, is called the *equity of redemption*. 2 *Black.* 159.

An equity of redemption is always considered as an estate in the land; for it may be devised, granted, or intailed with remainders, and such in tail and remainders may be barred by *fine* and recovery; and therefore cannot be considered as a mere right only, but such an estate whereof there may be a *feisin*; the person, therefore, entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets. 1 *Atk.* 605.

In order to prevent fraudulent mortgages, it is enacted by the 4 & 5 *W. c.* 16. that "if any person shall borrow any money, and for the payment thereof shall acknowledge any judgment, statute, or recognizance; and afterwards shall mortgage his lands, and not give notice to the mortgagee of such judgment, statute, or recognizance, he shall forfeit his equity of redemption." *f.* 2.

And "if any person having once mortgaged, shall again mortgage without giving notice of the first mortgage to the second mortgagee, he also shall forfeit his equity of redemption." *f.* 3.

Provided, "that the under-mortgagees may redeem the former mortgages, on payment of principal, interest, and costs, to the prior mortgagees." *f.* 4.

9. *Of foreclosure.*

As the mortgagor hath a right to call on the mortgagee, who hath

hath possession of his estate, to deliver it back, and account for the rents and profits received, on payment of his whole debt and interest; so, on the other hand, the mortgagee may either compel the sale of the estate in order to get the whole of his money immediately, or else call upon the mortgagor to redeem his estate presently, or, in default thereof, to be for ever foreclosed from redeeming the same; that is, to lose his equity of redemption. 2 *Black.* 159.

An *infant* cannot be foreclosed, without a day to shew cause after he comes of age; but the proper way in such cases is, to decree the lands to be sold to pay the debts. 1 *Vern.* 295.

It is a rule established in equity, analogous to the statute of limitation, that after *twenty years* possession of the mortgagee, he shall not be disturbed, unless there be extraordinary circumstances; as in the case of *femes covert*, *infants*, and the like. 2 *Ventr.* 340. 3. *Atk.* 313.

In a case before *Hardwicke*, Feb. 28, 1740, on a bill brought for a redemption after twenty-five years possession, the defendant by his answer submitted to be redeemed, notwithstanding the length of time; lord *Hardwicke* said, he saw no colour for the redemption; but on the defendant's submission, he decreed an account, and ordered the plaintiff to pay in six months, and thereupon the defendant to re-convey; but in default of the plaintiff's payment as aforesaid, the bill was to be dismissed. 2 *Atk.* 140.

Finally; June 26, 1745, in the case of *Aggas and Pickerell*, a bill was brought to redeem, after the mortgagee had been thirty years in possession. The defendant *pleaded the statute of limitation* in bar, and insisted on the length of time that he had been in quiet possession. Lord *Hardwicke* was in great doubt whether the defendant could plead the statute; for insisting on the length of time against a bill to redeem, is only a kind of equitable bar, and by way of analogy to the statute of limitation. But after a further hearing, and consideration of all the cases, he allowed the plea. 3 *Atk.* 225.

MORTMAIN, (*mortua manus*,) is where lands and tenements are given to any corporation, sole or aggregate, ecclesiastical or temporal; and is called *mortmain*, as coming into a *dead hand*; because the lords of them could receive nothing of the alienee, any more than from a dead hand, but lost their escheats and services before due to them. 1 *Inst.* 2.

By the 9 *G. 2. c. 36.* no lands or tenements, or money to be laid out thereon, shall be given for, or charged with, any charitable use whatsoever, unless by deed indented, executed in the presence of two witnesses twelve calendar months before the death of the donor, and inrolled in the court of chancery within six months after its execution, (except stocks in the public funds,

which may be transferred within six months previous to the donor's death,) and unless such gift be made to take effect immediately, and be without power of revocation: and all gifts in any other manner or form shall be void. Provided, that this shall not extend to the two universities, or their colleges, or to the scholars upon the foundation of *Eaton, Winchester, and Westminster*: yet so that no college shall be at liberty to purchase more advowsons, than are equal in number to one moiety of the fellows, or persons usually stiled and reputed as fellows; or where there are none such, then to one moiety of the students upon the respective foundations.

If a man deviseth lands to trustees to be turned into money, and that money to be laid out in a charity, it is not good within the act, for it is an interest arising out of land. So a devise of a mortgage, or of a term for years, to a charity is not good; for the words of the statute are, that the lands shall not be charged with any charitable use whatsoever. So also money given to be laid out in lands, is expressly within the statute; but money given generally, is not: and the trustees are not restrained from laying out that money in land, if they think proper, provided that it be not required of them so to dispose thereof by the act of donation.

MORTUARY, seems to have been originally an oblation made at the time of a person's death. In the Saxon times there was a funeral duty to be paid, which was called *pecunia sepulchralis*, and *symbolum anime*, or the *soul-shot*; which was required by the council of *Aenham*, and enforced by the laws of king *Canute*; and was due to the church which the party deceased belonged to, whether he was buried thereor not. 1 *Still*. 171.

Dr *Stillingfleet* makes a distinction between *mortuaries* and *corse presents*: The *mortuary*, he says, was a right settled on the church, upon the decease of a member of it; and a *corse present* was a voluntary oblation usually made at funerals. *Id*. 172.

And it seemeth that, in ancient times, a man might not dispose of his goods by his last will and testament, without first assigning therein a sufficient mortuary to the church. And this in a constitution of archbishop *Winchelsea*, is called the *principal legacy*; so denominated, saith *Lindwood*, because they who died did bequeath the best or second best of their goods to God and the church, in the first place, and before other legacies. *Lind*. 196.

And in another constitution of the same archbishop, it is enjoined, that if a person, at the time of his death, have three or more quick goods, the first best shall be given to the lord of the fee for a heriot; and the second best shall be reserved to the church where the deceased person received the sacraments whilst he lived. *Id*. 184.

And

And this was usually carried to the church with the dead corpse. And Mr. *Selden* quotes an ancient record, where it is recited, that a horse was present at the church the same day in the name of a mortuary, and that the parson received him, according to the custom of the land and of holy church. *Seld. Hist. Tith.* 287.

Mortuaries are recoverable in the spiritual court, unless the matter turn upon the point of custom; and then a prohibition will be granted in order to try the custom at law. *Cro. Eliz.* 151.

The variety of customs with regard to mortuaries, having given frequently a handle to exactions on the one side, and frauds or expensive litigations on the other, it was thought proper by the statute 21 *Hen. 8. c. 6.* to reduce them to some kind of certainty. For which purpose it is enacted, that all mortuaries or corse presents shall be taken in manner following, unless where by custom less or none at all is due: *viz.* for every person who doth not leave goods clear, above his debts paid, to the value of ten marks, nothing; for every person who leaves goods to the value of ten marks, and under 30*l.* 3*s.* 4*d.*; if above 30*l.* and under 40*l.* 6*s.* 8*d.*; if above 40*l.* ten shillings. And no mortuary shall be paid for the debt of a feme-covert; nor for any child; nor for any one of full age, that is not an house-keeper; nor for any wayfaring man, but such wayfaring man's mortuary shall be paid in the parish to which he belongs.

MOTION in court, is an occasional application by the party or his counsel, in order to obtain some rule or order of court, and is usually grounded upon an affidavit of the truth of the suggestion. 3 *Black.* 304.

MOVEABLES, are all such things personal as attend a man's person wherever he goes; in contradistinction to things *immoveable*, as houses and lands. 2 *Black.* 384.

MULIER, hath three significations: 1. It signifieth a woman in general. 2. A virgin. 3. A wife; and this is the most proper and legal signification of it; and a son or daughter, born of a lawful wife, is called *filius mulieratus*, or *filia mulierata*, a son *mulier*, or a daughter *mulier*; and it is always used in contradistinction to a bastard: thus a bastard is an illegitimate issue, and *mulier* is legitimate. 1 *Inst.* 243.

MUM. By the 27 *G. 3. c. 13.* a duty is imposed on the importation of mum into *Great Britain*, and drawbacks are to be allowed on the exportation thereof, as set forth in a schedule annexed to the act.

And also, by the annual malt act, a duty is imposed on all mum made in, or imported into, this kingdom; which duties are to be under the management of the commissioners of the customs and excise.

MURAGE

MURAGE, *muragium*, is a reasonable toll, to be taken of every cart or horse coming laden through a city or town, for the building or repairing the public walls thereof, due either by grant or prescription. The personal service of the inhabitants and adjoining tenants in building or repairing the walls, was called *murorum operatio*; and when this personal duty was changed into money, the tax so gathered was called *murage*. In the city of *Chester*, there are two ancient officers called *murengers*, being two of the principal aldermen, annually chosen to see the walls kept in good repair; for the maintenance of which, they receive certain tolls and customs.

MURDER, is where a man of sound memory, and of the age of discretion, unlawfully killeth any person under the king's peace, with malice forethought, either expressed by the party, or implied by law; so as the party wounded or hurt die of the wound or hurt within a year and a day. 3 *Injl.* 47.

By *malice express*, is meant a deliberate intention of doing any bodily harm to another, whereunto by law a person is not authorized. And the evidences of such a malice must arise from external circumstances, discovering that inward intention; as, lying in wait, menacings antecedent, former grudges, deliberate compassings, and the like; which are various, according to variety of circumstances. 1 *Hale's Hist.* 451.

Malice implied, is in several cases; as when one voluntarily kills another, without any provocation: for, in this case, the law presumes it to be malicious, and that he is a public enemy of mankind. Poisoning also implies malice, because it is an act of deliberation. Also, where an officer is killed in the execution of his office, it is murder; and the law implies malice. Also, where a prisoner dieth by duress of the gaoler, the law implies malice, by reason of the cruelty. And, in general, any formed design of doing mischief may be called malice, and therefore not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that shew the heart to be perversely wicked, is adjudged to be of malice prepense, and consequently murder. 1. *H. H.* 455. 2 *Haw.* 80.

If two fall out upon a sudden occasion, and agree to fight in such a field, and each of them goeth and fetcheth his weapon, and they go into the field, and therein fight, and the one killeth the other, this is no malice prepensed; for the fetching of the weapon, and going into the field, is but a continuance of the sudden falling out, and the blood was never cooled. But if there were deliberation, as that they meet the next day, nay, though it were the same day, if there were such a competent distance of time that in common presumption they had time of deliberation, then it is murder. And the law so far abhors all duelling in cold blood,
that

that not only the principal who actually kills the other, but also his seconds, are guilty of murder, whether they fought or not. And it is holden, that the seconds of the party slain are likewise guilty as accessaries. 3 *Inst.* 51. 1 *Haw.* 82.

By statute 21 *Ja. c.* 27. if a woman be delivered of a bastard child, and the endeavour privately, either by drowning or secret burying thereof, or any other way, either by herself or the procuring of others, so to conceal the death thereof, that it may not come to light whether it were born alive or not, but be concealed, she shall suffer death as in case of murder, except she can prove by one witness that it was born dead.

If a man have a beast, as a bull, cow, horse, or dog, used to hurt people, and he hath notice thereof, and it doth any body hurt, he is chargeable with an action for it: if he hath no particular notice that it did any such thing before, yet if it is *fera natura*, as a lion, a bear, a wolf, yea an ape or a monkey, if it get loose and do harm to any person, the owner is liable to an action for the damage: if he have notice of the quality of any such his beast, and use all due diligence to keep him up, yet he breaks loose and kills a man, this is no felony in the owner, but the beast is a deodand. But if he did not use that due diligence, but through negligence the beast goes abroad, after warning or notice of the condition, and kills a man, it seems to be manslaughter in the owner: but if he did purposely let him loose or wander abroad, with design to do mischief, nay though it were with design only to fright people and make sport, and it kills a man, it is murder in the owner. 1 *H. H.* 431.

Sentence, in case of murder, shall be pronounced in open court immediately after conviction, in which shall be expressed not only the usual judgment of death, but also the time appointed for the execution, with the marks of infamy directed for such offenders, which time shall be on the day next but one after sentence passed; and in the mean time the prisoner shall be kept alone in some cell apart from the other prisoners, and shall be fed with bread and water only. And after execution, the body shall be dissected and anatomized; and in no case shall be buried, unless after having been so dissected or anatomized. But the judge, if he sees cause, may relax or release any of these restraints or regulations. 25 *G. 2. c.* 37.

MUTA CANUM, (*Fr. meut de chiens*,) signifies a kennel of hounds. By the ancient law, upon the death of a bishop or abbot, the king is intitled to six things: his best horse or palfrey, with its furniture; his cloak or gown, and tippet; his cup and cover; his basin and ewer; his gold ring; and his *muta canum*, his *meu* or kennel of hounds. 2 *Inst.* 491.

MUTE, *mutus*, is one who is dumb and cannot speak; or, in cases of arraignment for felony, who refuses to speak or make answer. Heretofore, a person standing mute, and thereby refusing

fusing to stand to the law, was liable to a strange and severe punishment, called *pain forte et dure*; the judgment in which case was, that the man or woman should be removed to the prison, and laid there in some low and dark room, where they should lie naked on the bare earth, without any litter, rushes, or other covering, and without any garment about them but something to cover their privy parts; and that they should lie upon their backs, their heads uncovered and their feet, and one arm to be drawn to one quarter of the room with a cord, and the other arm to another quarter, and in the same manner to be done with their legs; and there should be laid upon their bodies iron and stone, as much as they might bear and more; and the next day following, to have three morsels of barley bread, without any drink; and the second day to drink thrice of the water next to the house of the prison (except running water) without any bread; and this to be their diet until they were dead. 2 *Inst.* 178.

And this some persons endured, for the sake of their children or other kindred; because in such case they forfeited their goods only, and not their lands; for lands could not be forfeited but by attainder.

But now, by the 12 G. 3. c. 20. if any person on arraignment for felony or piracy, shall stand mute, or will not answer directly, he shall be convicted of the offence, and suffer in all respects as if he had been convicted by verdict or confession.

And the same law is, with respect to an arraignment for treason or petty larceny; for before this act persons standing mute in either of these cases, were to have the like judgment as if they had confessed the indictment. 2 *Inst.* 177.

MUTILATION, is the depriving a man of the use of any of those limbs which may be useful to him in fight, the loss whereof amounts to what the law calls *mayhem*. Both the life and limbs of a man are of such high value in the estimation of the law, that it pardons even homicide if committed *se defendendo*, or in order to preserve them. For whatever is done by a man to save either life or member, is looked upon as done upon the highest necessity and compulsion. 1 *Black.* 130.

MUTUAL DEBTS, between the plaintiff and defendant, may be set one against the other, and either pleaded in bar, or given in evidence (after notice) upon the general issue at the trial; which shall operate as payment, and extinguish so much of the plaintiff's demand. 3 *Black.* 305.

MUTUAL PROMISE is, where one man promises to pay money to another, and he in consideration thereof promises to do a certain act. Such promises must be binding as well of the one side as of the other, and both made at the same time. *Hob.* 88.
1 *Salk.* 24.

N A M

N A M

NAME. See MISNOMER.

NAMIUM, (*nam, naam*, Sax.) signifies the taking or distraining another person's moveable goods. So *withernam*, (from *wyther*, other,) is another or second distress; which is, when goods distrained are driven out of the county, or otherwise withholden by the distrainor, that the sheriff cannot come at them to make a replevy; in this case, a writ of *withernam* goes, to take as much of the goods of the distrainor, and keep the same, until he make deliverance of the goods first by him distrained.

NATIVUS, one that was *born* a villein.

NATURAL AFFECTION, is a good consideration in a deed; and if one, without expressing any consideration, covenant to stand seised to the use of his wife, child, brother, or the like; here, the naming them to be of kin, implies the consideration of natural affection, whereupon such use will arise.

NATURALIZATION, is where a person who is an alien, is made the king's *natural* subject by act of parliament. Hereby an alien is put in the same state as if he had been born in the king's ligeance, except only that he is incapable of being a member of the privy council, or parliament, and of holding any office or grant. No bill for a naturalization can be received in either house of parliament, without such disabling clause in it; nor without a clause disabling the person from obtaining any immunity in trade thereby in any foreign country, unless he shall have resided in *Britain* for seven years next after the commencement of the session in which he is naturalized. Neither can any person be naturalized, or restored in blood, unless he hath received the sacrament within one month before the bringing in of the bill, and unless he also takes the oaths of allegiance and supremacy in the presence of the parliament. 1 *Black.* 374.

NAVAGE, a duty incumbent on tenants to carry their lord's goods by shipping.

NAVY;

1. FOR the supply of seamen to furnish his majesty's navy, the practice of *impressing*, and granting powers to the admiralty for that purpose, is of very ancient date, and hath been uniformly continued by a regular series of precedents to the present time: and this power, though not expressly declared by any act of parliament, yet is recognized by several acts of parliament, which do very strongly imply it. The 2 *Ric.* 2. c. 4. speaks of mariners being arrested and retained for the king's service, as a thing well known,

known, and practised without dispute; and provides a remedy against their running away. By the 2 & 3 P. & M. c. 16. if any waterman, who uses the river *Thames*, shall hide himself during the execution of any commission of pressing for the king's service, he is liable to heavy penalties. By the 2 & 3 An. c. 6. poor apprentices bound to the sea service, shall have a protection from the admiralty from being impressed till they attain eighteen years of age. And by several other statutes, protections are allowed to seamen from being impressed in several particular circumstances. All which statutes fully suppose and imply the legality of pressing; otherwise, they would be nugatory, and in the highest degree absurd. *Fosl.* 154. 1 *Black.* 419.

2. For the regulation and government of the officers and seamen belonging to his majesty's navy, particular provision is made by the 22 G. 2. c. 33. Which act, after taking order that public worship shall be duly observed, and prayers and preaching by the chaplain duly performed in each respective ship, goes on to recite particular offences, and enjoin their respective punishments. The offences are of three kinds or degrees; first, such for which the offender shall suffer death; secondly, such for which the offender shall suffer death, or such other punishment as a court martial shall inflict; thirdly, such as do not extend unto death, but are liable only to an inferior punishment.

The crimes against which death is denounced without mitigation, are, holding intelligence with the enemy; treacherously or cowardly yielding or crying for quarter; cowardice, or other neglect in not doing the utmost to take or destroy the enemy's shipping; not assisting or relieving any other of his majesty's ships in view; not pursuing the chase of an enemy beaten or flying; deserting to the enemy, or running away with any ship or stores; making mutinous assemblies on any pretence whatsoever; striking, or offering to strike, any superior officer; setting fire to any magazine or vessel not belonging to the enemy; committing murder, buggery, or sodomy.

Crimes of a second rate, for which a man shall suffer death, or such other punishment as a court martial shall inflict, are, not acquainting the superior officer with any letter or message sent from the enemy in the nature of a spy; relieving an enemy with victuals, ammunition, or other supply; officer not preparing to fight on signal given, and not personally encouraging the men to fight courageously; not using all possible endeavours in putting the orders of the commanding officer in execution; delaying or discouraging the service, on pretence of arrears of wages, or any other pretence; deserting, or inticing others to desert; not taking care of and defending ships under convoy; uttering words of sedition or mutiny; concealing any traitorous or mutinous practice; quarrelling with a superior officer, or disobeying any of his
lawful

lawful commands ; neglect of steering a ship, whereby the same may come in danger of being stranded ; sleeping on watch, or forsaking the station ; robbery in the fleet.

Crimes not extending unto death, are profane cursing and swearing ; drunkenness ; not sending to the admiralty papers found on board prize ships ; taking goods out of prize ships before the same shall have been condemned ; stripping off their cloaths, pillaging, or otherwise ill using persons taken on board prize ships ; behaving with contempt to a superior officer ; concealing mutinous words, or being present at any mutiny ; stirring up any disturbance about the unwholesomeness of victuals, otherwise than by quietly making the same known to the commanding officer ; quarrelling, or using reproachful speeches or gestures ; wasting or embezzling the stores. Unto this head also belong those offences of officers, for which the penalty of cashiering is inflicted ; which are, entertaining a deserter, and not giving notice to the captain of the vessel to which the deserter belongs ; taking goods on board other than for the use of the ship ; making or signing false musters ; and, in general, behaving in a scandalous, infamous, cruel, oppressive, or fraudulent manner, unbecoming the character of an officer.

Provided always, that no sentence of death (except in cases of mutiny) given by a court martial shall be put in execution, till after report of the proceeding shall have been made to the admiralty if it is within the narrow seas, and elsewhere, to the commander in chief, and their directions given thereupon.

3. No listed seaman shall be taken out of his majesty's service, by any process, other than for some criminal matter, unless affidavit be first-made that the debt or damage amounts to 20*l*. But the plaintiff may enter a common appearance, and have judgment and execution other than against his body. 31 G. 2. c. 10.

4. By the same statute 31 G. 2. c. 10. many useful regulations are made for the punctual, frequent, and certain payment of the wages of seamen employed in the royal navy ; and for enabling them more easily and readily to remit the same, for the support of their wives and families.

And personating seamen in order fraudulently to obtain their wages, is felony without benefit of clergy.

5. A seaman may make a nuncupative will without the strict formalities required of others by the 29 C. 2. c. 3. And the probate of the will of a seaman slain or dead in the service, and the certificate of his marriage, shall be exempted from the stamp duty.

6. Seamen, who have been employed in the king's service, may set up trades in any town or place without molestation, except in Oxford and Cambridge. 22 G. 2. c. 24.

7. If

7. If any seaman under the degree of a warrant or commission officer, who entered voluntarily into his majesty's service, shall be killed or drowned in the service, and leave a widow, she shall, on certificate of the marriage by the minister, churchwardens, and overseers of the poor where she resides, receive, from the admiralty, to the amount of one year's wages of her husband. 14 G. 2. c. 38.

NE ADMITTAS, is a prohibitory writ directed to the bishop, at the suit of one who is patron of any church, if he suspects that the bishop will admit the defendant's or any other clerk pending the plea betwixt them: in which case, a writ issues, requiring the bishop *not to admit (ne admittas)* any clerk whatsoever to that church, until the right shall be determined. *F. N. B.*

NEATGELD, *neatgelt*, a rent or tribute paid in cattle.

NECESSITY. The law charges no man with default, where the act is compulsory, and not voluntary; and where there is not a consent and election; and, therefore, if either an impossibility be for a man to do otherwise, or so great a perturbation of the judgment and reason as in presumption of law man's nature cannot overcome, such necessity carrieth a privilege in itself. *Bacon's Max. of the Law.*

Necessity is of three sorts; necessity of conservation of life; necessity of obedience; and necessity of the act of God, or of a stranger. 1. Necessity for conservation of life; as if divers be in danger of drowning by the casting away of some boat or bark, and one of them gets to some plank, or on the boat's side, to keep himself above water, and another to save his life thrusts him from it, whereby he is drowned; this is neither *se defendendo*, nor by misadventure, but it is justifiable homicide. So if divers felons be in a gaol, and the gaol by casualty is set on fire, whereby the prisoner gets forth; this is no escape, nor breaking of prison. 2. Necessity of obedience; as where husband and wife commit a felony, the wife can neither be principal nor accessary; because the law intends her to have no will, in regard of the subjection and obedience she oweth to her husband. 3. Necessity of the act of God, or of a stranger; as if I be tenant for years of an house, and it be overthrown by lightning or tempest, or by sudden floods, or by invasion of enemies; in all these cases I am excused in waste. *Id.*

But then it is to be noted, that necessity privilegeth only as to private rights, and not as to matters concerning the public; thus, if in danger of tempest, those that are in a ship throw overboard other men's goods, they are not answerable; but if a man be commanded to bring ordnance or ammunition to relieve any of the king's towns that are distressed, in such case he cannot for any danger of tempest justify the throwing them overboard; for there it holdeth, which was spoken by the *Roman*, when he alledged

alleged the same necessity of weather to hold him from embarking, "It is necessary for me to go, but not necessary for me to live." *Id.*

So if a fire happen in a street, I may justify the pulling down of the wall or house of another man, to save the row from the spreading of the fire; but if I be assailed in my house and distressed, and to save my life I set fire to my house, which spreads and takes hold of the other houses adjoining, this is not justifiable; but I am subject to their action upon the case, because I cannot rescue my own life by doing any thing against the public: but if it had been only a private trespass, as the going over another's ground, or the breaking of his inclosure when I am pursued, for the safeguard of my life, it is justifiable. *Id.*

NE EXEAT REGNUM. Within the realm, the king may command the attendance and service of all his liegemen; but he cannot send any man out of the realm, even upon the public service, except seamen and soldiers, the nature of whose employment necessarily implies an exception. 1 *Black.* 138.

By the common law, every man may go out of the realm for whatever cause he pleaseth, without obtaining the king's leave; but if the king, by writ of *ne exeat regnum*, under his great or privy seal, thinks proper to prohibit him from so doing; or if the king sends a writ to any man, when abroad, commanding his return; and in either case the subject disobeys; it is a high contempt, for which the offender's lands shall be seized till he return, and then he is liable to fine and imprisonment. 1 *Black.* 266. 1 *Haw.* 22.

This writ was originally confined to state affairs, and the intent of it was, to prevent any person from going beyond sea, to transact any thing to the prejudice of the king or his government; but now it is very properly used in civil cases, on motion to the high court of chancery. 1 *Att.* 521.

NEGATIVE, is the denial of any fact affirmed. A negative, regularly, cannot be proved or testified by witnesses; yet in some cases it may indirectly be proved by something tantamount: as if a man accuses another to have been at *York*, and there to have committed a certain fact, in proof of which he produces several witnesses, here the defendant cannot prove that he was not at *York*, against positive evidence that he was, but he shall be allowed to make out the negative by collateral testimony, that at that very time he was at *Exeter*, or the like, in such a house, and in such company. *Fortesc.* 37.

NEGATIVE PREGNANT, is a negative which implies or brings forth an affirmative; and is said to be where a negative carries an affirmative in its belly. Where an action is brought against a man, and he pleads in bar of the action a negative plea, which is not so special an answer to the action, but it
in-

includes also an affirmative, this is a negative pregnant : as for instance, he in reversion brings a writ of entry *in casu proviso* upon alienation made by tenant for life, supposing that he has aliened in fee, which is a forfeiture of his estate ; if the tenant comes and pleads that he hath not aliened in fee, this is a *negative*, wherein is included an affirmative ; for though it be true, that he has not aliened in fee, yet it may be he hath aliened in tail, which is also a forfeiture of his estate. 2 *Lill. Abr.* 212. So if a man, being impleaded to have done a thing on such a day, or in such a place, denies generally (without saying any thing more) that he did it on such a day, or in such a place, it is a negative pregnant, as it implies nevertheless that in some sort he did it. *Dyer*, 17.

NEGLIGENT ESCAPE, is where a prisoner escapes without his keeper's knowledge or consent, in which case, upon fresh pursuit, the party may be retaken, and the sheriff shall be excused if he has him again before any action brought against himself for the escape. 3 *Black.* 415.

NEGRO. See **SLAVERY**.

NEIF, *nativa*, is one that was *born* a villein or bond-woman. Anciently the lords of manors sold, gave, or assigned their bond-men or bond-women, as appears by the following deed or gift : *Sciant presentes et futuri, quod ego Radulphus de C. miles, dominus de L. dedi domino Roberto de D. Beatricem filiam Willielmi H. de L. quondam nativam meam, cum tota sequela sua et omnibus catallis suis et omnibus rebus suis perquisitis et perquirendis : habendam et tenendam prædictam Beatricem, cum tota sequela sua, et omnibus catallis suis, et omnibus rebus suis perquisitis et perquirendis prædicto domino Roberto vel suis assignatis, libere, quiete, bene, et in pace, imperpetuum. In cujus, &c. Hiis t. s. libus, &c. Datum apud L. in die sancti Laurentii martyris, anno 13 Ed. 3.*

NE INJUSTE VEXES, is a writ founded on the statute of *magna charta*, c. 10. that lies for a tenant distrained by his lord, for more services than he ought to perform ; and is a prohibition to the lord not *unjustly* to distrain or *vex* his tenant. And this is chiefly where the tenant in fee-simple hath prejudiced himself, by doing greater services, or paying more rent, than he needed to have done ; for in this case, by reason of the lord's seisin, the tenant cannot avoid it by avowry, but is driven to his writ for remedy. *F. N. B.*

NEW ASSIGNMENT. In many actions, where the plaintiff in his declaration hath alledged a general wrong, and the defendant hath put in an evasive plea, the plaintiff in his replication may reduce that general wrong to a more particular certainty, by assigning the injury afresh with all its specific circumstances, in such manner as clearly to ascertain and identify it, consistently with

with his general complaint; which is called a new or novel assignment. 3 *Black.* 311.

NEWSPAPERS. By several statutes, stamp duties are imposed on newspapers.

And by the 29 *G. 3. c. 50.* newspapers are not to be let out for hire.

NEW TRIAL :

FORMERLY, the only remedy for reversal of a verdict unduly given, was by writ of *attaint*; in which case the law inflicted a strange and severe punishment upon the jurors, though they erred never so innocently, but gave no relief to the party injured: but this course is now universally and justly exploded, and in the place thereof a new trial is granted. 3 *Black.* 389.

For if every verdict were to be final in the first instance, great injustice might ensue. Oftentimes, in the trial of a cause, the facts are complicated and intricate, the evidence of great length and variety, and sometimes contradictory; and where the nature of the dispute very frequently introduces nice questions and subtleties of law. Either party may be surpris'd by a piece of evidence, which (had he known of its production) he could have explained or answered; or may be puzzled by a legal doubt, which a little recollection would have solved. In the hurry of a trial, the ablest judge may mistake the law, and misdirect the jury; he may not be able so to state and range the evidence, as to lay it clearly before them; nor to take off the artful impressions which have been made on their minds by learned and experienced advocates. The jury are to give their opinion instantly; that is, before they separate, eat, or drink: and under these circumstances, the most intelligent and best-intentioned men may bring in a verdict, which they themselves, upon cool deliberation, would wish to reverse. 3 *Black.* 389, 90. *Bur. Mansf.* 393.

Granting a new trial, under proper regulations, cures all these inconveniences. But the court will not lend too easy an ear to every application for a review of the verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discuss'd, and that the decision is not agreeable to the justice and truth of the case. A new trial is not granted upon nice and formal objections, which do not go to the real merits: It is not granted where the scales of evidence hang nearly equal; for that which leans against the verdict ought always very strongly to preponderate. 3 *Black.* 391, 2.

In like manner, where the cause is extremely frivolous, as for a small trespass where the damages are very inconsiderable, the court will incline not to grant a new trial, although the verdict hath been contrary to the evidence; which denial is even beneficial to the party who prays the verdict to be set aside, for he cannot

have a new trial without paying the costs of the former trial, and can expect only very trifling damages. For a new trial ought only to be granted to obtain real justice, and not to gratify litigious passions. *Bur. Mansf.* 11. 54.

And in granting such further trial, the court will provide for supplying such defects as there may be; by laying the party applying under all such equitable terms, as the opposite party shall desire and mutually offer to comply with; such as, the discovery of some facts upon oath, the admission of others, the production of deeds, books, and papers, the examination of witnesses infirm or going beyond sea, and such like. 3 *Black.* 392.

A new trial shall not be granted in *penal* actions, where the verdict is for the defendant, though contrary to evidence; as in perjury, forcible entry, and the like. *Ld. Raym.* 62.

But in many instances, where the jury, in criminal cases, have contrary to evidence, found the prisoner guilty, their verdict hath been set aside, and a new trial granted by the court of king's bench; but there is no instance of granting a new trial, where the prisoner was acquitted upon the first: therefore, if the jury find the prisoner not guilty, he is for ever quit and discharged. 4 *Black.* 355.

On an action for the penalty of killing a hare, not being qualified, the jury found for the defendant, contrary to the direction of the judge; but the court refused to grant a new trial, saying, it had never been carried so far as to a penal action. *Str.* 899.

So verdicts for defendants are never set aside for penalties in the case of duties or customs. *Str.* 1238.

A judge of an inferior court cannot grant a new trial. 1 *Salk.* 113.

NIGHT, is when it is so dark that the countenance of a man cannot be discerned. 4 *Black.* 224.

NIGHT WALKERS, are such persons as sleep by day and walk by night, being often pilferers and disturbers of the peace, 5 *Ed.* 3. c. 14. And, by the common law, constables are authorized to arrest night walkers and suspicious persons. Watchmen also may arrest night walkers, and hold them until the morning. And it is said that a private person may arrest any suspicious night walker, and detain him till he give a good account of himself. 2 *Harw.* 61. 80.

NIHIL DICIT, is a failing by the defendant to put in an answer to the plaintiff's declaration by the day assigned; which being omitted, judgment is had against him of course, as *saying nothing* why it should not.

NIL DÉBET, is the general plea to the declaration in an action of debt upon contract, whereby the defendant pleads that

that he *owes nothing*; and thereupon issue is joined. 3 *Black.* 305.

NISI PRIUS, is a commission directed to the judges and clerk of assize, empowering them to try all questions of fact issuing out of the courts at *Westminster* that are then ripe for trial by jury. The original of which name is this; all causes commenced in the courts of *Westminster-hall* are, by the course of the courts, appointed to be tried on a day fixed in some *Easter* or *Michaelmas* term, by a jury returned from the county wherein the cause of action arises; but with this proviso, "*nisi prius*" *justiciarii ad assisas capiendas venerint*; that is, "*unless before*" the day prefixed, the judges of assize come into the county in question, which they always do in the vacation preceding each *Easter* and *Michaelmas* term, and there try the cause; which saves much expence and trouble, both to the parties, the jury, and the witnesses. And then, upon the return of the verdict given by the jury to the court above, the judges there give judgment for the party for whom the verdict is found. 3 *Black.* 59.

But in matters of great weight, or where the title is intricate, the judges above will often retain causes to be tried there; and then the jury and witnesses in such case must come to the courts at *Westminster* for the trial of the cause, which is called a trial at bar. *Wood. b. 4. c. 1.*

Errors before the justices at *nisi prius* shall be redressed in the king's bench, and not in the common pleas. *Id.*

NOBILITY. The civil state of *England* consists of the nobility and commonalty. The nobility are all those who are above the degree of knight; namely, dukes, marquesses, earls, viscounts, and barons. 1 *Black.* 396.

NOLLE PROSEQUI, is used in the law where a plaintiff in any action will proceed no further, and may be before or after verdict, though it is usually before; and it is then stronger against the plaintiff than a nonsuit, which is only a default in appearance; but this is a voluntary acknowledgment that he hath no cause of action. 2 *Lill.* 218.

NOMINE POENÆ, is a penalty incurred for not paying rent, or the like, at the day appointed by the lease or agreement for payment thereof. 2 *Lill.* 221. If rent is reserved, and there is a *nomine pœnæ* on the non-payment of it, and the rent is behind and unpaid, there must be an actual demand thereof made, before the grantee of the rent can distrain for it, the *nomine pœnæ* being of the same nature as the rent, and issuing out of the land out of which the rent doth issue. *Hob.* 82. 133.

NON-ABILITY, is an exception taken against the plaintiff in a cause, upon some just ground, why he cannot commence

any suit in law ; as præmunire, outlawry, excommunication, or the like. *F. N. B.*

NON-AGE, in general understanding, is all the time of a person's being under the age of one-and-twenty ; and in a special sense, as where a man is under the age of fourteen with respect to marriage, or twelve with respect to taking the oath of allegiance.

NON ASSUMPSIT, is a plea in a personal action, whereby a man denies any promise made. The plaintiff, when the proceedings were in Latin, charged that the defendant *assumpsit*, that is, *assumed*, undertook, or promised to do such a thing ; the defendant, in joining issue, pleaded *non assumpsit*, that he did *not assume* or promise to do such thing.

NON-CLAIM, is an omission or neglect of one that claims not within the time limited by law, as within a year and a day, where continual claim ought to be made, or in five years after a fine levied.

NON COMPOS MENTIS, is where a person is not of sound mind, memory, and understanding ; and is of four kinds.

1. Idiots, who are of *non-sane* memory from their nativity, by a perpetual infirmity.

2. They that lose their memory and understanding by the visitation of God ; as by sickness or other accident.

3. Lunatics ; who have sometimes their understanding, and sometimes not.

4. Drunkards ; who by their own vicious act for a time deprive themselves of their memory and understanding. 1 *Inst.* 247.

Idiots and lunatics, who are under a natural inability of distinguishing between good and evil, are not punishable by any criminal prosecution. 1 *Harv.* 2.

But drunkards have no privilege by their want of sound mind ; but shall have the same judgment as if they were in their right senses. *Id.*

NON-CONFORMISTS. See **DISSENTERS.**

NON-CUL', abbreviated from *non-culpabilis*, is a plea of *not guilty* to any action of trespass or wrong in a civil suit, or to an indictment in any matter criminal.

NON DAMNIFICATUS, is a plea to an action of debt upon a bond, with condition to save the plaintiff harmless ; in which the defendant may plead generally that the plaintiff is not damnified ; but if it is to save harmless specially in a particular suit or thing, there the defendant must shew how he hath saved him harmless and indemnified. 2 *Lill.* 224. 1 *Lea.* 72.

NON DECIMANDO, is to be free from the payment of tithes, without any recompence for the same. Concerning which,

which, the general rule is, that no layman can prescribe in *non decimando*; that is, to be discharged absolutely of the payment of tithes, and to pay nothing in lieu thereof, unless he begin his prescription in a religious or ecclesiastical person. But all spiritual persons, as bishops, deans, prebendaries, parsons, and vicars, may prescribe generally in *non decimando*. 1 *Roll's Abr.* 653.

And these had their lands capable of being discharged of tithes several ways; as, 1. By real composition, originally made between the owner of the land on the one part, and the parson, patron, and ordinary on the other. 2. By the pope's bull of exemption. 3. By unity of possession; as where the rectory of a parish, and lands in the same parish, both belonged to a religious house, those lands were discharged of tithes by this unity of possession. 4. By prescription; having never been liable to tithes, by being always in spiritual hands. 5. By virtue of their order; as the knights templars, hospitallers, cistercians, and præmonstratenses, whose lands were privileged by the pope, with a discharge of tithes: though, upon the dissolution of the abbeys by king *Hen. 8.* most of these exemptions from tithes would have fallen with them, and the lands become tithable again, had they not been supported and upheld by the statute 31 *H. 8. c. 13.* which enacts, that all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of tithes, in as large and ample manner as the abbeys themselves formerly held them. And from this original have sprung all the lands, which, being in lay hands, do at present claim to be tithe-free; for, if a man can shew his lands to have been such abbey lands, and also immemorially discharged of tithes by any of the means aforesaid, this is now a good prescription *de non decimando*. But he must shew both these requisites; for abbey lands, without a special ground of discharge, are not discharged of course; neither will any prescription *de non decimando* avail in total discharge of tithes, unless it relates to such abbey lands. 2 *Black.* 31.

NON EST FACTUM, is a plea where an action is brought upon a bond or any other deed, and the defendant denies it to be *his deed* whereon he is impleaded. In every case where the bond is void, the defendant may plead *non est factum*; but where a bond is voidable only, he must shew the special matter. 2 *Lill.* 226.

This plea is good in all cases where the bond or specialty was not executed; or if it were executed, but was void *ab initio*, as for default of capacity, the obligor being an infant, feme covert, or the like, in which case the defendant may plead a special *non est factum*.

NON EST INVENTUS, is the sheriff's return to a writ when the defendant is *not to be found* in his bailiwick.

NON-FEASANCE, (*not doing of a thing*;) is an offence of omission of what ought to be done, as in not resorting to church; which offence need not be alleged in any certain place, for generally speaking, it is not committed any where. 1 *How.* 13.

NON-JURORS, are persons who refuse to take the oaths to the government, who thereupon are liable to certain incapacities.

NON OBSTANTE, was a clause frequent in the king's letters patent granting a thing *notwithstanding* any statute or act of parliament to the contrary; which assumed power, setting the prerogative above the laws, was effectually demolished by the bill of rights at the revolution, and abdicated *Westminster-hall*, when king *James* abdicated the kingdom. 1 *Black.* 342.

NON OMITTAS, is a writ directed to the sheriff, where the bailiff of a liberty or franchise, who hath the return of writs, refuses or neglects to serve a process, for the sheriff to enter into the franchise and execute the king's process himself, or by his officer, *non omittas propter aliquam libertatem*. But for dispatch of business, a *non omittas* is commonly directed in the first instance. *F. N. B.*

NONPLEVIN, (*nonplevina*;) is defined to be *default after default*. Anciently the defendant was to replevy his lands seized by the king within fifteen days; and if he neglected, then at the next court day he should lose his seisin, *sicut per defaultam post defaultam*. But by statute 9 *Ed. 3. c. 2.* it was enacted, that none should lose his land because of *nonplevin*; that is, where the land was not replevied in due time.

NON PONENDIS IN ASSISIS ET JURATIS, is a writ granted for freeing some persons from serving on juries; but by 4 & 5 *W. c. 24.* no such writ shall be granted, unless upon oath made that the suggestions upon which it is granted are true.

NON PROS'. If the plaintiff neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law in any subsequent stage of the action, he is adjudged *not to follow* or pursue his remedy as he ought to do; and thereupon a *non suit*, or *non prosequitur*, is entered; and by a compendious form of expression, he is said to be *non pros'd.* And for thus deserting his complaint, he shall not only pay costs to the defendant, but is liable to be amerced to the king. 3 *Black.* 295.

NON-RESIDENCE. See **RESIDENCE**.

NON SANE MEMORY. See **NON COMPOS**.

NONSENSE. Where a matter set forth is grammatically right, but absurd in the sense and unintelligible, some words can not

not be rejected to make sense of the rest, but must be taken as they are; for there is nothing so absurd, but what by rejecting may be made sense; but where a matter is nonsense, by being contradictory and repugnant to somewhat precedent, there the precedent matter which is sense, shall not be defeated by the repugnancy which follows; but that which is contradictory shall be rejected. As in ejection, where the declaration is of a demise the second of *January*, and that the defendant afterwards, *scilicet*, the first of *January* ejected him, here the *scilicet* may be rejected, as being contrary to what went before. 1 *Salk.* 324.

NONSUIT, is the letting a suit or action fall; as if the plaintiff neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law in any subsequent stage of the action, he is then adjudged *not to follow* or *pursue* his remedy as he ought to do; and thereupon a *non suit*, or *non prosequitur*, is entered: and for thus deserting his complaint, after making a false claim or complaint, he shall not only pay costs to the defendant, but is liable to be amerced to the king. 3 *Black.* 296.

And this deserting or renunciation of the suit often happeneth upon the discovery of some error or defect, when the matter is so far proceeded in, as the jury is ready at the bar to deliver their verdict; in which case he is then called, and may be nonsuited, notwithstanding his appearance before. *Br.* Nonsuit.

A *retraxit* differs from a nonsuit, in that the one is negative, and the other positive: the nonsuit is a default and neglect of the plaintiff, and therefore he is allowed to begin the suit again, upon payment of costs; but a *retraxit* is an open and voluntary renunciation of his suit in court; and by this he for ever loseth his action. 3 *Black.* 296.

A *discontinuance* is somewhat similar to a nonsuit; for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day, and from time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend; but the plaintiff must begin again, by suing out a new original, usually paying costs to the defendant. *Id.*

The king cannot be nonsuit, because in judgment of law he is ever present in court; but the king's attorney may enter an *ulterius non vult prosequi*, which has the effect of a nonsuit. 1 *Inst.* 139.

NON SUM INFORMATUS, is a formal answer made of course by an attorney, who is *not informed* or instructed to say any thing material in defence of his client; by which he is deemed to leave it undefended, and so judgment passeth against his client.

NON TENURE, is a plea in bar to a real action, by saying that

that he (the defendant) holdeth not the land mentioned in the plaintiff's declaration. And there is non-tenure *general* and *special*: *general*, where one denies ever to have been tenant of the land in question; and *special*, which is an exception, alleging that he was not tenant on the day whereon the writ was obtained. *West. Symb. par. 2.*

NON-USER, of a public office, is an immediate cause of forfeiture; so also of a franchise: but non-user of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby. 2 *Black. 153.*

NOSE-SLITTING. By statute 22 & 23 C. 2. c. 1. if any person shall of malice aforethought, and, by lying in wait, slit the nose, or cut off a nose or lip, of any person, with intent to disfigure him, he shall be guilty of felony without benefit of clergy. Which statute goes by the name of the *Coventry act*, because it was made on occasion of an assault on sir *John Coventry* in the street, and slitting his nose, in revenge (as was supposed) for some obnoxious words uttered by him in parliament. 4 *Bl ck. 207.*

NOTARY, is an officer who takes *notes*, or makes a short draught of contracts, obligations, or other writings and instruments. A *notary public*, is properly one who publicly attests deeds or writings, to make them authentic in another country, especially in business relating to merchants. They make protests in cases of bills of exchange.

NOTE OF A FINE, is a brief of a fine made by the proper officer, before it is engrossed.

NOTE OF HAND, or a promissory note, is an engagement in writing, to pay a sum specified at the time therein limited, to a person therein named, or sometimes to his order, or often to the bearer at large; and by the statute 3 & 4 *Ann. c. 9.* is made assignable in like manner as a bill of exchange. 2 *Black. 467.*
SEE BILL OF EXCHANGE.

NOT GUILTY, is the general issue or plea of the defendant in any criminal action; as also in an action of trespass, or for deceits and wrongs; but not on a promise or *assumpsit*. *Palm. 393.*

NOTICE:

1. THE party that intends to move the court in a questionable matter, ought to give notice thereof to the party against whom he intends to move, or to his attorney or solicitor, and not to his counsel; for the counsel is not concerned to take notice of any thing but from his client, nor bound to seek out his client to give him notice. 2 *L. P. R. 242.*

2. If one be bound to give to another *personal* notice, it is not sufficient that notice be left at the dwelling house of the party;
for

for notice may be given there, and yet the party may not know it. 2 *L. P. R.* 237.

3. If the plaintiff intends to bring on his cause for trial at the assizes, he shall give the defendant, if he lives within forty miles of *London*, eight days notice of trial; and if he lives at a greater distance, he shall give fourteen days notice. 3 *Black.* 357.

And by the 14 *G.* 2. c. 17. no indictment, information or cause whatsoever, shall be tried at nisi prius, where the defendant lives above forty miles from *London*, unless ten days notice be given.

And if any person shall have given notice, and shall not countermand it at least six days before the trial, he shall pay costs as if such notice had not been countermanded.

4. A recital of a deed which refers to an incumbrance upon an estate, is notice against a purchaser; so if the title must be by a will; for it was his own negligence that he did not seek after it. 2 *Chq. Ca.* 246.

A purchaser with notice himself, from a person who purchased without notice, may shelter himself under the first purchaser; otherwise it would very much clog the sale of estates. 2 *Atk.* 242.

If, on a marriage settlement, an agent is employed on both sides, both will be affected by notice to him. 1 *Vez.* 65.

Notice to an agent placing out money on a mortgage, of a prior judgment, shall affect the employer. 2 *Vez.* 370.

A second mortgagee, with notice of a former mortgage, but without notice of a trust charge antecedent to both, of which the first mortgagee had notice, must take subject to that demand. 2 *Vez.* 485.

On notice to execute a writ of inquiry at a certain hour, the party is not tied down to the exact time fixed by the notice: the sheriff may have prior business which may last beyond the hour. *Douglas.* 188.

NOVEL ASSIGNMENT, (*nova assignatio*), is an assignment of time, place, or such like, in an action of trespass, otherwise than as it was before assigned. And if the defendant justifies in a place where no trespass was done, then the plaintiff is to assign the place where, to which the defendant is to plead. *T. L.*

NOVEL DISSEISIN. A writ of assize of *novel* (new or recent) *disseisin* lies, where tenant in fee simple, fee tail, or for term of life, is put out and *disseised* of his lands or tenements, rents, common of pasture, common way, or of an office, toll, or the like: in which case, if upon trial he can prove his title, and his actual seisin in consequence thereof, and the disseisin by the present tenant, he shall have judgment to recover his seisin and damages for the injury sustained. *Blackst. b.* 3. c. 10.

But

But this kind of action is now out of use, and is superseded by actions of trespass or ejectment.

NUDUM PACTUM, is a bare naked contract, without any consideration had for the same. If a man bargains or sells goods, and there is no recompence made or given for the doing thereof; as if one say to another, "I sell you all my lands or goods," but nothing is agreed upon what the other shall give or pay for them, this is a nude contract, and void in law; and for the performance thereof no action will lie. *T. L.*

But if such contract be evidenced by writing, it is allowed to be good, against the contractor himself, but not to prejudice creditors or strangers to the contract. *Burr. Mansf.* 1671.

NUN, a woman admitted into a monastery, called by the Latins *nonna*; they used also the word *nonnus*, to signify a monk; and both from the Hebrew *nin* or *aun*, which signifies a son.

NUNCUPATIVE WILL, or testament is, when the testator without any writing, declares his will, before a sufficient number of witnesses; who by the 4 & 5 *Ann. c.* 16. must be such as are admissible upon trials at common law.

But by the statute 29 *C. 2. c.* 3. no nuncupative will shall be good, where the estate bequeathed exceeds 30l. unless proved by three such witnesses present at the making thereof, and unless they or some of them were specially required to bear witness thereto by the testator himself; and unless it was made in his last sickness, in his own house, or where he had been previously resident ten days at least, except he be surpris'd with sickness on a journey or from home, and dies without returning.

And no *written* will shall be revoked or altered by a subsequent nuncupative one, except the same be in the life-time of the testator reduced to writing, and read over to him, and approved; and unless the same be proved to have been so done by three such witnesses.

And no nuncupative will shall be proved till fourteen days after the death of the testator, nor till process hath first issued to call in the widow, or next of kin, to contest it if they think proper.

NUSANCE, *nocumentum*, signifies any thing that worketh annoyance, hurt, damage, or inconvenience. 3 *Black.* 216.

Nusances are of two kinds; *public* or *common* nusances, which affect the public, and are an annoyance to all the king's subjects; and *private* nusances, which affect particular persons only in their private and separate capacity.

If a man erects an house, or other building, so near to mine, that it stops up my ancient lights and windows, this is a nuisance; but then it must appear that the house is an ancient house, and the lights ancient lights; otherwise there is no injury done: for he hath as much right to build a new edifice upon
his

his own ground, as I have upon mine; since every man may do what he pleases upon the upright or perpendicular of his own soil. *Id.*

The setting up and exercising of an offensive trade, or keeping hogs, or other noisome animals, so near a man's house as to incommode him, and render the air unwholesome, is a nuisance; but stopping a prospect only, which is merely matter of pleasure, hath been held not to be in the eye of the law a nuisance. *Id.* 217.

If a man erects a smelting-house for lead, so near the land of another, that the vapour and smoke kill his corn and grass, and damage his cattle therein, this is held to be a nuisance. *Id.*

So to corrupt or poison a water-course, by erecting a dye-house or a lime-pit in the upper part of the stream, or to do any act therein, that in its consequences must necessarily tend to the prejudice of one's neighbour. *Id.* 218.

A gate erected in a highway, where none had been before, is a common nuisance. 1 *Haw.* 199.

If a man has a dog that kills sheep, this is not a common nuisance; but the owner of the dog (knowing thereof) is liable to an action: but a mastiff going at large in the street unmuzzled, from the ferocity of his nature being dangerous and cause of terror to the king's subjects, seemeth to be a common nuisance.

Generally, a nuisance may be abated or removed by the party aggrieved thereby, without the formalities of legal process, provided he commit no riot in the doing of it. If a man builds a house so close to mine that his roof overhangs my roof, and throws the water off his roof upon mine, which is a *private* nuisance, I may enter my neighbour's ground, and peaceably pull it down. Or if a new gate be erected across a public highway, which is a *public* or common nuisance, any of the king's subjects passing that way may cut it down and destroy it. And the reason why the law allows this private summary method of doing one's self justice is, because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice. 3 *Black.* 5.

If a man hath not availed himself of this remedy by abatement, he may, if it is a *private* nuisance, bring his action against the wrong doer. The ancient remedy in this case, was by the writs of *assise of nuisance*, and *quod permittat prosternere*, whereby judgment was given for damages to the plaintiff, and to remove the nuisance; but the process on these writs being tedious and difficult, they are now entirely out of use, and have given way to an action upon the case: by which action, indeed, though the party injured may recover satisfaction for the injury sustained,

ed, yet the nuisance cannot be removed; but as every continuance of a nuisance is a fresh nuisance, therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardness to continue it. *Id.* 220.

For a *public* nuisance, no action upon the case will lie; and this the law hath provided for avoiding a multiplicity of suits; for if any one might have an action, all men might have the like; but the law, for this public or common nuisance, hath provided an apt remedy, by presentment or indictment at the suit of the king, in behalf of all his subjects; unless any man hath a particular damage, as if he and his horse fall into a ditch made across a highway, whereby he received hurt and loss, there, for his special damage, which is not common to others, he shall have an action upon the case. *1 Inst.* 56.

On conviction of a nuisance, the offender may be fined and imprisoned; and it is said, that a person convicted of a nuisance done to the king's highway, may be commanded by the judgment to remove the nuisance at his own costs; and it seemeth to be reasonable, that those who are convicted of any other common nuisance, shall also have the like judgment. And the court never admits the defendant to a small fine, until proof is made of the nuisance being removed. *1 Harw.* 200. *Dalt. c.* 66.

O A T

OA'TH is a corruption of the Saxon word *eoþh*. It is commonly called a corporal oath, because the person lays his hand upon some part of the scriptures when he takes it.

If the oath be taken upon the common prayer-book, which has the epistles and gospels, it is good enough, and perjury may be assigned on this oath. *3 Keb.* 314.

If one call another a *perjured* man, he may have an action on the case, because it shall be intended to be contrary to his oath in a judicial proceeding; but for calling one a *forsworn* man, no action lies; because the forswearing may be extrajudicial, and consequently no perjury in law. *3 Inst.* 166.

The oath of *allegiance* is very ancient, and every layman above the age of twelve years was obliged to take it at the tourn or leet, on pain of being punished as for a high contempt. But the clergy were not obliged to take it until the reformation, any further

ther than doing homage to the king for the lands holden of him in right of the church. 1 *Inst.* 68.

The oath of *supremacy* came in upon abolishing the papal authority at the reformation.

The oath of *abjuration* came in after the revolution; received some alterations in the first year of queen *Anne*; and again in the first year of king *George* the first; and, finally, in the sixth year of king *George* the third.

By statute 1 *G. 2. c.* 13. two justices of the peace may summon persons, whom they shall suspect to be disaffected, to appear before them at a time and place appointed, to take the oaths; which, if they shall refuse or neglect to do, they shall certify the same to the next sessions; and if the party shall not appear at such sessions, and take the oaths, he shall be adjudged a popish recusant convict; and the clerk of the peace shall certify the same into the chancery, or court of king's bench, to be there recorded.

Quakers are allowed, in civil cases, to take a solemn affirmation instead of an oath; but not in criminal cases: nor shall they, without such oath, be permitted to serve on juries, or to bear any office of profit in the government.

Jews and heathens are allowed to take an oath after their own form and manner. *Str.* 404.

OBIT, signifies a funeral solemnity or office for the dead; most commonly performed when the corpse lies in the church uninterred. Also the anniversary of any person's death was called the obit; and to observe such day with prayers and alms, or other commemoration, was keeping of the obit.

OBLATIONS. See OFFERINGS.

OBLIGATION, *obligatio*, is a bond containing a penalty with a condition annexed for the payment of money, performance of covenants, or the like; it differs from a bill, which is generally without a penalty or condition, though a bill may be obligatory. *C. Lit.* 172.

OBLIGOR, is the party that enters into an obligation or bond; OBLIGEE is the person to whom the bond is made.

OCCASIO, was a tribute which the lord imposed on his vassals and tenants, occasionally, for the wars or other necessities.

OCCUPANCY, is the taking possession of those things, which before belonged to no body; and this is the true ground and foundation of all property, or of holding those things in severalty, which by the law of nature, unqualified by that of society, were common to all mankind. But this right of occupancy, so far as it concerns real property, hath been confined by the laws of *England* within a very narrow compass, and was extended only to a single instance; namely, where a man was
tenant

tenant *pur autre vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another person, and died during the life of *cestuy que vie*, or him by whose life it was holden; in this case, he that could first enter on the land might lawfully retain the possession so long as *cestuy que vie* lived, by right of occupancy: for it did not revert to the grantor, who had parted with all his interest, so long as *cestuy que vie* lived; it did not escheat to the lord of the fee, for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it; it did not belong to the grantee, for he was dead; it did not descend to his heirs, for there were no words of inheritance in the grant; nor could it vest in his executors, for no executors could succeed to a freehold. Belonging therefore to no body, the law left it open to be seized and appropriated by the first person that could enter upon it, during the life of *cestuy que vie*, under the name of an occupant. But now the title of common occupancy is reduced almost to nothing, by two statutes; the one 29 C. 2. c. 3. which enacts, that where there is no special occupant in whom the trust may vest, the tenant *pur autre vie* may devise it by will, or it shall go to executors or administrators, and be assets in their hands for payment of debts; the other, 14 G. 2. c. 20. which enacts, that the surplus of such estate *pur autre vie*, after payment of debts, shall go, in a course of distribution, like a chattel interest. 2 *Black.* 258.

Generally, as to things *personal*, where these are found without any owner, they do not go to the first finder or occupant, but do belong to the king by his prerogative.

OCCUPATION signifies, in our law, use or tenure; as we say, such lands are in the tenure or occupation of such a man; that is, in his possession or management. Also it is used for a trade or mystery. 12 C. 2. c. 18.

ODHALL, or *allodial* right, signifies the absolute property in lands; from *all*, and *odh*, which in the Northern languages signifies property. These lands were holden of no superior lord, being absolutely independent, which, after the introduction of feuds, was converted into the military tenure. 2 *Black.* 45.

ODIO ET ATIA, was a writ anciently used, and directed to the sheriff, commanding him to inquire whether a prisoner charged with murder was committed upon just cause of suspicion, or merely *propter odium et atiam*, for hatred and ill-will: and if, upon the inquisition, due cause of suspicion did not appear, then there issued another writ for the sheriff to admit him to bail. 3 *Black.* 128.

OFFENCE, is an act committed against law, or omitted where the law requires it. Offences are of two sorts, *capital*, or *at capital*: capital offences are those for which the offender shall lose his life; such as *high treason*, *petit treason*, and *felony*; offences

fences not capital, include the remaining part of the pleas of the crown, and come under the title of *misdemeanors*. 2 H. P. c. 126. 134. *Finch*, 25.

OFFERINGS, *oblations*, and *obventions*, are one and the same thing; and under these are comprehended all small ecclesiastical dues, payable at *Easter* by communicants; as also for marriages, christenings, churchings, and burials.

OFFERTORY, *offertorium*, is a service in the church, which is read at the celebration of the holy communion, during the time that the church wardens are collecting the alms or *offerings* of the congregation for the use of the poor. Sometimes the money collected is itself called the *offertory*.

OFFICE. By divers statutes, every person admitted into any office, civil or military, or who shall receive any pay by reason of any patent or grant from the king, or shall have any command or place of trust in *England*, or in the navy, or shall have any service or employment in the king's household, shall, within three months after his admission, receive the sacrament; and afterwards, in the court where he takes the oaths to the government, shall exhibit a certificate of such his receiving under the hands of the minister and church wardens, and make and subscribe the declaration against transubstantiation.

Which said oaths are the oaths of allegiance, supremacy, and abjuration, which are to be taken within six months after their admission in one of the courts at *Westminster*, or at the quarter sessions, by all the said persons; as also by all ecclesiastical persons, heads and members of colleges, being of the foundation, or having any exhibition, and being of eighteen years of age, and all persons teaching pupils, schoolmasters and ushers, preachers and teachers of separate congregations, high constables, and practisers of the law.

And if any person shall make default in the premises, he shall be incapable to hold such office, or to sue in any action, or to be guardian, executor, or administrator, or capable of any legacy or deed of gift, or to bear any office, or vote at an election for members of parliament, and forfeit 500l.

By 31 G. 2. c. 22. a duty of 1s. in the pound is laid on all perquisites of offices; by which perquisites are meant, such profits as arise from fees established by custom or authority, and payable in consideration of business done in the course of such offices.

When a person is refused to be admitted to an office or place in a corporation, or is wrongfully removed therefrom, the statute 9 An. c. 20. hath provided a summary remedy by a writ of *mandamus*; commanding, upon good cause shewn to the court, the party complaining to be admitted or restored to his office. 3 *Black*. 264.

OFFICE,

OFFICE, *inquest of*, is an inquiry made by the king's officer, his sheriff, coroner, or escheator, by virtue of their office, or by writ to them sent for that purpose, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. These inquests of office were more frequently in practice than at present, during the continuance of the military tenures; when, upon the death of every one of the king's tenants, an inquest of office was held, called an *inquisition post mortem*; to inquire of what lands he died seised, who was his heir, and of what age; in order to entitle the king to his marriage, wardship, relief, primer seisin, or other advantages. 3 *Black.* 258.

OFFICIAL, by the *civil* law, is one that is the minister of, or attendant upon, a magistrate. In the *canon* law, he is one to whom the bishop commits the charge of spiritual jurisdiction, under the name of *official principal*, who hath cognizance of temporal matters, such as wills, legacies, and administrations; as the *vicar general* hath of ecclesiastical matters, as visitation, correction of manners, and the like. Both of which offices are commonly united under the general name of *chancellor*.

OFFICIO, EX, oath of, is an oath whereby a person may be obliged to make any presentment of any crime or offence, or to confess or accuse himself of any criminal matter or thing, whereby he may be liable to any censure, penalty, or punishment. This oath was made use of in the spiritual courts, as well in criminal cases of ecclesiastical cognizance, as in matters of civil right; of which the high commission court in particular made a most extravagant and illegal use, forming a court of inquisition, in which all persons were obliged to answer in cases of bare suspicion, if the commissioners thought proper to proceed against them for any supposed ecclesiastical enormities. But when the high commission court was abolished by statute 16 *C. 1. c. 11.* this oath *ex officio* was abolished with it; and it is also enacted by statute 13 *C. 2. ff. 1. c. 12.* that it shall not be lawful for any bishop, or ecclesiastical judge, to tender to any person the oath *ex officio*, or any other oath whereby the party may be charged or compelled to confess, accuse, or purge himself of any criminal matter. But this doth not extend to oaths in a *civil* suit; and therefore it is still the practice, both in the spiritual courts and in equity, to demand the personal answer of the party himself upon oath. Yet if in the bill any question be put, that tends to the discovery of any crime, the defendant may thereupon demur, and refuse to answer. 3 *Black.* 447.

OLERON LAWS, are a code of maritime laws, made by king *Richard* the first, at the isle of *Oleron*, on the coast of *France*, which was then part of the possessions of the crown of *England*.

England. These laws are of so much repute, that they have been received by all the nations in *Europe*, as the ground work of their marine constitutions.

ONUS PROBANDI, is the burden of proving any thing.

OPTION. Every bishop, whether created or translated, is bound, immediately after confirmation, to make a legal conveyance to the archbishop, of the next avoidance of such dignity or benefice belonging to the see, as the said archbishop shall chuse; which is therefore called an *option*; which options are only binding on the bishop himself who grants them, and not on his successors.

ORDEAL, is said to be derived of two Saxon words, *or*, great, and *dele*, judgment; that is, the *great judgment*; which was a form of trial for discovering innocence or guilt. Anciently, when an offender being arraigned, pleaded not guilty, he was asked (as he is still to this day) how he would be tried. Which was then a significant question, although now it is only matter of form; for he had it in his choice, whether he would be tried by *battel*, or by *ordeal*, (which was called the judgment of God,) or by his *country* (that is, by a jury of twelve men). The trial by *ordeal*, which was peculiarly denominated the *judgment of God*, was called *common purgation*, to distinguish it from the *canonical purgation*, which was by the oath of the party: and it was of two sorts; either *fire ordeal*, or *water ordeal*; the former being confined to persons of higher rank, the latter to the common people. Both these might be performed by deputy, but the principal was to answer for the success of the trial; the deputy only venturing some corporal pain, for hire, or perhaps for friendship. Some remains of which there are still in the common expression of going through fire and water to serve another. *Fire ordeal*, was performed either by taking up in the hand a piece of red-hot iron, of one, two, or three pounds weight; or else by walking, barefoot and blindfold, over nine red hot plowshares, laid at unequal distances; and if the party escaped being hurt, he was adjudged innocent; but if it happened otherwise, he was then condemned as guilty. By this latter method, queen *Emma*, mother of *Edward the Confessor*, is mentioned to have cleared her character, when suspected of familiarity with *Alwyn*, bishop of *Winchester*. *Water ordeal* was performed, either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt thereby, or by casting the person suspected into a river or pond of cold water; and if he floated therein, without any action of swimming, it was deemed an evidence of his guilt; but if he sunk, he was acquitted: of which kind of water ordeal, there are still some traditional remains in many countries to discover witches, by cast-

ing them into a pool of water, whereby to determine their guilt or innocence, by floating or sinking. 4 *Black.* 340.

ORDINARY, in the ecclesiastical law, is a word applied to a bishop, or any other who hath ordinary jurisdiction in his own right, and not by deputation. But sometimes it is taken less strictly, for every one that is in the place of the bishop; as guardian of the spiritualities, chancellors, commissaries, and all such as are in the place of the ordinary. 1 *Inst.* 96. 2 *Inst.* 398.

ORDINATION: No person shall be admitted to the holy order of deacon, unless he be twenty-three years of age; nor to the order of priest, unless he be twenty-four years of age complete. And none shall be ordained without a title. And he shall have a testimonial of his good life and behaviour. And the bishop shall examine him; and, if he sees cause, may refuse him. And before he is ordained, he shall take the oaths of allegiance and supremacy before the ordinary, and subscribe the thirty-nine articles.

ORIGINAL WRIT, is a mandatory letter from the king in parchment, sealed with his great seal, and directed to the sheriff of the county wherein the injury is committed, or supposed so to be, requiring him to command the wrong doer, or party accused, either to do justice to the complainant, or else to appear in court, and answer the accusation against him. Whatever the sheriff doth in pursuance of this writ, he must return or certify to the court, together with the writ itself; which return is always made to be at the least fifteen days from the date or teste of the writ. 3 *Black.* 273. This original is the foundation of the *capias*, and all subsequent process. The court of common pleas proceeds by original in all cases.

Original writs in actions are also used in the king's bench; and when the party proceeds on such writ, error lies in parliament only, and not (as on the common process) in the exchequer chamber.

To sue a party to outlawry, the proceedings must be by *original*.

ORPHAN. In the city of *London*, a court is established for the care and government of orphans, which is a court of record. The lord mayor and aldermen have the custody of orphans (under age and unmarried) of freemen or freewomen of *London* that die, though they did not inhabit in *London*; and the keeping of all their lands and goods. And if they commit the custody of an orphan to another man, he shall have a writ of ravishment of ward, if the orphan is taken away; or the mayor and aldermen may imprison the offender till he produces the infant. *Wood. b. 4. c. 2.*

Executors and administrators are to exhibit true inventories in this

this court, and must give security to the chamberlain, by recognizance for the orphan's part; which, if they refuse to do, the court may commit them to prison till they obey. And if any sue in the ecclesiastical court, or elsewhere, for a legacy, account, or duty to them by the custom, the court of orphans may by custom send a prohibition. But an infant may waive the benefit of suing in the court of orphans, and file a bill in equity against any one for discovery of the personal estate. *Id.*

If any one without the consent of the court of aldermen, marries such orphan under the age of twenty-one, though out of the city, they may fine him, and imprison him for non-payment. *Id.*

OVERT, Fr. open. So *overture*, an opening, or proposal.

OVERT ACT, open deed. In the case of treason in compassing or imagining the death of the king, this imagining must be manifested by some open act; otherwise being only an act of the mind, it cannot fall under any judicial cognizance. Bare words are held not to amount to an overt act, unless put into writing; in which case they are then held to be an overt act, as arguing a more deliberate intention.

OUSTED, is from the French *ouster*, to put out; as when we say such a one is ousted; that is, put out of possession.

OUSTER LE MAIN, *amovere manum*, signifies a livery of lands out of the hands of the lord, after the tenant came of age; which, if the lord refused to do, the tenant might have a writ to recover the same from the lord; which recovery *out of the hands of the lord*, was called *ouster le main*.

OUSTER LE MER, *ultra mare*, is one of the causes of es-foign or excuse, if a man appear not in court upon summons, for that he was then beyond the seas.

OUTFANGTHIEF, from the Saxon *ut*, out, and *fang*, taken, is a liberty or privilege, whereby a lord of a manor was enabled to call any man dwelling in his manor, and taken for felony in another place *out of his manor*, to judgment in his own fee; as *infangthief* was the privilege of trying a thief or felon taken *within his fee*.

OUTLAW, (outlaghe,) *utlagatus*, comes not immediately from the latin *lex*, but is derived to us through the Saxon *laga*, which signifies *law*: and a person outlawed, is one that is out of the protection of the king, and out of the aid of the law.

Process of outlawry lies in all indictments of treason and felony, on returns of rescous, or indictments of trespass with force and arms; but not any indictment for a crime of an inferior nature. And it seems agreed, that it lies not on any action on a statute, unless it be given by such statute, either expressly or impliedly. But, by divers statutes, outlawry lies in many civil ac-

tions; as in debt, case, account, covenant, and the like. 2 *Haw.* 302.

In which cases, in order to proceed to outlawry, an *original writ* must be sued out regularly, and after that a *capias*; and if the sheriff cannot find the defendant upon the *capias*, and returns a *non inventus*, there issues out an *alias writ*, and after that a *pluries*, to the same effect as the former. And if a *non inventus* is returned upon all of them, then a writ of *exigent* may be sued out, requiring the sheriff to cause the defendant to be proclaimed or *exacted* in five county courts successively, to render himself; and, if he does, then to take him, as in a *capias*; but if he doth not appear, and is returned *quinto exactus*, he shall then be outlawed by the coroners of the county; whereby he is put out of the protection of the law, so as to be incapable of taking the benefit of it in any respect, either by bringing actions or otherwise. 3 *Black.* 283.

By the 31 *El. c. 3.* in every action *personal*, wherein any *exigent* shall be awarded, one writ of proclamation shall be issued, having day of teste and return, as the writ of *exigent* shall have, directed to the sheriff where the defendant dwells; which writ of proclamation shall contain the effect of the action; and the sheriff shall make one proclamation in the open county court, and another at the general quarter sessions of the peace where the defendant dwells, and another a month at least before the *quinto exactus*, at or near the most usual door of the church or chapel where the defendant shall be dwelling, at the time of the *exigent* awarded, on a *Sunday* immediately after divine service.

And by 4 & 5 *W. c. 22.* upon issuing an *exigent* against any person for a *criminal* matter, before judgment or conviction, there shall also issue a writ of proclamation, bearing the same teste and return, where the person in the record of the proceeding is mentioned to inhabit, according to the form of the said statute 31 *El. c. 3.* which writ of proclamation shall be delivered to the sheriff, three months before the return of the same.

The punishment of an outlawry in a *civil* action, and also upon an indictment for a misdemeanor, is forfeiture of goods and chattels. And if after outlawry, the defendant appears publicly, he may be arrested by a writ of *capias utlagatum*, and confined till the outlawry be reversed; which reversal may be had by the defendant's appearing personally in court (and in the king's bench without personal appearance, so as he appear by attorney according to the statute 4 & 5 *W. c. 18.*); and any plausible cause, however slight, will in general be sufficient to reverse it, the same being considered only as a process to compel an appearance. But then the defendant must pay full costs, and put the plaintiff in the same condition, as if he had appeared before the *exigent* was awarded. An outlawry in *treason* or *felony* amounts to a conviction
on

on and attainder of the offence charged in the indictment, as much as if the offender had been found guilty by his country. 3 *Black.* 284. 4 *Black.* 319.

OWLING, (so called from its being carried on in the night, when the owl is abroad,) is the offence of transporting wool or sheep out of the kingdom; which was an offence at common law, and is further prohibited by divers acts of parliament. The 8 *El. c.* 3. makes the transporting of live sheep, or embarking them on board any ship, for the first offence, forfeiture of goods and imprisonment for a year; and, at the end of the year, the left hand to be cut off in some public market, and nailed in the openest place; and the second offence is felony. (But the offender may have his clergy, as well in the case of cutting off his hand, as in the case of felony. 3 *Inst.* 104.) The statute 12 *C.* 2. *c.* 32. and 7 & 8 *W. c.* 28. make the exportation of wool, sheep, or fuller's earth, liable to pecuniary penalties; and the forfeiture of the interest of the ship and cargo by the owners, if privy thereto; and confiscation of goods, and three years imprisonment to the master and all the mariners. And the statute 4 *G. c.* 11. (amended and further enforced by 12 *G.* 2. *c.* 21, and 19 *G.* 2. *c.* 34.) makes it transportation for seven years, if the penalties be not paid. 4 *Black.* 154. [All these acts are repealed by 28 *G.* 3. *c.* 38. See **WOOL.**]

OXGANG of land, is of no certain determinate quantity, being in general as much as in an ordinary way one yoke of oxen can cultivate in a year.

OYER AND TERMINER, is a court held by virtue of the king's commission, to *hear and determine* all treasons, felonies, and misdemeanors. This commission is directed commonly to two of the judges of the circuit, and several gentlemen of the county; but the judges only are of the quorum, so that the rest cannot act without them. The words of the commission are, "to inquire, hear, and determine;" so that, by virtue of this commission, they can only proceed upon an indictment found at the same assizes; for they must first *inquire* by means of the grand jury, or inquest, before they are impowered to *hear and determine* by the help of the petty jury. Therefore, they have another commission, of *general gaol delivery*; which empowers them to try and deliver every prisoner, who shall be in gaol when the judges arrive at the place of assize, whenever indicted, or for whatever crime committed. So that, one way or another, the gaol is cleared at that time. Sometimes, upon urgent occasions, the king issues a special or extraordinary commission of oyer and terminer, limited to those offences which stand in need of immediate inquiry and punishment; upon which, the course of proceeding is much the same as upon general and ordinary commissions. Formerly, no judge could act in the county where he was born or

inhabited ; but now by the 12 G. 2. c. 27. he may act as a justice of oyer and terminer, and of general gaol delivery, within any county of *England*; though he is still restrained in civil causes of assize and nisi prius. 4 *Black.* 269.

OYES, is an expression used by the cryer of a court, in order to enjoin silence, when any proclamation is to be made ; being a corruption of the French *oyez*, which signifies *bear ye*. 4 *Black.* 340.

P A I

PAIN FORTE ET DURE. See MUTE.

PAINS AND PENALTIES. Acts of parliament to at- taint particular persons of treason or felony, or to inflict *pains and penalties* beyond, or contrary to the common law, to serve a special purpose, are to all intents and purposes new laws, made *pro re natâ*, and by no means an execution of such as are already in being. 4 *Black.* 259.

PAIS, *patria*, the country ; as trial *per pais*, is tryal by the country, or a jury.

PALATINE COUNTIES, are those of *Chester*, *Durham*, and *Lancaster* ; so called a *palatio*, because the owner thereof, the earl of *Chester*, the bishop of *Durham*, and the duke of *Lancaster*, had in those counties *jura regalia*, as fully as the king hath in his *palace*. They had large privileges granted to them, because they bordered upon the enemies countries, *Wales* and *Scotland* ; in order that the owners, being encouraged by so large an authority, might be more watchful in their defence ; and that the inhabitants, having justice administered at home, might not be obliged to go out of the county, and leave it open to the enemies incur- sions. 1 *Black.* 116.

PALMESTRY, a kind of divination practised by looking upon the lines and marks in the *palm* of the hand ; being a deceitful art used by the Egyptians, prohibited by the statute 1 & 2 P. & M. c. 4. 4 *Black.* 166.

PANEL, is a little *pane*, or oblong piece of parchment, con- taining the names of the jurors, annexed to the writ of *venire fa- cias*, and returned by the sheriff to the court from whence the process issued.

PANNAGE, *pasnage*, is the fruit of trees ; as acorns, crabs, nuts, which the swine feed upon in the woods. Sometimes also, it is used to signify the money which is paid for the pan- nage.

PAPER.

PAPER. By the 24 G. 3. c. 41. every paper-stainer or maker of paper, shall take out a licence annually from the officers of excise.

And by the 27 G. 3. c. 13. and 27 G. 3. c. 31. certain duties are imposed on all paper made, printed, painted, or stained in *Great Britain*; and also on paper imported; and drawbacks are allowed on the exportation thereof, as set forth in schedules annexed to the said acts. And several regulations are made by the said acts, and also by several others, concerning the making, printing, painting, and staining of paper, which is to be under the management of officers appointed by the commissioners of the treasury.

PAPISTS. See **POPERY.**

PAR, is a term in exchange, where a man, to whom a bill is payable, receives of the acceptor just so much in value as was paid to the drawer by the remitter. And, in the exchange between one country and another, *par* is defined to be a certain number of pieces of the coin of one country, containing in them an equal quantity of silver to that of another number of pieces of the coin of some other country; as, where 36*s.* of the money of *Holland*, have just as much silver as 20*s.* *English* money; the bills of exchange drawn from *England* to *Holland* at the rate of 36*s.* *Dutch* for each pound sterling, is according to the *par*. *Lock's Consideration of Money*, pag. 18.

PARAMOUNT, signifies the highest lord of the fee, having under him inferior or mesne lords, of whom the tenants hold immediately, as they hold mediately of the lord paramount. This feignory of a lord paramount, is frequently termed an *honor*, and not a manor; especially, if it hath belonged to an ancient feudal baron, or hath been at any time in the hands of the crown. 2 *Black.* 91.

PARAPHERNALIA, from *παρεα*, and *prater*; and *φίσην*, *dos*; are the woman's apparel, jewels, and other things, which, in the life-time of her husband, she wore as the ornaments of her person, to be allowed by the discretion of the court according to the quality of her and her husband, over and above her jointure and dower.

The husband cannot by his will devise such ornaments and jewels of his wife; though, during his life, he hath power to sell or dispose of them. But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, legatees, and all other persons except creditors where there is a deficiency of assets. 2 *Black.* 430.

Where the personal estate hath been exhausted in payment of specialty creditors, the widow shall stand in their place to the amount of her *paraphernalia*, upon the real assets of the heir at law. 3 *Atk.* 369.

PARAVAIL,

PARAVAIL, signifies the lowest tenant of the fee, or he that is immediate tenant to one that holdeth over of another : and he is called tenant *paravail*, because it is presumed he has the profit and *avail* of the land. 2 *Inst.* 296.

PARCENARY, is the holding of lands jointly by parceners, when the common inheritance is not divided. For which, see **COPARCENERS**.

PARCHMENT. See **VELLUM**.

PARCO FRACTO, is a writ that lies against one who violently breaks the pound, and takes out beasts from thence which had been lawfully impounded.

PARDON, is a work of mercy, whereby the king, either before the attainder, sentence, or conviction, or after, forgives any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical. 3 *Inst.* 233.

Pardons are either *general* or *special* : *general*, are by act of parliament ; of which, if they are without exceptions, the court must take notice *ex officio* ; but if there are exceptions therein, the party must aver that he is none of the persons excepted. The acts of general pardon, from time to time occasionally passed, have commonly run in one and the same form. The last was that of the 20 G. 2. c. 52. whereby all persons are pardoned and discharged from all treasons, misprisions of treasons, felonies, treasonable and seditious words and libels, leasing making, misprisions of felony, offences whereby any person may be charged with the penalty of *premunire*, riots, routs, offences, contempts, trespasses, entries, wrongs, deceits, misdemeanors, forfeitures, penalties, sums of money, pains of death, pains corporal, and pains pecuniary, and generally, from all other things, causes, quarrels, suits, judgments, and executions, not by this act excepted, which can by the king be pardoned :—Excepted, persons in the service of the pretender ; forging the king's seal ; coining ; violating the privileges of ambassadors ; murders ; petty treasons ; poisonings ; burning of houses, corn, hay, straw, wood ; shooting at any person ; sending threatening letters ; piracy ; destroying ships ; offences in the navy or army ; burglary ; sacrilege ; robbery ; sodomy ; buggery ; rape ; perjury ; subordination ; forgery ; felony in cases of bankruptcy ; destroying banks of rivers, and sea banks ; firing coal-pits ; offences against the excise, customs, land-tax, post-office, stamp duties, duty on houses and windows, wool, importing, or exporting goods ; offences concerning highways or bridges ; imbezzling goods and warlike stores of the crown ; titles of *quare impedit* ; incest ; simony ; dilapidations ; first fruits ; tenths ; money due to the king from public officers on account ; persons transported ; offences by papists ; contempts in cases for non-performance of awards, or non-payment of costs ; contempts in ecclesiastical courts, in causes commenced

menced for matters of right only, and not for correction; contempts in courts of admiralty proceeding civilly, and not criminally; and excepted, several persons by name.

Special pardons are either *of course*, as to persons convicted of manslaughter, or *se defendendo*; and by divers statutes, to those who shall discover their accomplices in several felonies; or, *of grace*, which are by the king's charter, of which the court cannot take notice *ex officio*, but they must be pleaded. 3 *Inst.* 233.

Some things there are which the king cannot pardon; as, he cannot pardon an offence before it is committed, but such pardon is void. 2 *Haw.* 389.

As the release of the party will not bar an indictment at the suit of the king; so neither will a pardon by the king be any bar to an appeal at the suit of the party. 2 *Haw.* 392.

And in some cases, even where the king is sole party, some things there are which he cannot pardon; as, for example, for all common nuisances, as for not repairing of bridges or highways, the suit (for avoiding multiplicity of suits) is given to the king only, for redress and reformation thereof; but the king cannot pardon or discharge either the nuisance, or the suit for the same; because, such pardon would take away the only means of compelling a redress of it. 3 *Inst.* 237.

Thus also, if one be bound by recognizance to the king, to keep the peace against another by name, and generally, all other lieges of the king, in this case, before the peace be broken, the king cannot pardon or release the recognizance, although it be made only to him, because it is for the benefit and safety of his subjects. *Id.* 238.

A pardon after retainer doth not restore the corruption of blood, for this cannot be restored but by act of parliament. But, as to issue born after the pardon, it hath the effect of a restitution of blood. 1 *H. H.* 358.

A pardon of treason or felony restores a man to his credit so as he may be a good witness; but a pardon of perjury doth not so restore his credit as to admit him to be a witness. 1 *Ventr.* 349.

PARENTS AND CHILDREN:

1. If a man hath a wife and dieth, and within a very short time after, the wife marries again, and within nine months hath a child, so as it may be the child of the one or the other, this child may chuse either of them for his father. 1 *Inst.* 8.

2. The father hath interest in the profits of the children's labour while they are under age, if they live with him, and are maintained by him. But the father hath no interest in the *estate* of the children, either real or personal, otherwise than as their guardian; for he must account to them for it, and for the profits received, when they come of age. *Wood. b. 1. c. 6.*

So the father cannot apply a legacy left to a child in the main-
tenance

tenance of such child; nor can he put him out apprentice with the money arising from the legacy. 3 *Atk.* 399.

3. The consent or concurrence of the parent to the marriage of a child under age is necessary; otherwise the marriage is void. 26 *G. 2. c.* 33.

4. If a child dies intestate and unmarried, the father alone is intitled to the goods and chattels of such child: if there be no father, the mother can only come in for an equal share with every of the brothers and sisters.

5. The eldest son is heir to his father; if there be no son, but daughter only, then all the daughters shall be heirs equally.

6. Parents and children may assist each other in their suits; and may justify the defence of each other's persons. 2 *Inst.* 564.

7. Father and grandfather, mother and grandmother, and children of every poor and impotent person, being of sufficient ability, shall maintain such poor person in such manner as the justices in sessions shall appoint; by the 43 *Eliz. c.* 2. And the interpretation which the courts of law have made upon this statute is, that if a mother or grandmother marries again, and was before such second marriage of sufficient ability to keep the child, the husband shall be charged to maintain it; for this being a debt of her's when single, shall, like others, extend to charge the husband. But at her death, the relation being dissolved, the husband is under no farther obligation. 1 *Black.* 448.

If parents run away, and leave their children at the charge of the parish, the churchwardens and overseers, by order of the justices, may seize the rents, goods, and chattels of such parents, and dispose thereof towards their children's maintenance. 5 *G. c.* 8.

If any popish parent shall refuse to allow his protestant child a fitting maintenance, with a view to compel him to change his religion, the lord chancellor shall, by order of court, constrain him to do what is just and reasonable. 11 & 12 *W. c.* 4.

Also, if Jewish parents refuse to allow their protestant children a fitting maintenance, suitable to the fortune of the parent, the lord chancellor, on complaint, shall make such order therein as he shall think proper. 1 *An. fl. 1. c.* 30.

8. A parent may lawfully correct his child, being under age, in a reasonable manner. But the legal power of a father over the persons of his children ceaseth at the age of twenty-one; for they are then arrived at that point which the law hath established, when the empire of the father, or other guardian, gives place to the empire of reason. 1 *Black.* 452, 3.

PARES, a man's *peers* or *equals*; as the jury for trial of causes, who were originally the vassals or tenants of the lord, being the equals or peers of the parties litigant; and, as the lord's vassals judged each other in the lord's courts, so the king's vassals,

or

or the lords themselves, judged each other in the king's court.

3 *Black.* 349.

PARISH, is that circuit of ground which is committed to the charge of one parson, or vicar, or other minister, having care of souls therein. These districts are computed to be near ten thousand in number. How ancient the division of parishes is, may at present be difficult to ascertain; for it seems to be agreed, that in the early ages of christianity in this island, parishes were unknown, or at least signified the same that a diocese does now. There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only, that he did it to some: or, if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion. 2 *Black.*

112.

PARISH CLERK, was anciently a real clerk, and some are so at this day. He is generally appointed by the incumbent, but by custom may be chosen by the inhabitants; and if such custom appears, the court of king's bench will grant a mandamus to the ordinary to swear him in, for the establishment of the custom turns it into a temporal or civil right. Parish clerks are regarded by the common law, as persons who have freeholds in their offices; and therefore, though they may be punished, yet they cannot be deprived, by ecclesiastical censures. 1 *Black.* 395.

PARK, (from the French *parquer*, to inclose,) is a large parcel of ground privileged for wild beasts of chase, by the king's grant, or by prescription. 1 *Inst.* 233.

A park must be inclosed; for if it lies open, it is a good cause of seizure into the king's hands as forfeited; and the owner cannot have an action against those that hunt in his park, if it lies open. *Id.*

The beasts of park properly extend to the buck, doe, fox, marten, and roe; but, in a common and legal sense, to all the beasts of the forest; which, besides the other, are reckoned to be hart, hind, hare, boar, and wolf, and, in a word, all wild beasts of venery or hunting. *Id.*

Parks, as well as chases, are subject to the common law, and are not to be governed by the forest laws. 4 *Inst.* 314.

If any person shall pull down or destroy the pale or wall of any park, he shall forfeit 3*l.* 16 *G.* 3. c. 30.

PARLIAMENT:

1. *Issuing the writ.*
2. *Qualification of the candidates.*
3. *Qualification of the electors.*
4. *Election.*

5. *Return.*

5. *Return.*
6. *Manner of proceeding in parliament.*
7. *Privilege of parliament.*
8. *Adjournment, prorogation, and dissolution.*

1. *Issuing the writ.*

1. WHEN any new parliament is summoned, the lord chancellor sends his warrant to the clerk of the crown in chancery, who thereupon issues out writs to the sheriff of every county, for the election of all the members to serve for that county, and every city and borough therein. Or, if a vacancy happens during the sitting of parliament, the speaker, by order of the house, issues the like writ; and if a vacancy happens by death, in the time of a recess for upwards of twenty days, then the speaker issues such writ without the order of the house.

And there shall be forty days between the teste or date of the writ, and the return of it.

And the writ shall be delivered to the proper officer to whom the execution thereof doth belong, and to no other person. 7 & 8 W. c. 25. f. 1.

And every such officer, upon receipt of the writ, shall indorse thereon the day that he received it. *Id.*

2. And in case of an election of a *knight of a shire*, the sheriff shall, within two days after the receipt of the writ, cause proclamation to be made at the place where the ensuing election ought by law to be holden, of a special county court to be there holden, for the purpose of such election only, on any day, (*Sunday* excepted,) not later from the day of making such proclamation than the sixteenth day, nor sooner than the tenth day; and shall proceed in such election, at such special county court, in the same manner as if the said election was to be held at a county court as heretofore. 25 G. 3. c. 84. f. 4.

3. With respect to *cities, boroughs, and towns corporate*, the sheriff or other officer who received the writ, shall forthwith, upon receipt thereof, make out a precept to each borough, town corporate, or place within his jurisdiction, where any members are to be elected, and within three days (and in the cinque ports six days) after receipt of the said writ, shall, by himself, or his proper agent, deliver the precept to the officer to whom the execution thereof doth belong, and to no other person; which officer shall indorse the day of his receipt thereof, in presence of the party to whom he received the same; and shall forthwith cause public notice to be given of the time and place of election, and shall proceed in the election within eight days after receipt of the precept, and give four days notice at least of the day appointed for the election. 7 & 8 W. c. 25. f. 1. 10 & 11 W. c. 7.

4. In a *city or town, being a county of itself*, the sheriff shall forthwith,

with, on receipt of the writ, give public notice of the time and place of election, and proceed to election thereupon, within eight days after receipt of the writ, and give three days notice thereof at least, exclusive of the day of receipt of the writ, and of the day of election. 19 G. 2. c. 28.

2. *Qualification of the candidates.*

1. No member shall sit or vote in either house of parliament, unless he be *twenty-one years of age*. 4 *Inst.* 47.

2. In order to prevent *papists* from sitting in either house of parliament, it is enacted, that no person shall sit or vote in either house till he hath, in presence of the house, taken the oaths of allegiance, supremacy, and abjuration, and subscribed and repeated the declaration against transubstantiation, and invocation of saints, and the sacrifice of the mass. 30 C. 2. *st.* 2. c. 1. 1 G. c. 13.

3. No person born out of *Great Britain* or *Ireland*, or the dominions thereunto belonging (although he be naturalized and made a denizen, except such as be born of *English* parents) shall be capable to be a member of either house of parliament. 12 & 13 *W. c.* 2.

4. Sheriffs of counties, and mayors and bailiffs of boroughs, are not eligible in their respective jurisdictions, as being returning officers; but a sheriff of one county may be chosen knight of another. 1 *Black.* 175.

5. By several statutes, no persons concerned in the management of any duties or taxes created since 1692, except the commissioners of the treasury; nor any of the officers following, viz. commissioners of prizes, transports, sick, and wounded, wine licences, navy, and victualling; secretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations; officers of *Minorca* or *Gibraltar*; officers of the excise and customs; clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretaries of state, salt, stamps, appeals, wine licences, hackney coaches, hawkers, and pedlars; nor any persons that hold any new office under the crown, created since 1705, are capable of being elected. 1 *Black.* 175.

But this shall not extend to, or exclude the treasurer or comptroller of the navy, secretaries of the treasury, secretary to the chancellor of the exchequer, secretaries of the admiralty, undersecretary of state, deputy paymaster of the army, or any person holding any office for life, or for so long as he shall behave himself well in his office. 15 G. 2. c. 22.

If any member shall accept an office of profit under the crown, except an officer in the army or navy accepting a new commission, his

his election shall be void; but he shall be capable of being re-elected. 6 *An. c. 7. f. 26.*

6. No person having a pension from the crown during pleasure, shall be capable of being elected. 6 *An. c. 7. f. 25.*

7. No person shall be capable to sit or vote in the house of commons for a county, unless he hath an estate freehold or copyhold, for his life or some greater estate, of the clear yearly value of 600*l.*; nor for a city or borough, unless he hath a like estate of 300*l.* And any other candidate, or two electors, may require him to make oath thereof at the time of election, or before the day of the meeting of the parliament; and before he shall vote in the house of commons, he shall deliver in an account of his qualification, and the value thereof, under his hand, and make oath of the truth of the same. But this shall not extend to the eldest son or heir apparent of a peer, or of any person qualified to serve as knight of a shire, nor to the members of either of the two universities. 9 *Ann. c. 5. 33 G. 2. c. 20.*

3. *Qualification of the electors.*

1. No person shall be admitted to vote, under the age of twenty-one years. 7 & 8 *W. c. 25.*

2. By several acts, every elector of a knight of a shire shall have freehold to the value of 40*s.* a year within the county; which is to be clear of all charges and deductions, except parliamentary and parochial taxes. 1 *Black. 172.*

3. No person shall vote in right of any freehold granted to him fraudulently to qualify him to vote. Fraudulent grants are such as contain an agreement to re-convey, or to defeat the estate granted; which agreements are enacted to be void, and the estate vested absolutely in him to whom it is so granted. 1 *Black. 173.*

4. No person shall vote for a knight of a shire, without having been in the actual possession of the estate for which he votes, or in the receipt of the rents or profits thereof to his own use, above twelve calendar months; unless it came to him by descent, marriage, marriage settlement, devise, or promotion to a benefice or office. 18 *G. 2. c. 18. f. 5.*

5. No person shall vote in respect of an annuity or rent charge, unless registered with the clerk of the peace twelve calendar months before. 3 *G. 3. c. 24.*

6. In mortgaged or trust estates, the mortgagor, or *cestui que trust*, shall vote; and not the trustee or mortgagee, unless they be in actual possession. 7 & 8 *W. c. 25. f. 7.*

7. All conveyances to multiply voices, or to split votes, shall be void; and no more than one voice shall be admitted for one and the same house or tenement. *Id.*

8. No person shall vote for a knight of a shire, in respect of any

any messuages, lands, or tenements, which have not been charged to the land tax six calendar months before. 20 G. 3. c. 17. f. 1, 2.

9. No person shall vote for any estate holden by copy of court roll. 31 G. 2. c. 14.

10. The right of election in *boroughs* is various, depending intirely on the several charters, customs, and constitutions of the respective places; but by the 2 G. 2. c. 24. this right of voting for the future shall be allowed according to the last determination of the house of commons concerning it.

And no person, claiming to vote in right of his being a *freeman* of a corporation, shall be allowed, unless he hath been admitted to his freedom twelve calendar months before. 3 G. 3. c. 15.

And no person shall vote at any election for any city or borough, as an inhabitant paying scot and lot, or inhabitant householder, housekeeper, and pot-waller, legally settled or resiant, or as an inhabitant thereof, unless he hath been *bona fide* an inhabitant thereof for six calendar months previous to the day of election; and such vote shall be void, and he shall forfeit 20*l.* except possession acquired by descent, devise, marriage, or marriage settlement, or promotion to an office or benefice: and this shall relate only to persons who claim to vote in manner aforesaid. 26 G. 3. c. 100. f. 1, 2.

4. Election.

1. IN order that elections may be free, the secretary at war, on notice given to him by the clerk of the crown, of the writ being issued, shall send orders for the removal of soldiers, one day at least before the election, to the distance of two or more miles, and not to return till one day after the poll shall be closed. But this not to extend to the guards, nor to any castle or fortified place where a garrison is usually kept, nor to any officer or soldier having right to vote at such election. 8 G. 2. c. 30.

2. By vote of the house of commons, to whom alone belongs the power of determining contested elections, no lord of parliament, or lord lieutenant of a county, hath any right to interfere in the election of commoners. And, by several statutes, if any officer of the excise, customs, post-office, stamps, or certain other branches of the revenue, shall meddle in elections, by persuading or dissuading any voter, he shall forfeit 100*l.* and be disabled to hold any office. 1 *Black.* 178.

3. And to prevent bribery and corruption, no candidate, after teite of the writ of summons, or after a place becomes vacant in parliament time, shall, by himself, or by any other ways or means on his behalf, or at his charge, before his election, directly or indirectly, give, or promise to give, to any elector, any money, meat,

meat, drink, provision, present, reward, or entertainment, to or for any such elector in particular; or to any county, city, town, borough, port, or place in general; in order to his being elected, on pain of being incapacitated. 7 & 8 W. c. 4.

4. And the sheriff shall erect, at the expence of the candidates, such number of *booths* for taking the poll, as the candidates, or any of them, shall, three days at least before the commencement of the poll, desire, not exceeding the number of hundreds or other like divisions, and not exceeding fifteen in the whole; and shall affix, on the most public part of each, the name of the hundred for which such booth is designed; and shall make out a list for each booth of the several townes, parishes, and hamlets, wholly or in part within such hundred; and shall, on request, deliver a copy to any of the candidates, paying 2s. 18 G. 2. c. 18.

5. And the sheriff shall appoint such number of *clerks*, as he shall think fit, for taking the poll in the presence of himself or deputy; which clerks, before they begin to take the poll, shall be sworn by the sheriff or under-sheriff, truly and indifferently to take the poll, and to set down the name of each freeholder, and the place of his freehold, and for whom he polls; and to poll no freeholder who is not sworn, if so required by any of the candidates. 7 & 8 W. c. 25. s. 3.

And where there are several booths, the sheriff shall appoint clerks at each booth; who shall be paid by the candidates, not exceeding each one guinea a day. 18 G. 2. c. 18.

And he shall admit one person for each candidate to be *inspector* of the clerks. 7 & 8 W. c. 25. s. 3.

6. Also the sheriff shall allow a *cheque book* for every poll book for each candidate, to be kept by their inspectors at the place of taking the poll. 19 G. 2. c. 28.

7. Before the returning officer shall proceed to the election, he shall, immediately after the reading of the writ, take and subscribe the following oath, to be administered by a justice of the peace, or any three electors: "I *A. B.* do solemnly swear, that
 " I have not, directly or indirectly, received any sum or sums
 " of money, office, place, or employment, gratuity, or reward,
 " or any bond, bill, or note, or any promise of gratuity what-
 " soever, either by myself, or any other person to my
 " use, or benefit, or advantage, for making any return at
 " the present election of members to serve in parliament; and
 " that I will return such person or persons as shall, to the best
 " of my judgment, appear to me to have the majority of legal
 " votes;" which oath shall be entered amongst the records of the sessions. 2 G. 2. c. 24. s. 3.

And if the election shall not be determined upon view, with the consent of the freeholders there present, but a poll shall be demanded, the same shall commence on the day on which such demand

demand is made, or upon the next day at farthest, (unless it be Sunday, and then on the day after,) and shall be regularly proceeded in from day to day (Sunday excepted) until the same be finished, and shall not continue more than fifteen days at most, (Sunday excepted;) and the poll shall be kept open seven hours at least each day, between eight in the morning and eight in the evening. 25 G. 3. c. 84. f. 1. 3.

8. And every freeholder, before he is admitted to poll for a knight of the shire, shall, if required by a candidate, or any elector, take the following oath (to be administered by the sheriff, undersheriff, or one of the sworn clerks): “ You shall swear (or, being one of the people called Quakers, you shall solemnly affirm) that you are a freeholder in the county of _____ and have a freehold estate, consisting of _____ [specifying the nature of it, whether messuage, land, rent, tithe, or what else; and if such freehold estate consists in messuages, lands, or tithes, then specifying in whose occupation; and if in rent, then specifying the names of the owners or possessors of the lands or tenements, out of which such rent is issuing] lying or being at _____ in the county of _____ of the clear yearly value of 40s. over and above all rents and charges payable out of, or in respect of the same; and that you have been in the actual possession or receipt of rents or profits thereof, for your own use, above twelve calendar months, or that the same came to you within the time aforesaid, by descent, marriage, marriage-settlement, devise, or promotion to a benefice in the church, or by promotion to an office; and that such freehold estate has not been granted or made to you fraudulently, on purpose to qualify you to give your vote; and that the place of your abode is at _____ in _____ and that you are twenty-one years of age, as you believe; and that you have not been polled before at this election.” And if he falsifies, he shall suffer as in case of perjury. 18 G. 2. c. 18. f. 1.

And the sheriff and clerk shall enter not only the place of his freehold, but also the place of his abode, as he shall declare the same at the time of giving his vote; and shall enter *jurat* against the name of every such voter who hath taken the oath. 10 An. c. 23. f. 5.

And the aforesaid act of the 18 G. 2. c. 18. shall extend to *cities and towns, that are counties of themselves*, where persons have a right to vote in respect of a freehold of 40s. a year; but not where they have a right to vote in respect of burgage tenure, or where the right to vote for a freehold doth not require the same to be of 40s. a year. 19 G. 2. c. 28.

9. And the voter, if required by either of the candidates, or any two electors, shall, before he votes, take the oath against bribery, to be administered by the returning officer, or his deputy,

as follows: " I *A. B.* do swear (*or being one of the people called Quakers, do solemnly affirm*) I have not received or had by myself, or any person whatsoever in trust for me, or for my use and benefit, directly or indirectly, any sum or sums of money, office, place, or employment, gift or reward, or any promise or security for any money, office, employment, or gift, in order to give my vote at this election; and that I have not before been polled at this election." 2 *G. 2. c. 24. f. 1.*

And if any person shall take any money or other reward, or contract or agree for any money, gift, office, employment, or other reward, to give, or forbear to give his vote, he shall forfeit 500*l.* *f. 7.*

And in all cases where no oath of qualification other than the said oath against bribery, or the oaths of allegiance, supremacy, and abjuration, can now by law be required, every person claiming to vote, shall, (if required as aforesaid,) before he is admitted to poll, take the oath following:

" I do swear (*or affirm*) that my name is *A. B.*, and that I am _____ and that the place of my abode is at _____ in the county of _____ and that I have not before polled at this election; and that I verily believe myself to be of the full age of twenty-one years." 25 *G. 3. c. 84. f. 5.*

5. *Return.*

1. AFTER the election, the names of the persons chosen shall be written in an indenture, under the seals of the electors, and tacked to the writ. 7 *H. 4. c. 15.*

2. The returning officer in boroughs, returns his precept to the sheriff, with the persons elected by the majority. And the sheriff returns the whole, together with the writ for the county, and the knights elected thereupon, to the clerk of the crown in chancery, before the day of meeting, if it be a new parliament; or within fourteen days after the election, if it be an occasional vacancy; and this, under the penalty of 500*l.* And if the sheriff doth not return such knights only as are duly elected, he forfeits by the ancient statutes 100*l.*; and the returning officer of a borough, for a like false return, 40*l.* And by later statutes, they are liable to an action at the suit of the party duly elected, and to pay double damages. And the like remedy shall be against an officer making a double return. 1 *Black. 180. 7 & 8 W. c. 7.*

3. And the sheriff shall deliver copies of the poll to any person desiring the same, paying a reasonable charge for writing thereof. 7 & 8 *W. c. 25. f. 6.*

4. And he shall, within twenty days after the election, deliver over upon oath, (to be administered by two justices,) all the poll books to the clerk of the peace, without alteration; to be kept amongst the records of the sessions. 10 *Ann. c. 23. f. 5.*

And

And the check polls, as well as the original polls taken by the sheriff or his clerks, must be lodged with the clerk of the peace : as in the *Radnorshire* election, the sheriff swore a clerk, and each of the candidates two others, and five polls were taken, which were delivered to the sheriff ; he carried in that only which was taken by his clerk, as being the original poll, and the others only checks ; the court held, that all the books ought to have been carried in ; and granted an information against the sheriff for not doing it. 2 *Str.* 1048. *R. v. Davis.*

5. On petition to the house of commons, complaining of an undue election, forty-nine members of the house of commons shall be chosen by ballot, out of whom each party shall alternately strike out one, till they be reduced to the number of thirteen ; who together with two more, of whom each party shall nominate one, shall be a select committee, for determining such controverted election. 10 *G.* 3. c. 10 11 *G.* 3. c. 42.

6. *Manner of proceeding in parliament.*

1. THE method of making laws is much the same in both houses. In the house of commons, in order to bring in a bill, if the relief sought by it is of a *private* nature, it is first necessary to prefer a petition ; which must be presented by a member, and usually sets forth the grievance desired to be remedied. This petition, when founded on facts that may be in their nature disputed, is referred to a committee of members, who examine the matter alleged, and accordingly report it to the house ; and then (or otherwise upon the mere petition) leave is given to bring in the bill. In *public* matters, the bill is brought in upon motion made to the house, without any petition at all. 1 *Black.* 181.

2. If the bill begins in the house of lords, if of a *private* nature, it is referred to two of the judges, to make report. *Id.* 182.

3. After the second reading, the bill is *committed*, that is, referred to a committee ; which is either selected by the house, in matters of small importance ; or else, upon a bill of consequence, the house resolves itself into a committee of the whole house. A committee of the whole house is composed of every member ; and to form it, the speaker quits the chair, and may sit and debate as a private member, another member being appointed chairman for the time. In these committees the bill is debated clause by clause, amendments made, and sometimes the bill intirely new modelled. Upon the third reading, amendments are sometimes again made to it ; and if a new clause be added, it is done by tacking a separate piece of parchment on the bill, which is called a rider. 1 *Black.* 182.

7. *Privilege of Parliament.*

By the common law, a member of parliament shall have the privilege of parliament, not only for himself and his servants, to be freed from arrest, *subpœna*, *citation*, and the like; but also for his horses and goods to be free from distresses: but for treason, felony, and breach of the peace, there can be no privilege.

4 *Inst.* 24, 25.

But by the 10 G. 3. c. 50, any person may commence and prosecute any action in any court of record, or court of equity, or of admiralty, or in causes matrimonial and testamentary, against any peer or member of the house of commons, or any of their menial or other servants; and no proceedings thereupon shall be delayed under colour of such privilege: provided, that this shall not subject the person of any member of the house of commons to be arrested or imprisoned on any suit or proceedings. And the court out of which the writ proceeds, may order the issues levied by distringas from time to time, to be sold, and the money arising thereby, to be applied to pay such costs to the plaintiff as the court shall think just, and the surplus to be detained till the defendant shall have appeared, or other purpose of the writ be answered. And obedience may be enforced to any rule of court against any person intitled to privilege by distress infinite, if the plaintiff shall chuse to proceed in that way.

8. *Adjournment, prorogation, and dissolution.*

1. *Adjournment* is a continuance of the session from one day to another; and this is done by the authority of each house separately every day; and sometimes for a fortnight or a month together, as at *Christmas* or *Easter*; or upon other particular occasions: but the adjournment of one house is no adjournment of the other. 1 *Black.* 186.

2. *Prorogation* is the continuance of the parliament, not from one day to another, but from one sessions to another. And this is done by the royal authority. And by this, both houses are prorogued at the same time; it not being a prorogation of the house of lords or commons, but of the parliament. The session is never understood to be at an end until a prorogation; though unless some act be passed, or some judgment given in parliament, it is, in truth, no session at all. *Id.*

3. *Dissolution* of the parliament puts an end to it altogether: and this may be effected either by the king, who by his prerogative may dissolve the parliament whenever he pleases, or by the death of the king, or by the expiration of the time for which they were convened. *Id.*

By the 1 G. 3. c. 38. the parliament shall have continuance
for

for seven years, to be accounted from the day on which, by the writ of summons, they shall be appointed to meet; unless sooner dissolved by the king.

And by the 7 & 8 W. c. 25. and 6 An. c. 7. they shall not be immediately dissolved by the king's death, but shall continue further for six months, unless sooner dissolved by the successor.

PAROL DEMURRER, is a privilege allowed to an infant, that the action may stay till he comes of full age. In many real actions brought against, or by an infant under the age of twenty-one years, and also in actions of debt brought against him as heir to any deceased ancestor, either party may suggest the non-age of the infant, and pray that the proceedings may be deferred till his full age, or according to the legal phrase, that *the infant may have his age*, and that the *parol may demur*; that is, that the pleadings may be stayed; and then they shall not proceed till his full age, unless it be apparent that he cannot be prejudiced thereby. But by the statutes 3 Ed. 1. c. 46. and 6 Ed. 1. c. 2. in writs of entry *sur disseisin* in some particular cases, and in actions *ancestral* brought by an infant, the parol shall not demur; otherwise he might be deforced of his whole property, and even want a maintenance till he came of age. So likewise, in a writ of dower, the heir shall not have his age; for it is necessary that the widow's claim be immediately determined, else she may want a present subsistence. Nor shall an infant patron have it in a *quare impedit*, since the law holds it necessary and expedient that the church be immediately filled. 3 Black. 300.

PARRICIDE, is the murder of one's father or mother; for which the law hath provided no peculiar punishment different from that of common murder, presuming probably, that no person, unless totally deprived of reason, can be guilty of it.

PARSON, *persona*, properly signifies the rector of a parish church; because, during the time of his incumbency, he represents the church, and, in the eye of the law, sustains the *person* thereof, as well in suing, as in being sued, in any action touching the same. He is in himself a body corporate, in order to protect and defend the rights of the church by a perpetual succession. He is sometimes called the *rector*, or governor of the church; but *parson* is the more proper and legal appellation. 1 Inst. 300. When a parson is instituted and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law, *persona impersonata*, or *parson impersonae*. 1 Black. 391.

PARTITION, is a dividing of lands descended by the common law, or by custom, among coheirs or parceners, where there are two at the least. It may be made by coparceners, jointenants and tenants in common.

PARTNERS, are where two or more agree to come in, share

and share alike, to any trade or bargain. And although generally, where an obligation is made to divers persons for one debt, he who surviveth shall have the whole; yet in case of joint traders it is otherwise; for the wares, merchandizes, debts, or duties, that they have as joint merchants or partners, shall not survive, but the share of him that dieth shall go to his executors. And this is by the law of merchants, which is part of the laws of this realm, for the advancement and continuance of commerce and trade. 1 *Inst.* 182.

So if there are two partners in trade, and judgment is recovered against one of them, his moiety of the goods in partnership only shall be taken in execution. *Show. Rep.* 174.

An agent or factor to joint merchants, must sue the survivor for the wages: and if he accounts, he shall deduct his charges out of the effects of both; but that which is clear upon the account stated, will belong to the survivor and to the administrator; but the survivor shall take the whole, and allow a moiety to the administrator: for it would cause great confusion if both should sue, one in his own, and the other in the right of another. *L. Raym.* 341.

PASSAGE, *passagium*, is, properly, over water, as a *way* is over land. It relates to the sea and great rivers: it is used for the hire that a man pays for being transported over the sea, or over any river. An immunity from this payment was granted to several of the religious houses by divers ancient charters.

PASTURE, common of, is a right of feeding one's beasts on another's land; for in those waste grounds which are called commons, the property of the soil is generally in the lord of the manor, as in common fields it is in the particular tenants. 2 *Black.* 32.

PATRONAGE, is the right of presentation to a church, or ecclesiastical benefice: it signifies to take the church into his protection. For when lords of manors first built churches on their own demesnes, and endowed them with lands or other possessions, they had of common right a power annexed of nominating ministers to officiate in such churches of which they were the founders, endowers, or *patrons*. 2 *Black.* 21.

PAVIAGE, is money paid towards the paving of streets or highways.

PAUPERIS FORMA. See **FORMA PAUPERIS**.

PAWN, (*pignus*,) is a pledge or gage for surety of payment of money lent.

PAWN-BROKER, is one who lets out money upon pawn or pledge, whose office is regulated by divers statutes.

By the 25 *G. 3. c.* 48. every pawn-broker is required to take out a licence annually from the commissioners of the stamp duties. By 30 *G. 2. c.* 24. *f.* 4. & 29 *G. 3. c.* 57. *f.* 4. every person

son who shall take any goods by way of pawn or pledge, shall enter a description thereof in a book, and the money advanced thereon, at what time, and to whom, and deliver a duplicate thereof to such person, if required.

And where goods pawned shall be damaged through neglect of the pawn-broker, a justice of the peace may award a reasonable satisfaction to be deducted out of the principal and interest. *f. 5. & 29 G. 3. c. 57. f. 18.*

Persons buying or taking in pledge linen or apparel, intrusted to others to wash or mend, shall forfeit double the sum, and restore the goods. *f. 6.*

The sale of goods wrongfully gotten within *London and Westminster*, to any broker or pawn taker, shall not alter the property. And such broker shall, upon request, declare what goods are come to his hands, on pain of forfeiting double value. *1 Jac. c. 21.*

Persons offering goods to sale or pawn, not giving a good account of themselves, may be detained with the goods, and delivered over to a constable, to be carried before a justice, who may commit the party for further examination; and a justice, on application and oath of the owner whose goods are unlawfully pawned, may issue his warrant to search the suspected person's house; and the goods, if found, shall be restored to the owner. *30 G. 2. c. 24. f. 7, 8, 9.*

Goods remaining unredeemed for two years [but by *29 G. 3. c. 57. f. 12.* one year] may be sold, subject to an account for the overplus. *f. 11.*

PAYMENT. If a rent is reserved upon a lease of lands at four usual feasts in the year, the lessor shall have an action of debt after the first day of failure; because the same is accounted in law a reservation of parcel of the profits of the land: so that every quarter's rent is a several debt. So it is of a covenant or promise, or recognizance to pay tool, at five several days after the first default. Yet if one lease a stock of cattle, or other personal goods, and the rent is to be paid at several days, the lessor must tarry until all the days are expired, because it is a personal contract. And so it is of a contract for payment of several sums of money. Where note a diversity between real and personal contracts. *Wood. b. 2. c. 2.*

When one is to pay rent at a certain day, he hath all that day until night to pay it; but so that the receiver may see to tell it. And when a common person appoints no place of payment of his rent, the law appoints it to be on the land; but in the case of the king, the payment must be at the exchequer, or to his receiver. If a man is bound in an obligation to pay his rent at a day, he must seek out his landlord to pay him. *Id.*

Payment of money before the day, is in law payment at the day;

day; for it cannot in presumption of law, be any prejudice to him to whom the payment is made, to have his money before the time; and it appears by the party's receipt of it, that it is for his own advantage to receive it then, otherwise he would not do it. 5 *Co.* 117.

Upon pleading of payment at the day, it is good evidence to prove payment at any time *after* the day, and before action brought. 2 *Lil.* 287.

PEACE. The king, by his office and dignity royal, is the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace kept, and to punish such as break it; hence it is usually called the *king's peace*. All the great officers of state are generally conservators of the peace throughout the kingdom, and may commit all breakers of it, or bind them in recognizances to keep it. As also the sheriff, coroner, constables, and tithingmen, are conservators of the peace within their own jurisdiction, and may apprehend all breakers of the peace, and commit them, till they find sureties to keep the peace. 1 *Black.* 350.

By the ancient *Saxon* constitution, these sureties of the peace were always at hand, by means of king *Alfred's* institution of decennaries or frankpledges, wherein the whole neighbourhood or tithing were mutually pledges of each other's good behaviour. But this falling into disuse, there hath succeeded to it the method of making suspected persons find particular and special surety for their future conduct. 4 *Black.* 252.

Any justices of the peace, by virtue of their commission, or those who by virtue of their office are conservators of the peace, may demand such security according to their own discretion, or at the request of any other, on due cause shewn. 4 *Black.* 253.

When the courts of justice are open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be the time of peace. So when, by invasion, insurrection, rebellion, or such like, the peaceable course of justice is disturbed and stopped, so that the courts of justice are, as it were, shut up, then it is said to be time of war. If a man be disseised in time of peace, and a descent is cast in time of war, this shall not take away the entry of the disseisee. In all real actions, the expenses or taking of the profits are laid *in time of peace*; for if they were taken *in time of war*, they are not accounted of in law. 1 *Inst.* 249.

PECULIARS, are places exempt from the jurisdiction of the ordinary of the diocese; and are of several sorts: 1. Royal peculiars; which are the king's free chapels, and are exempt from any jurisdiction but the king's. 2. Peculiars of the archbishops, exclusive of the bishops and archdeacons, which arose from

from a privilege they had to enjoy jurisdiction in such places where their seats and possessions were. Of these, there are upwards of an hundred in the province of *Canterbury*, wherein jurisdiction is administered by several commissaries, the chief of whom is the dean of the arches, for the thirteen peculiars of the archbishop within the city of *London*. 3. Peculiars of bishops, exclusive of the jurisdiction of the bishop of the diocese in which they are situate. 4. Peculiars of bishops in their own dioceses, exclusive of archidiaconal jurisdiction. 5. Peculiars of deans, deans and chapters, prebendaries, and the like; which are places wherein, by ancient compositions, the bishops have parted with their jurisdiction as ordinaries, to these societies.

PEDAGE, *pedagium*, is money given for a *foot* passage through any district or place.

PEERS, PEERAGE:

1. *Peers, pares*, signify generally by the common law, those that are impanelled in an inquest for the trial of any person, and convicting or clearing him of the offence for which he is called in question: and by *magna charta*, every one is to be tried by his peers or equals. But in common acceptation, the word peers denotes the nobility of the kingdom only, or lords of parliament, consisting of dukes, marquesses, earls, viscounts, and barons. And the reason why they are called *peers* is, for that notwithstanding there be a distinction of dignities, yet in all public actions they are equal; as in their votes in parliament, and in passing upon the trial of any nobleman.

2. The right of peerage seems to have been originally territorial; that is, annexed to lands, honors, castles, and the like; the proprietors and possessors of which were (in right of those estates) allowed to be peers of the realm, and were summoned to parliament to do suit and service to their sovereign; and, when the land was alienated, the dignity passed with it as appendant. Thus the bishops sit still in the house of lords in right of succession to certain ancient baronies annexed, or supposed to be annexed to their episcopal lands. 1 *Black.* 399.

But afterwards, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and instead of territorial, became personal. Actual proof of a tenure by barony became no longer necessary to constitute a lord of parliament; but the record of the writ of summons to him, or his ancestors, was admitted as a sufficient evidence of the tenure. *Id.* 400.

3. Peers are now created either by *writ* or by *patent*; for those who claim by prescription must suppose either a writ or patent made to their ancestors, though by length of time it may be lost. The creation by *writ*, or the king's letter, is a summons

mons to attend the house of peers, by the style and title of that barony, which the king is pleased to confer; that by *patent*, is a royal grant to a subject of any dignity and degree of peerage. The creation by writ is the more ancient way; but a man is not ennobled thereby, unless he actually take his seat in the house of lords: and therefore the most usual, because the surest, way is to grant the dignity by patent, which enures to a man and his heirs, according to the limitations thereof, though he never himself makes use of it. *Id.*

4. In criminal cases, a nobleman shall be tried by his peers. But it is said, that this doth not extend to bishops; who, though they are lords of parliament, and sit there by virtue of their baronies which they hold in right of the church, yet are not ennobled in blood, and consequently not peers of the realm. But this trial by peers is to be understood only at the suit of the king, upon an indictment of high treason, petit treason, felony, or misprision thereof; but in a case of a *præmunire*, riot, or the like, and generally for all other crimes out of parliament (unless otherwise specially provided for by statute, as it is in many instances) though it be at the suit of the king, a nobleman shall not be tried by his peers, but by the freeholders of the county. 3 *Inst.* 30. 2 *Haw.* 424.

5. Peers shall have the benefit of clergy for the first offence of felony, without being burned in the hand. 1 *Ed.* 6. c. 12.

6. A peer sitting in judgment gives not his verdict upon oath, like an ordinary jurymen, but upon his honour. He answers to bills in chancery upon his honour, and not upon his oath. But when he is examined as a witness, either in civil or criminal cases, he must be sworn. 1 *Black.* 402.

7. To spread false reports of peers or noblemen is much more penal than of common persons; scandal against them being called by the peculiar name of *scandalum magnatum*, and subjected to peculiar punishment by divers ancient statutes. *Id.*

8. A peer or peeress cannot be arrested in civil cases.

9. A peer or peeress cannot be bound over to the peace, or good behaviour, in any other place than the courts of king's bench or chancery. 1 *Haw.* 127.

10. Peers are not obliged to attend at the tourn or leet.

11. No peer hath privilege against being compelled by process of the courts of *Westminster-hall* to pay obedience to a writ of *habeas corpus* directed to him. *Burr. Mansf.* 632.

12. Process of outlawry lies against a peer, if he be indicted, and appears not, and cannot be taken; otherwise he might take advantage of his own contumacy. 3 *Inst.* 31.

13. By an order of the house of lords, *May 11, 1767*, the heralds are directed to take exact accounts, and preserve regular entries, of all peers and peeresses of *England*, and their respective descen-

descendants; and an exact pedigree of each peer and his family shall, on the day of his first admission, be delivered to the house by the principal king at arms. 3 *Black.* 106.

PEN, Brit. a hill or mountain, a head. So in the names of places; *Penrith*, a red hill; *Penruddock*, from the name of the owner: so *Penburrock*, a heap of stones upon a hill.

PENAL STATUTES, must be construed strictly; as, where the statute 1 *Ed. 6. c. 12.* having enacted, that those who are convicted of stealing *horses* should not have the benefit of clergy, the judges conceived that this did not extend to him that should steal but one horse, and therefore procured an act for that purpose in the year following. 1 *Black.* 88.

All actions upon penal statutes, for any forfeiture limited to the king, shall be brought within two years after the offence committed; if limited to the king and prosecutor, then within one year: and if it is not sued for in that one year, then the king may sue for the same within two years after the expiration of that one year. 31 *Elis. c. 5.*

PENANCE, (*pœnitentia*,) is an ecclesiastical punishment, used in the discipline of the church, which affects the body of the penitent, by which he is obliged to give a public satisfaction to the church for the scandal he hath given by his evil example. So in the primitive times, they were to give testimony of their reformation before they were re-admitted into the Christian society. In the case of incontinence, the offender is usually enjoined to do a public penance in the parish church, bareheaded and barefooted, in a white sheet, and to make open profession of his crime in a prescribed form of words; which is augmented or moderated, according to the quality of the offence, and the discretion of the judge. So in smaller faults and scandals, a public satisfaction or penance, as the judge shall decree, is to be made before the minister, churchwardens, or some of the parishioners, respect being had to the quality of the offence, and circumstances of the fact; as in case of defamation, or laying violent hands on a clerk, or the like. And as these censures may be moderated by the judge's discretion, according to the nature of the offence, so also they may be totally altered by a commutation of penance; and this hath been the ancient privilege of the ecclesiastical judge, to admit that an oblation of a sum of money, for pious uses, shall be accepted in satisfaction of public penance. But penance must be first enjoined, before there can be a commutation; or otherwise it is a commutation for nothing. *Godolph. Report. Canon. Append. 18.*

PENSION. No person having a pension from the crown, during pleasure, or for any term of years, is capable of being elected a member of the house of commons. 1 *Black.* 176.

To receive a pension from a foreign prince or state, without leave

leave of our king, hath been held to be criminal; because it may incline a man to prefer the interest of such foreign prince to that of his own country. 1 *Haw.* 58.

By statute 31 G. 1. c. 22. a duty of 1s. a pound is laid upon all perquisites of offices and pensions, payable by the crown. 1 *Black.* 326.

PENSION ECCLESIASTICAL, is a certain sum of money, paid to a clergyman in lieu of tithes: and some churches have settled on them annuities or pensions, payable by other churches. It may be sued for in the ecclesiastical court; and a bishop may sue for a pension before his chancellor, and an archdeacon before his official. *Wood. b. 2. c. 2.*

If an incumbent leaves arrearages of a pension, the successor shall be answerable; because the church itself is charged, into whatever hand it comes. *Cro. El.* 810.

PENTECOSTALS, were oblations usually paid to the church at the time of pentecost; from whence they were also called *Whitsun-f-rthings*. The payment of these is now out of use, except in some particular churches by custom.

PER; entry *sur disseisin in the per*. See **ENTRY**.

PERFUMERY. By the 26 G. 3. c. 49. a stamp duty is imposed on perfumery, according to the price the same shall be sold at. And every person who shall deal therein, shall take out a licence annually from the stamp-office.

PERJURY, by the common law, is a wilful false oath by one, who, being lawfully required to depose the truth in a judicial proceeding, swears absolutely, in a matter material to the point in question, whether he be believed or not. 3 *Inst.* 164.

It must be in a judicial proceeding; therefore no oath whatsoever, taken before persons acting merely in a private capacity; or before those who take upon them to administer oaths, without legal authority; or before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them; or even before those who take upon them to administer justice by virtue of an authority, seemingly colourable, but in truth unwarranted, and merely void; can amount to perjury, but is altogether idle and of no force. 1 *Haw.* 174.

And though an oath be given by him that hath lawful authority, and the same be broken, yet if it be not in a judicial proceeding, it is not perjury; because such oaths are general and extrajudicial; but it serves for aggravation of the offence: such are general oaths given to officers or ministers of justice, the oaths of fealty and allegiance, and such like. Thus, if an officer commit extortion, it is against his general oath, but yet not perjury, because not in a judicial proceeding; but when he is charged with extortion, the breach of his oath may serve for aggravation. 3 *Inst.* 166.

Subornation of perjury, by the common law, is an offence in procuring

procuring a person to take a false oath, amounting to perjury, who actually taketh such oath. 1 *Haw.* 177.

But if the person incited to take such an oath, do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury; yet he is liable to be punished, not only by fine, but also by infamous corporal punishment. *Id.*

To convict a man of perjury, a probable evidence is not enough, but it must be a strong and clear evidence; and the witnesses must be more numerous than those on the side of the defendant; for otherwise, it is only oath against oath. 10 *Mod.* 194.

And the party prejudiced by the perjury, shall not be admitted to prove the perjury. *L. Raym.* 396.

By the statute 5 *El. c. 9.* the punishment of *subornation of perjury*, if the prosecution is on that statute, is forfeiture of 40*l.*; and if the offender is not able to pay, he shall be imprisoned for half a year, and stand on the pillory one hour. The punishment of *perjury* by the same statute is, forfeiture of 20*l.* and imprisonment for six months; and if the offender is not able to pay the 20*l.* he shall be set on the pillory, and have both his ears nailed. And if the prosecution is at the common law, no less punishment shall be set than is contained in this statute.

And the judge, if he sees cause, may order the offender to be sent to the house of correction, not exceeding seven years, to be kept to hard labour; or otherwise to be transported for any term not exceeding seven years. 2 *G. 2. c. 25.*

The judge, sitting the court, or within twenty-four hours after, may direct a prosecution for perjury, and assign counsel to the prosecutor, who shall do their duty *gratis.* 23 *G. 2. c. 11.*

A person convicted of perjury, is disabled from being a juror or witness. 2 *Haw.* 287, 433.

If a person calleth another *perjured* man, he may have an action upon the case against him, because it must be intended contrary to his oath in a judicial proceeding; but for calling him a *forsworn* man, no action lies, because the forswearing may be extrajudicial. 3 *Inst.* 166.

PERNANCY, (from the French *prendre*, to take,) is a taking or receiving; as a pernor of profits, is he who receives the profits of lands; tithes in pernancy, are tithes taken, or that may be taken in kind.

PERPETUATING the testimony of witnesses is, where the witnesses are old and infirm, and one of the parties institutes a suit to perpetuate their testimony; for it may be a man's antagonist only waits for the death of some of them to begin his suit. This is most frequent where lands are devised by will away from the heir at law; and the devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in chancery against the heir, and sets forth the will *verbatim* therein, suggesting

gesting that the heir is inclined to dispute its validity; and then, the defendant having answered, they proceed to issue as in other cases, and examine the witnesses to the will; after which, the cause is at an end, without proceeding to any decree, no relief being prayed by the bill; but the heir is intitled to his costs, even though he contests the will. This is what is usually meant by proving a will in chancery. 3 *Black.* 450.

PERPETUITY is, where if all that have interest join in the conveyance, yet they cannot bar or pass the estate; for if, by concurrence of all having interest, the estate may be barred, it is no perpetuity. 1 *Cha. Ca.* 213.

A perpetuity is a thing odious in law, and destructive to the public; tending to put a stop to commerce, and prevent the circulation of the property of the kingdom; for the defeating whereof, the method of common recoveries was invented. 12 *Mod.* 282.

PER QUOD, are words respecting any special damage; as if a man's title to his land be slandered, whereby he brings his action for damages, he must set forth specially, *per quod*, (that is, whereby,) he lost an opportunity of selling it. If a man brings an action against another for beating his servant, he must say *per quod* he lost his service.

PERRY. See CYDER.

PERSONA IMPERSONATA, *parson impersonate*, is the rector that is in possession of a church parochial, be it presentative or improper, and of whom the church is full. 1 *Inst.* 300.

PERSONAL ACTIONS, are such whereby a man claims a debt, or personal duty or damages in lieu thereof; and likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon injuries and wrongs. Of the former nature, are all actions upon debt or promises; of the latter, all actions for trespasses, nuisances, assaults, defamatory words, and the like. Of this latter sort, for personal injuries and wrongs, when the person dieth, the action dieth with him, and cannot be revived either by or against executors or administrators. But for debt, or other personal duty, where the matter ariseth from contract, though the suit shall abate by the death of either of the parties, yet the right being transmissible to the representatives, the action may be revived by and against the executors or administrators respectively. 3 *Black.* 117. 302.

PERSONAL TITHES, are such profits as do arise by the honest labour and industry of man employing himself in some personal work, artifice, or negotiation; being the tenth part of the clear gain, after charges deducted. *Watf. c.* 49.

PERSONATING, is to represent one by a fictitious or assumed character, so as to pass for the person represented. By statute 21 *J. c.* 26. to acknowledge any fine, recovery, deed inrolled, statute, recognizance, bail, or judgment, in the name of another

another person, not privy to the same, is felony, without benefit of clergy. As is also, by 31 G. 2. c. 10. the personating any seaman in his majesty's service, or his executors or administrators, in order to obtain his wages or other allowance.

PETER-PENCE, was an annual tribute of one penny, paid at *Rome*, out of every family, at the feast of *St. Peter*. And this, *Ina* the Saxon king, when he went in pilgrimage to *Rome*, about the year 740, gave to the pope, partly as alms, and partly in recompence of a house erected in *Rome* for *English* pilgrims. And this continued to be paid generally, until the time of king *Henry* the eighth, when it was enacted, that from henceforth no person shall pay any pensions, *Peter-pence*, or other impositions, to the use of the bishop or see of *Rome*.

PETIT LARCENY. SEE LARCENY.

PETIT SERJEANTY, is where a man holds his land of the king, to render to him yearly, a bow, a sword, a lance, a pair of gloves of mail, a pair of gilt spurs, or such other small things belonging to war: and such service is but socage in effect, because such tenant, by his tenure, ought not to go, nor do any thing in his proper person, but to render and pay yearly certain things to the king, as if a man ought to pay a rent. *Litt.* 160.

PETIT-TREASON. SEE TREASON.

PETITIONING. By the 13 & 14 C. 2. *st.* 1. c. 5. no petition to the king, or to either house of parliament, for any alteration in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury, in the country; and in *London*, by the lord mayor, aldermen, and common council; nor shall any petition be presented by more than ten persons at a time. But under these regulations, it is declared by the statute 1 *W. st.* 2. c. 2. that the subject hath a right to petition, and that all commitments and prosecutions for such petitioning, are illegal. 1 *Black.* 143.

PEWS, in a church, are somewhat of the nature of heir-looms, which may descend by custom immemorial, from the ancestor to the heir, without any ecclesiastical concurrence. 2 *Black.* 429.

PHYSICIANS. By statute 14 & 15 H. 8. c. 5. physicians in *London*, and within seven miles thereof, are incorporated, with power to make statutes for the government of the society; and no physician shall practise within the said limits, till admitted by the president and community under their common seal. And four censors are to be chosen yearly, who shall have the ordering of the practitioners within the said limits, and the supervising of medicines, with power to fine and imprison. And no person shall be allowed to practise in physic out of *London*, until he shall have been examined at *London*, by the president and three of the elects of the said society, and have letters testimonial of their approving

proving and examination; except he be a graduate of *Oxford* or *Cambridge*.

PICKAGE, is a payment to the lord of the soil, for liberty to pick up or break the ground, in order to erect a stall in a fair or market.

PIEPOUDRE court, *curia pedis pulverizati*, is commonly said to be so called from the *dusty feet* of the suitors: others derive it, with more probability, from the old French, *ped poldreaux*, a pedlar; being the court of such petty chapmen as resort to fairs or markets. It is the most expeditious court of justice known to this kingdom. It is a court of record, incident to every fair and market, whereof the steward of him who owns, or has the toll of the fair or market is the judge. 3 *Black.* 32.

It was instituted to administer justice for all commercial injuries done in that very fair or market, and not in any preceding one. So that the injury must be done, complained of, heard, and determined, within the compass of one and the same day, unless the fair continues longer. *Id.*

The trial is by merchants and traders in the fair; and the judgment against the defendant is, that he shall be amerced. *Wood. b. 4. c. 1.*

From this court a writ of error lies, in the nature of an appeal, to the courts of *Westminster*. 3 *Black.* 32.

But this court is now gone much out of use.

PIGEONS. A lord of a manor may build a dove-coat on his own lands, parcel of the manor; but a tenant cannot, without the lord's licence. 3 *Salk.* 248. But any freeholder may build a dove-coat on his own ground. *Cro. El.* 548. *Cro. Ja.* 382.

Every person who shall shoot at or kill any pigeon, shall be imprisoned three months, unless he pay to the poor 20s. for every pigeon. 1 *Jac. c. 27. s. 2.* 2 *G. 3. c. 29.*

But if the pigeons come upon my ground, and I kill them, the owner hath no remedy against me, though I may be liable to the statutes which make it penal to destroy them. *Cro. Ja.* 492.

Pigeons in a dove house shall go to the heir, and not to the executor. 1 *Inst.* 8.

PILLORY, (in Latin *collistrigium*, from the person's neck being put between two boards,) is a very ancient punishment in this kingdom, and was used heretofore by the Saxons. 3 *Inst.* 192.

The word *pill* is common to all the European languages, and signifies to spoil, plunder, or *pillage*. And *pillory*, which we have immediately from the French, *pilleurie*, hath been improperly applied to denote the mode of punishment; whereas it signifies the offence, as *pillour* signifies the offender. *Barrington on the Statutes*, 30.

Every one that hath a leet or market, ought to have a pillory; and it seems that a leet may be forfeited for the want of it. 2 *Haw.* 75.

They

They that have been adjudged to the pillory, are infamous, and not to be received to be jurors or witnesses. 3 *Inll.* 219.

PIRACY. Formerly piracy was only cognizable by the admiralty courts, which proceed by the rules of the civil law. But it being inconsistent with the liberties of the subject, that any man's life should be taken away, unless by the judgment of his peers, or the common law of the land, the statute of 28 *H. 8. c.* 15. established a new jurisdiction for this purpose, which proceeds according to the course of the common law. 4 *Black.* 71.

By which statute, all treasons, felonies, robberies, murders, and confederacies, committed upon the sea, or in any haven, creek, or place where the admiral hath jurisdiction, shall be tried in such shires or places, as the king shall appoint by his commission, in like form as if such offence had been committed upon the land, and according to the course of the common law. And the offenders shall suffer death, without benefit of clergy.

By the 11 & 12 *W. c.* 7. the said offences may be tried by like commission in any of his majesty's colonies, forts, or factories abroad, at any place at sea, or upon the land; and they may hear and determine, and award execution, according to the civil law, and the method and rules of the admiralty.

The offence of piracy properly consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there; but by statute, some other offences are made piracy also.

As, by the said act of 11 & 12 *W. c.* 7. if any of his majesty's subjects shall commit any act of hostility against any other of his majesty's subjects upon the sea, under colour of a commission from any foreign power, he shall be adjudged a pirate.

And, if any master or mariner shall betray his trust, and run away with the ship, or any boat, ammunition, goods, or merchandize, or yield them up voluntarily to a pirate, or confederate with any pirate, or attempt to hinder the defence of the ship, he shall suffer death as a pirate; whether he be principal, or merely accessory, by setting forth such pirates, or abetting them before the fact, or receiving or concealing them or their goods after the fact. And by a subsequent statute these accessories are declared principals.

And a reward of 10*l.* for every ship of one hundred tons or under, and of 15*l.* for every ship of greater burthen, shall be paid by the captain or master of the ship, to the person who shall first make discovery of any combination to run away with the ship; to be paid at the port where the wages of the seamen are to be paid.

And by the same statute, 11 & 12 *W. c.* 7. commanders of ships or others, trading with pirates, or furnishing them with

stores or ammunition, or corresponding with them, and persons belonging to any vessel, forcibly boarding any merchant ship, and throwing overboard or destroying any of the goods, shall be adjudged pirates: and ships fitted out to trade with pirates, and the goods therein, shall be forfeited, half to the king, and half to him who shall discover the same; to be sued for in the admiralty.

And for encouragement of the mariners, when a ship hath been defended and brought to the designed port, and any of the officers or seamen have been killed or wounded, the judge of the court of admiralty in the port of *London*, and the mayor or chief officer in the several out-ports, may, on petition of the seamen, call unto him four or more substantial merchants, not interested, and by advice with them, may levy upon the owners of the ship and goods, by process out of the said court, such sum as himself and the said merchants, by plurality of voices, shall judge reasonable, not exceeding two *per cent.* of the freight, and of the ship and goods; which shall be distributed among the officers and seamen, or the widows and children of the slain, according to the direction of such justice, mayor, or chief officer. And persons maimed in such service, shall also be intitled to be admitted into Greenwich hospital. 8 G. c. 24.

And masters or seamen, not defending the ship (if it carries guns or arms) against pirates, or who shall utter any discouraging words, shall, if the ship be taken, forfeit their wages to the owners, and suffer six months imprisonment. *Id.*

PISCARY, is a right or liberty of fishing in the water of another; of which there are three kinds; *free fishery*, *separate fishery*, and *common* of fishery. See FISHERY.

PLAGUE. By statute 9 *An. c. 2.* and 26 G. 2. c. 6. all vessels, persons, and goods, coming from any place from whence the king, with advice of his council, shall judge it probable that the infection may be brought, shall make their quarantine in such places, and for such time as his majesty shall direct.

And the justices of the peace shall appoint watchmen, who shall not permit any person to come on shore or go on board, except persons licensed by those who have the charge of seeing the quarantine duly performed.

And if any superintendant of the quarantine or watchman shall neglect his duty, he shall be guilty of felony without benefit of clergy.

And if the master of a ship, having on board any person infected, shall conceal the same, he shall incur the like penalty.

And if any officer of the customs, or other officer, shall neglect his duty, he shall forfeit his office, and also 100%.

If

If the commander of the ship shall go, or permit any other to go on shore during the quarantine, without licence, the ship and tackle shall be forfeited, and the master shall forfeit 500*l*.

And if any person shall go on board, he shall be compelled to continue during the quarantine.

And lazarets shall be appointed for receiving of persons obliged to perform quarantine, and for airing of goods; and if any person appointed to perform quarantine shall escape, or attempt to escape from thence, he shall be guilty of felony without benefit of clergy.

And if any person not infected, nor obliged to perform quarantine, shall enter such lazaret, he shall be compelled to continue during the quarantine; and if he shall escape, he shall be guilty of felony without benefit of clergy.

PLAINT, *querela*, is the exhibiting any action, real or personal, in writing; and the party making his plaint, is called the *plaintiff*.

This plaint is chiefly in small actions in the inferior courts, under the value of 40*s*. : it is in the nature of an original writ, briefly setting forth the plaintiff's cause of action, in this manner: "A. B. complains against C. D. of a plea of trespass, &c." If the defendant shall not appear, he must be distrained, first, by something of small value; and then, if he doth not appear, a further distress is to be taken to a greater value, and so on: if all his goods are taken upon the first distress, an attachment may be applied for to the court of king's bench. 2 *Lill. Abr.* 294.

PLANTATIONS, or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded by treaties. 1 *Black.* 107.

With respect to their interior policy, they are properly of three sorts: 1. Provincial establishments, the constitutions of which depend on the respective commissions issued by the crown to the governors, and the instructions which usually accompany those commissions; under the authority of which, provincial assemblies are constituted, with power of making local ordinances, not repugnant to the laws of the mother country. 2. Proprietary governments, granted out by the crown to individuals, in the nature of feudatory principalities, with all the inferior regalities, and subordinate powers of legislation, which formerly belonged to the owners of counties palatine, yet so that nothing be attempted which may derogate from the sovereignty of the mother country. 3. Charter governments, in the nature of civil corporations, with the power of making by-laws for their own interior regulation,

and with such special authorities as are given them in their charters of incorporation. 1 *Black.* 108.

PLATE. To prevent frauds in the true manufacturing of plate, assayers shall be appointed for the assaying and making of plate, to which all working gold or silver smiths shall lend all plate made by them to be touched or assayed.

And, by 32 *G. 2. c. 24.* every person who shall trade in, or sell any gold or silver plate, or goods in which gold or silver is manufactured, shall take out a licence annually from the officers of excise.

PLAYERS acting for hire where they have no settlement nor licence from the lord chamberlain, shall be deemed rogues and vagabonds, and punished as such; or, otherwise, every such player shall forfeit 50*l.*, in which case he shall not suffer as a vagrant. 10 *G. 2. c. 28.*

But by the 28 *G. 3. c. 28.* justices of the peace in sessions may licence playhouses for a certain time, and under certain restrictions.

PLEA, *placitum*, is that which either party alleges for himself in court, in a cause there depending to be tried: and *pleading*, in a large sense, contains all the matters which come after the declaration, as well on the defendant's as on the plaintiff's side, till issue is joined; but it is commonly taken for the defendant's answer to the plaintiff's declaration.

Pleas are divided into *common pleas*, and *pleas of the crown*: *common pleas* are those which are agitated between *common persons* in *civil cases*, and not between the king and the party: *pleas of the crown* are all suits in the king's name for *criminal offences* against his *crown* and dignity; as treasons, felonies, batteries, and such like.

Common pleas are either *dilatory*, or *pleas to the action*. *Pleas dilatory* are such as tend merely to delay, or put off the suit, by questioning the propriety of the remedy, rather than by denying the injury: *pleas to the action* are such as dispute the very cause of suit. 3 *Black.* 301.

Dilatory pleas are, 1. To the *jurisdiction of the court*; alleging, for instance, that it ought not to hold plea of this injury, because it arose beyond sea; or, because the land in question is of ancient demesne, and ought only to be demanded in the lord's court. 2. To the *disability of the plaintiff*; by reason whereof he is incapable to commence or continue the suit; as, that he is an infant, an alien enemy, outlawed, or excommunicate. 3. In *abatement*; which abatement is either of the writ or the declaration, for some defect in one of them; as by mistaking the defendant, or giving him a wrong addition, or other want of form in any material respect. *Id.*

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These pleas to the jurisdiction, to the disability, or in abatement, were formerly very often used as merely dilatory, without any foundation of truth, and calculated only for delay, but now, by the statute 4 & 5 An. c. 16. no dilatory plea shall be admitted without affidavit made of the truth thereof, or some probable matter shewn to the court to induce them to believe it true. *Id.* 302.

Pleas to the *jurisdiction*, conclude to the cognizance of the court, praying "judgment whether the court will have further cognizance of the suit:" pleas to the *disability*, conclude to the person, by praying "judgment if the plaintiff ought to be answered:" pleas in *abatement*, when the suit is by *original*, conclude to the writ or declaration, by praying "judgment of the writ or declaration, and that the same may be quashed;" but if the action be by *bill*, the plea must pray "judgment of the bill," and not of the declaration, the bill being here the original, and the declaration only a copy of the bill. *Id.* 303.

When these dilatory pleas are allowed, the cause is either dismissed from that jurisdiction, or the plaintiff is stayed till his disability be removed; or he is obliged to sue out a new writ by leave obtained from the court, or to amend and new frame his declaration. But when, on the other hand, they are over-ruled, as frivolous, the defendant hath judgment to answer over to the action. *Id.*

Plea to the action, is to answer to the *merits* of the complaint; and is either *general* or *special*. The *general* plea, or *general issue*, is what traverses, thwarts, and denies at once the whole declaration, without offering any special matter whereby to evade it. As, in trespass either by force of arms, or on the case, *not guilty*; in debt upon contract, *he owes nothing*; in debt on bond, *it is not his deed*; on a promise, *he made no such promise*: these pleas are called the *general issue*; because, by importing an absolute and general denial of what is alleged in the declaration, they amount at once to an issue, by which is meant a fact affirmed on one side, and denied on the other. *Id.* 305.

Formerly, the general issue was seldom pleaded, except when the party intended wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a *special* plea; which was originally intended to apprise the court and the adverse party of the nature and circumstances of the defence, and to keep the law and the fact distinct. And it is an invariable rule, that every defence which cannot be thus specially pleaded, may be given in evidence, upon the general issue at the trial. But the science of special pleading having been frequently perverted to purposes of chicane and delay, the courts have of late, in some instances, and the legislature in many more,

permitted the general issue to be pleaded, which leaves every thing open, the fact, the law, and the equity of the case; and have allowed special matter to be given in evidence at the trial.
Id.

Special pleas, in bar of the plaintiff's demand, are very various, according to the circumstances of the defendant's case; as in real actions, a general release, or a fine, both of which may destroy the plaintiff's title: or in personal actions, an accord, arbitration, conditions performed, non-age of the defendant, or some other fact which precludes the plaintiff from his action. A justification is likewise a special plea in bar; as in an action of assault and battery, that it was the plaintiff's own original assault; in trespass, that the defendant did the thing complained of in right of some office which warranted him so to do; or, in an action of slander, that the plaintiff is really as bad a man as the defendant said he was. Also a man may plead in bar the statutes of limitation; as upon a promise to pay money to the plaintiff, the defendant may plead that he made no such promise within six years. *Id.* 306.

The conditions and qualities of a plea are, 1. That it be single, and contain only one matter. 2. That it be direct and positive, and not argumentative. 3. That it have convenient certainty of time, place, and persons. 4. That it answer the plaintiff's allegations in every material point. 5. That it be so pleaded as to be capable of trial. But by statute 4 & 5 Ann. c. 16, a man, with leave of the court, may plead two or more distinct matters; as in an action of assault and battery, he may plead not guilty, that the other struck first, and the statute of limitation. *Id.* 308.

When the plea of the defendant is thus put in, if it doth not amount to an issue or total contradiction of the declaration, but only evades it, the plaintiff may *reply* to the defendant's plea, either traversing it, or alleging new matter in contradiction to it. To which replication the defendant may *rejoin*, or put in an answer called a *rejoinder*. The plaintiff may answer the rejoinder by a *surrejoinder*. Upon which the defendant may *rebut*; and the plaintiff answer him by a *surrebutter*. But it is seldom that the matter goes so far. Which said pleas, replications, rejoinders, surrejoinders, rebutters, and surrebutters, answer to the *exceptio, replicatio, duplicatio, triplicatio, and quadruplicatio*, of the Roman law. *Id.* 309.

In *criminal matters*, the plea is of five kinds: 1. To the *jurisdiction of the court*; which is, where an indictment is taken before a court that hath no cognizance of the offence; as if a man be indicted for a rape at the sheriff's tourn, or for treason at the quarter sessions. 2. *Demurrer*; which is when the fact, as alleged, is allowed to be true; but the prisoner joins issue upon
some

some point of law in the indictment, by which he insists, that the fact, as stated, is no felony, treason, or whatever the crime is alleged to be: as if a man be indicted for feloniously stealing a greyhound, which is not felony, but only a civil trespass. But this demurrer is seldom used; because the same advantage may be taken upon the plea of not guilty; or afterwards, in arrest of judgment, when the verdict hath established the fact.

3. In *abatement*; which is principally for misnaming the prisoner, or giving him a wrong addition: but this kind of plea is of little advantage; for if the exception be allowed, a new bill of indictment may be framed according to what the prisoner in his plea avers to be his true name and addition. 4. A *special plea in bar*; of which there are four kinds: First, a former acquittal, (*auterfoits acquit*,) founded on this principle, that no man shall be brought in jeopardy of his life more than once for the same offence. Secondly, a former conviction (*auterfoits convict*) for the same offence, though no judgment was given, or perhaps will be given, (being suspended by the benefit of clergy, or other cause); and this depends on the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime. Thirdly, a former attainder, (*auterfoits attain*,) which is a good plea in bar, whether it be for the same or any other felony; for having, by the attainder, forfeited all he had, he is dead in law; and it would be absurd to attain him a second time; but it is otherwise if the attainder hath been reversed for error, or the judgment hath been vacated by the king's pardon, with regard to felonies committed afterwards. Fourthly, a *pardon* of the offence charged in the indictment may be pleaded in bar; which at once destroys the end and purpose of the prosecution, by remitting the punishment which the prosecution was calculated to inflict. Fifthly, the *general issue*, or plea of *not guilty*; upon which plea alone the prisoner can receive his final judgment of death. In case of an indictment of felony or treason, there can be no special justification by way of plea; as on an indictment of murder, a man cannot plead that it was in his own defence against a robber on the highway, or a housebreaker; but he must plead the general issue *not guilty*, and give this special matter in evidence; and the jury, upon the evidence, will take notice of any defensive matter, and give their verdict accordingly, as effectually as if it were, or could be, specially pleaded. 4 *Black.* 332.

PLEDGE is of two kinds; living and dead. *Living* pledge is, when a man borrows a sum of money of another, and grants him an estate, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case, the land or pledge is said to be *living*: it subsists and survives the debt; and immediately,

ately, on the discharge of it, results back to the borrower. A *dead* pledge or *mortgage*, is where a man borrows of another a specific sum, and grants him an estate in fee, on condition that if he, the mortgagor, shall repay to the mortgagee the said sum on a certain day conditioned in the deed, that then the mortgagee may re-enter on the estate so granted in pledge, or that the mortgagee shall re-convey the estate to the mortgagor; and in this case the land, which is so put in pledge, is by law, in case of non-payment at the time limited, dead and gone. 2 *Bl. ck.* 157.

If a pawnbroker receives plate or jewels as a pledge or security for the re-payment of money lent thereon at a day certain, he has them on an express contract or condition to restore them, if the pledger performs his part by redeeming them in due time; for the due execution of which contract, many useful regulations are made by the statute 30 *G. 2. c. 24.* 2 *Bl. ck.* 452.

And so if a landlord distrains goods for rent, or a parish officer for taxes, these, for a time, are only a pledge in the hands of the distrainers; and they are bound by an implied contract in law, to restore them on payment of the debt, duty and expences, before the time of sale; or, when sold, to render back the overplus. *Il.*

PLENARTY, in the ecclesiastical law, is where a church is full of an incumbent. At the common law, if a stranger who had no right to the presentation had presented a clerk upon a vacancy, and the clerk had been admitted and instituted thereupon, the true patron had no other remedy to recover his advowson, but a writ of right of advowson, wherein the incumbent was not to be removed; for plenarty, generally, was a good plea both in *quare impedit*, and a *darrein presentment*; and the reason was, to the intent that the incumbent might quietly intend and apply himself to his spiritual charge. But by statute 7 *An. c. 18.* no usurpation upon any avoidance shall displace the estate or interest of any person intitled to an advowson, or hinder him to present on the next avoidance, or to maintain a *quare impedit* to gain the possession.

PLOUGH-BOTE, is an allowance to the tenant of wood sufficient for ploughs, harrows, carts, and other instruments of husbandry.

PLOUGH-LAND, is as much land as can reasonably be cultivated in a year with one plough. By the statutes relating to the repair of the high-ways, it hath been usually estimated at 50*l. per annum.*

PLURALITY. By the statute 21 *H. 8. c. 13.* if any person, having one benefice with cure of souls of 8*l.* a year in the king's books, shall accept another of whatsoever value, and be instituted and inducted into the same, the former benefice shall be void;

void ; unless he have a dispensation from the archbishop of *Canterbury*, who hath power to grant dispensations to chaplains of noblemen and others, under proper qualifications, to hold two livings, provided that the livings be not more than thirty miles distant from each other, and provided that he reside in each for a reasonable time in every year, and that he keep a sufficient curate in that wherein he doth not ordinarily reside.

Though the act mentions *instituted and inducted*, yet, when he is instituted into the second benefice, the dispensation to hold two benefices comes too late, although he be afterwards inducted ; for, by institution, the church is full of the incumbent. 4 *Ca.* 79.

But with respect to *lapse*, the avoidance of the former benefice doth not take place, till induction to the second ; so that the patron hath six months from the induction to present in, to save the incurring of a lapse ; yet he may, if he pleases, present before the induction. *Bur. Mansf.* 1512.

But a man may hold as many benefices *without cure* as he can get ; all of them, or all but the last, being under the value of 8*l.* a year. *Watf. c.* 3.

PLURIES, is a writ that issues in the third place, after two former writs have been disobeyed ; for first, goes out the original writ, or *capius* ; which, if it has not effect, then issues the *alias* ; and if that also fails, then the *pluries* : “ We command “ you as we have often commanded you,”—*sicut pluries precipimus*. It is used in proceedings to outlawry, and in great diversity of cases.

POISONING, is the most detestable of all kinds of murder ; because it is most horrible and fearful to the nature of man, and of all others can be least prevented, either by resistance or foresight. By the statute 22 *H. 8. c.* 9. was inflicted for this crime a more grievous and lingering death than the common law prescribed : namely, that the offender should be boiled to death ; but this was repealed by 1 *Ed. 6. c.* 12.

If a man persuade another to drink a poisonous liquor, under the notion of a medicine, who afterwards drinks it in his absence, the procuror of the felony, in this case, is as much a principal, as if he had been actually present when it was done ; so are all those who were present when the poison was infused, and privy and consenting to the design. But those who only abetted the crime by their command, counsel, or advice, but were absent when the poison was infused, are accessaries, and not principals. 2 *Haw.* 313.

POLICY OF INSURANCE, is an instrument entered into by insurers of ships and merchandize to merchants, obligatory for the payment of a sum agreed on in case of loss. It is a course taken by those who adventure goods to sea, that they, unwilling

unwilling to hazard the whole, give unto some other, called an insurer, a certain rate or proportionable sum of so much *per cent.*, to secure the safe arrival of the ship and goods at the place agreed on; so that if the ship and merchandize miscarry, the insurer makes good to the adventurer so much as he promised to secure; but if the ship arrive safely, he gains that clear which the merchant compounds to pay him. See **INSURANCE**.

POLL, a head; so where particular jurors are challenged, it is called a challenge to the *polls*; so *poll money*, *poll silver*, sometimes call a capitation tax, is a tax upon the people at so much a head. *Pollard* trees, are such whose heads have been cut off. A *deed-poll*, is a deed not indented at the top, but is polled or shaved quite even.

POLYGAMY, in strictness, differs from *bigamy*; *polygamy*, being where a man hath several wives at the same time; *bigamy* where he hath had two wives successively. By statute 1 *J. c. 11.* if any person within his majesty's dominions of *England* and *Wales*, being married, shall marry any person, the former husband or wife being alive, such offence shall be felony (but within clergy). But this shall not extend (1.) to any person whose husband or wife shall be continually remaining beyond the seas, by the space of seven years together, and this, although the party in *England* hath notice, that such husband or wife is living: nor (2.) to any person whose husband or wife shall absent him or herself, the one from the other for seven years together, in any part of his majesty's dominions, the one of them not knowing the other to be living within that time: nor (3.) to any person who shall be at the time of such marriage divorced by sentence in the ecclesiastical court: nor (4.) to any person whose former marriage by sentence in the ecclesiastical court, hath been declared to be void: nor (5.) to any person by reason of any former marriage made within age of consent; that is, either the woman being under twelve, or the man under fourteen.

If the first marriage was beyond sea, and the latter in *England*, the party may be indicted here, because the latter marriage makes the offence; but if the first marriage was in *England*, and the latter beyond sea, the offender cannot be indicted here, because the offence was not within the kingdom. *Kely. 79.*

On a prosecution on this statute, the first and true wife cannot be allowed as a witness against the husband; but the second wife may be admitted to prove the second marriage, for she is not his wife so much as *de facto*. 1 *Hale's Hist. 693.*

PONE, is a writ whereby a cause depending in the county court, or other inferior court, is removed into the court of common pleas, and sometimes into the king's bench; as when a replevin is depending by writ out of chancery, the plaintiff or defendant may remove the plea by *pone*, requiring the sheriff to *put* the
the

the **plaint**, which is in his county court, before the king's justices at Westminster. *Wood. b. 4. c. 4.*

Also a writ commanding the sheriff (on the plaintiff's putting in sureties to prosecute, which is a thing merely supposed) to summon the defendant to appear, and to answer to the plaintiff's suit, is likewise called a *pone*. *Id.*

PONTAGE, *pontagium*, is a contribution towards the maintenance or rebuilding of bridges. And it also signifies toll taken for that purpose. This was one of the three public charges from which no one was exempt; *viz.* castles, bridges, and expeditions. Unto which even the religious societies were subject.

POPERY. Amongst many other forfeitures, and disabilities, it was enacted by the statute 10 & 11 *W. c. 4.* that if any popish priest shall say mass, or exercise any part of his office or function, (except in foreign ministers houses,) or if any papist shall keep school, or take upon him the education, or government, or boarding of youth, he shall be adjudged to perpetual imprisonment: and if any papist shall not, within six months after he shall be eighteen years of age, take the oaths to the government, he shall be incapable to take any lands by descent, devise, or limitation; also, every papist shall be disabled to purchase any lands in his own name, or in the name of any other to his use. But by the 18 *G. 3. c. 66.* all this is repealed, with respect to such persons as shall within six months after the accruing of his title, being of the age of twenty-one years, take an oath in the nature of the present oath of allegiance and supremacy.

POPULAR ACTION, is an action given in general to any of the king's *people*, who will sue for a penalty on the breach of some penal statute. See **INFORMATION**.

PORTION. Where a portion is charged upon land, by deed or by will, if the person dies before it becomes due, it shall sink into the inheritance for the benefit of the heir at law, whether it be given with or without interest. 1 *Atk.* 555.

A portion given to one payable at a certain age, and if he dies, limited over to another, without mentioning any age; if the first dies before the time of payment, it vests in the second immediately. *Id.* 556.

If a younger brother hath a provision under a settlement, and lives with the elder, whose estate is charged with the portion, he shall have an allowance for his maintenance out of the interest. For where there is a power of charging interest, it shall be considered as maintenance; for giving interest is the same thing as giving express maintenance. *Id.*

PORT-

PORT-REEVE, *portgrave*, is the chief magistrate of a port town; as *sheriff* (*shire-reeve*) is the chief officer of the shire.

PORT TOLL, is a payment for the liberty of bringing goods into a port; and for this the owner of the port may prescribe, without any consideration alleged; for the privilege of bringing goods into a port for safety, implies a consideration in itself.

POSSE COMITATUS. For keeping the peace, and pursuing felons, the sheriff may command all the people of his county to attend him, which is called the *posse comitatus*: which summons, every person above the age of fifteen, and under the degree of a peer, is bound to attend, on pain of fine and imprisonment. 1 *Black.* 343.

POSSESSION, obtained by a mere stranger without right, is a title, until the true owner enters upon him; which, in such case, the true owner may do, without the formalities of law. But if a descent hath been cast, this *prima facie* operates as a title in him who comes in by descent; and he shall not be ousted by the true owner without process of law, and proving in himself a superior title. 3 *Black.* 176.

Possession is the lowest degree of title, which may be without any apparent right, or pretence of right; as where one man invades the possession of another, and, by force or surprize, turns him out of the occupation of his lands, which is usually called a disseisin. Or it may happen, when, after the death of the ancestor, and before the entry of the heir, or after the death of a particular tenant, and before the entry of him in remainder or reversion, a stranger gets possession of the vacant land, and holds out him that had a right to enter; in such cases, the wrong doer hath only a mere naked possession, which the rightful owner may put an end to by a variety of legal remedies. But in the mean time, till some act be done by the rightful owner, to divest this possession, and assert his title, such actual possession is *prima facie* evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right, by degrees, ripen into a perfect and indefeasible title. 2 *Black.* 196.

The next step towards a good title, is the *right* of possession; for this may reside in one man, while the actual possession is not in himself, but in another. For if a man be disseised, or otherwise kept out of possession, although the actual possession be lost, yet he hath still remaining in him the *right* of possession, and may exert it whenever he thinks proper, by entering upon the disseisor, and turning him out of that occupancy which he hath so illegally gained. But this right of possession is of two sorts; an *apparent* right of possession, which may be defeated by proving a better; and an *actual* right of possession, which will stand the test against all opponents. Thus, if the disseisor, or other
wrong

wrong doer, dies possessed of the land whereof he so became seised by his own unlawful act, and the same descends to his heir, now by the common law, the heir hath obtained an *apparent* right, though the actual right of possession resides in the person disseised; and it shall not be lawful for the person disseised to divest this apparent right by mere entry, or other act of his own, but only by an action at law: for until the contrary be proved by legal demonstration, the law will rather presume the right to reside in the heir, whose ancestor died seised, than in one who has no such presumptive evidence to urge in his own behalf. But if he, who has the actual right of possession, puts in his claim, and brings his action within a reasonable time, and can prove by what unlawful means the ancestor became seised, he will then, by sentence of law, recover that possession to which he hath such actual right. Yet if he omits to bring his possessory action within a competent time, his adversary may imperceptibly gain an actual *right* of possession, in consequence of the other's negligence; and in such case, he will have nothing left in him but the mere right of *property*, without either *possession*, or even a right of possession. Thus if a disseisor turns me out of possession of my lands, he thereby gains a *mere naked possession*, and I still retain the *right of possession*, and *right of property*. If the disseisor dies, and the lands descend to his son, the son gains an *apparent* right of possession; but I still retain the *actual* right both of possession and property. If I acquiesce for thirty years, without bringing any action to recover possession of the lands, the son gains the actual *right of possession*, and I retain nothing but the mere *right of property*: and even this right of property will fail, unless I pursue it within the space of sixty years. 2 *Black.* 196.

POST:

1. By the several acts of parliament relating to the post office, there shall be one general post office in *London*, and one post master general. And none but persons authorized by him, shall carry letters; except letters carried by carriers or shipmasters with goods, instruments out of any court, letters sent by friends in their journey, or by a special messenger; and except the two universities; to and from which letters and other things may be sent in manner as heretofore hath been used.

2. The rates for carriage of letters shall be as follows:

For every single letter, not exceeding one whole post stage from the office where the letter is put in, *2d.*; double letter, *4d.*; treble, *6d.*; an ounce, *8d.*; and so in proportion.

Above one post stage and not exceeding two; a single letter, *3d.*; double, *6d.*; treble, *9d.*; an ounce, *1s.*

Above two post stages, and not exceeding eighty miles from
London;

London; a single letter 4*d.*; double, 8*d.*; treble, 1*s.*; an ounce, 1*s.* 4*d.*

Above eighty miles, and not exceeding one hundred and fifty miles; a single letter, 5*d.*; double, 10*d.*; treble, 1*s.* 3*d.*; an ounce, 1*s.* 8*d.*

Above one hundred and fifty miles; single, 6*d.*; double, 1*s.*; treble, 1*s.* 6*d.*; an ounce, 2*s.*; and so in proportion.

But no letter under an ounce, shall be rated higher than as a treble letter; and if one ounce, to be rated as four single letters, and so in proportion above an ounce; every quarter of an ounce to be rated as a single letter.

3. Within the limits of the penny post in *London*, shall be paid, 1*d.* at putting in, and 1*d.* at delivery.

4. No letters shall be exempted from postage;

Except letters from or to the king:

And such, not exceeding the weight of two ounces, as shall be sent during the sitting of parliament, or within forty days before or after any summons or prorogation, and whereon the whole superscription shall be of the hand-writing of the member directing the same, and shall have his name indorsed thereon, together with the name of the post town, from which it is intended to be sent; and the day, month, and year, when put into the office, (the day of the month to be in words at length,) and shall be put into the office on the day of the date put upon such letter.

Or such as shall be directed to any member of either house of parliament, at the place where he shall actually be at the time of the delivery thereof, or at his usual place of residence in *London*, or at the house of parliament, of which he is a member.

Or to the officers of the treasury, admiralty, war office, general post office, secretaries of state, paymaster general of the forces, clerk of the parliaments, clerk of the house of commons, or upon his majesty's service (indorsed by the proper officer).

Also this shall not extend to printed votes or proceedings in parliament, or printed newspapers, sent without covers, or in covers open at the sides, signed on the outside by any member of parliament, or directed to a member at any place whereof he shall have given notice to the postmaster general.

Also clerks in the offices of the secretaries of state and post office, being thereunto licensed by the secretaries or postmaster general respectively, may continue to frank votes and newspapers as heretofore hath been used; provided the same be sent without covers, or in covers open at the sides.

5. If any person shall counterfeit the handwriting of any person in the superscription, or shall alter the date put thereon, or knowingly write or send any letter, the cover whereof shall have

have been forged, counterfeited, or altered, he shall be guilty of felony, and transported for seven years.

6. If any post boy shall quit the mail before his arrival at the next stage, or shall suffer any other person (except the person employed to guard the mail) to ride on the horse or carriage; or shall loiter on the road, or shall not, in all possible cases, convey the mail after the rate of six miles an hour, at least, he shall be sent to the house of correction.

7. If any post boy shall, by himself, or in combination with others, unlawfully collect any letters, or convey, or cause them to be conveyed, he shall forfeit, for every letter, 10s. or be committed to the house of correction.

8. If any person employed in any business in the post office, who shall take any letter or packet to be forwarded by the post, and receive any money therewith for the postage, shall burn or destroy any such letter or packet, or shall advance the rate of postage upon any letter or packet, and not duly account for the money by him received for such advanced postage, he shall be guilty of felony.

9. No person shall open, detain, or delay any letter or packet, after the same shall be delivered into the post office; except by warrant from a secretary of state, or where the party shall refuse to pay for the same, or where they are returned for want of true directions, and the party cannot be found, on pain of 20*l.* and being disabled from having any employment in the post office; and every postmaster, before he enters upon his office, shall make oath before a justice of the peace to the like purpose.

And in all post towns, the postmaster is bound to deliver letters at the houses of the inhabitants, on paying the legal postage only.
Bur. Mansf. 2153.

10. All sums, not exceeding 5*l.*, that shall be due from any persons for letters, or which shall be received for the carriage of letters, without answering the same to the receiver general, shall be recovered before justices of the peace, in the same manner as small tithes; and such debt shall be preferable in payment, before any debt to any private person.

11. If any person employed in the post office, shall secrete, embezzle, or destroy any letter or packet, containing any bank note, bill of exchange, or other writing, for payment of money, he shall be guilty of felony, without benefit of clergy.

12. The postmasters, and no other person, (except the owners of chaises duly licensed,) shall provide horses and furniture to let to hire, to persons riding post; and they may charge 3*d.* a mile for each horse riding post, and 4*d.* a mile for the person riding as guide, and shall not charge for any bundle or parcel of goods, not exceeding eighty pounds weight, to be laid on the horse rode by the guide. But if the postmaster doth not, or cannot furnish persons

persons riding post with horses, in half an hour after demand, such persons may furnish themselves elsewhere, provided that they take no horses without the owner's consent.

13. And by the 25 G. 3. c. 51. every postmaster, inn-keeper, or other person, who shall let any horse, or carriage, to travel post, or for hire, shall take out a licence annually from the commissioners of the stamp duties.

And also a duty is to be paid for all horses travelling post, hired by the mile, stage, or by the day; and on public stage coaches and diligences, hackney coaches excepted. And by the 27 G. 3. c. 26. the said duties may be let to farm.

14. And by the 25 G. 3. c. 57. all carriages or horses employed in carrying the mail, shall be exempted from tolls at every turnpike-gate.

15. No postmaster shall, by word, message, or writing, or in any other manner, endeavour to persuade any elector to give, or dissuade any elector from giving, his vote for the choice of any person to serve in parliament, on pain of 100*l.* and of being incapacitated.

POSTEA, is the return of the judge, before whom a cause was tried, of what was done in the cause *after* the joining issue, and awarding the trial, and is indorsed on the back of the *nisi prius* record. The substance of which is, that *postea* (*afterwards*) the said plaintiff and defendant appeared by their attorneys in the place of trial; and a jury, being sworn, found such a verdict; or that the plaintiff, after the jury sworn, made default, and did not prosecute his suit, or as the case shall be. It is usually delivered by the clerk of assize to the attorney in the cause, who is to deliver the same into the office, that judgment may be entered according thereto by the officer of the court. It is brought into court at the day in bank, and recorded there, and delivered back to the attorney, who gives a rule for judgment upon it; and if there be no rule to the contrary, after the rule for judgment is out, the attorney brings his *postea* to the secondary, who signs the judgment, and then he enters all this matter upon the issue roll.
2 *Lill.* 337.

POSTERIORITY signifies the being or coming *after*, and is a word of comparison and relation in tenures, the correlative whereof is *priority*. As a man holding lands of two lords, holds of his ancient lord by *priority*, and of his latter lord by *posteriority*.
2 *Inst.* 392.

POST-FINE, is a duty to the king, for a fine acknowledged in his court, paid by the cognizee after the fine is fully passed. It is called a *post-fine*, because there was a former or *primer* fine paid on suing out the writ. This post-fine is as much as the primer fine, and half as much more, or ten shillings for every five marks
of

of said; that is, three twentieth parts of the supposed annual value. 2 *Black.* 350."

POSTHUMOUS, is where a child is born after his father's death. By statute 10 & 11 *W. c.* 16. where it often happens, that by marriage, and other settlements, estates are limited in remainder, to the use of the sons and daughters, the issue of such marriage, with remainders over, without limiting an estate to trustees, to preserve the contingent remainders limited to such sons and daughters, who, if they happen to be born after the decease of their father, are in danger to be defeated of their remainder, by the next in remainder after them; it is therefore enacted, that such sons and daughters, that shall be born after the decease of their father, may take such estates, so limited to the first and other sons, or to the daughter or daughters, as if born in the life-time of their father, although there shall happen to be no estate limited to trustees, after the decease of the father, to preserve the contingent remainder to such after-born children, until they shall come *in esse*, or be born.

A posthumous child, either of the whole, or half blood, shall take under the statute of distribution. 1 *Wes.* 156.

POUND, *parcus*, is generally any place inclosed to keep in beasts; but especially a place of strength, to keep cattle that are distrained, or put in for any trespass done by them, until they are replevied or redeemed.

And it is either a pound *overt* or pound *covert*. A pound *overt*, is an open pound, usually built in the lord's waste, and which he provides for the use of himself and his tenants; and it is also called the lord's or common pound; also a backside, yard, or other place, whereto the owner of the beasts impounded may come to give them meat, without trespass, is a pound *overt*: A pound *covert* is a close place, where the owner of the cattle cannot come for the purpose aforesaid, without trespass. *T. L.*

There is difference between a *common* pound, an *open* pound, and a *close* pound; as to cattle impounded; for where cattle are kept in a common pound, no notice is necessary to the owner to feed them; but if they are put into any other open place, it is otherwise, for notice is to be given.

A common pound belongs to a township, lordship, or village, and there ought to be such a pound in every township, kept in repair by those who have used to do it time out of mind; the oversight whereof is to be by the constable or steward of the leet.

If the owner be guilty of pound-breach, and takes away his goods, the party distraining may have his action, and also may take the goods that were distrained wherever he finds them, and impound them again. 1 *Inst.* 47.

If distress be taken of goods without cause, the owner may make rescous; but if they be distrained without cause, and impounded, the owner may not break the pound and take them out, because they are then in custody of the law. *Id.*

POUND-BREACH. By the common law, if a man break the pound, or the lock of it, or part of it, he shall be punished as for a breach of the peace; and the party who distrained may take the goods again, wheresoever he finds them, and impound them again.

And by statute 2 *W. c. 5.* on any pound breach, or rescous of goods distrained for rent, the party grieved, on a special action on the case, shall recover treble damages and costs.

Also for pound-breach, the offender may be punished in the court leet. 1 *Inst. 47.*

POWER, is an authority which one man gives another to act for him; and is sometimes a reservation, which a person makes in a conveyance for himself, to do some acts; as to make leases, or the like. 2 *Lill. Abr. 339.*

The limitation and modifying of estates, by virtue of powers, came from equity into the common law, with the statute of uses. *Burr. Mansf. 120.*

In conveyances to an use, a man may direct and model that use as he pleases, and the statute 27 *H. 8. c. 10.* executes the possession to the use; therefore he may annex powers to estates, which cannot be annexed to them by a conveyance at the common law. 1 *Inst. 237.*

To make leases, is of all kinds of powers the most frequent. *Burr. Mansf. 120.*

The plan of this power to make leases is for the mutual advantage of possessor and successor. *Id. 121.*

The successor therefore must not be prejudiced in point of remedy, or any other circumstance of full and ample enjoyment. *Id.*

The two usual methods of leasing are, either at the best rent, or upon fines; and the conditions in favour of the successor, must be pursued not only literally, but substantially. *Id. 122.*

If the ancient rent is to be reserved, it must be reserved with all the beneficial circumstances, that the remainder man may be under no difficulty in receiving the rent. *Id.*

POYNINGS' LAW, was a law made in *Ireland* in the reign of king *Hen. 7.* when Sir *Edward Poynings* was lord deputy there, that all acts of parliament before that time, made in *England*, should be of force within the realm of *Ireland.* 1 *Black. 103.*

PRÆCIPE, is a writ commanding the defendant to do the thing required, or to shew cause why he hath not done it. The use of this writ is, where something certain is demanded by the plaintiff,

plaintiff, which is in the power of the defendant to perform ; as to restore the possession of land, to pay a certain liquidated debt, to perform a specific covenant, to render an account, and the like ; in all which cases, the writ is drawn up in the form of a *præcipe* or command, to do thus, or shew cause to the contrary ; giving the defendant his choice, to redress the injury or stand suit. 2 *Black.* 274.

Tenant to the præcipe, is he against whom the writ of *præcipe* is brought, in suing out a common recovery, and must be seised, or tenant of the freehold of the lands of which the recovery is to be suffered.

PRÆDIAL TITHES, are such as arise merely and immediately from the ground ; as grain of all sorts, hay, wood, fruits, herbs ; for a piece of land or ground being called in Latin *prædium*, (whether it be arable, meadow, or pasture,) the fruit or produce thereof is called *prædial* ; and consequently, the tithe, payable for such annual produce, is called a *prædial tithe*.

PRÆMONSTRATENSES, were canons who lived according to the rule of *St. Austin*, as reformed by *St. Norbert*, who set up this regulation about the year 1120 at *Præmonstratum* in *Picardy* ; a place so called because it was said to be forethewn, or *præmonstrated*, by the Blessed Virgin, to be the head seat or mother church of this order. They were brought into *England* soon after the year 1140, and had about thirty-five houses in this kingdom before the dissolution.

PRÆMUNIRE, is so called from a word in the writ respecting the principal matter, *præmunire facias præfatum A. B. quod tunc sit coram nobis, &c.* where *præmunire* is used for *præmonere*, to warn the person to appear. 1 *Inff.* 129.

By 27 *Ed.* 3. c. 1. called the statute of provisors, they which shall draw any out of the realm in plea, whereof the cognizance pertaineth to the king's court, or which do sue in any other court, to defeat or impeach the judgment given in the king's court, shall have a day, containing the space of two months, by warning to be made to them by the sheriff or other officer, to appear to answer in their proper persons for the contempt : and if they come not at the said day to be at the law, they shall be put out of the king's protection, their lands and goods forfeited to the king, and their bodies (wheresoever they may be found) shall be taken and imprisoned, and ransomed at the king's will. And, upon the same, a writ shall be made to take them by their bodies, and to seize their lands, goods, and possessions, into the king's hands. And if it be returned, that they be not found, they shall be put in exigent and outlawed.

And by the 16 *R.* 2. c. 5. commonly called the statute of *præmunire*, both they who pursue, or cause to be pursued, in the court of *Rome* or elsewhere, any processes or instruments, or other

things whatsoever, which touch the king, against him, his crown and regality, or his realm, and also they who shall bring, receive, or execute the same, shall be out of the king's protection; and their lands and tenements, goods and chattels, forfeited to the king; and they shall be attached by their bodies, if they may be found, and brought before the king and his council, there to answer; or process shall be made against them by *præmunire facias*, in manner as is ordained in other statutes of provisors.

And in these two statutes are contained the pains and penalties of what is called a *præmunire*: they were intended chiefly to oppose the papal incroachments in this realm; but the penalties thereof, by several subsequent statutes, are extended to other cases which have no principal relation to popery.

So odious was this offence formerly, that a man who was attainted of the same, might have been slain by any one without danger of law; because it was provided by law, that a man might do to him as to the king's enemy, and a man may lawfully kill an enemy; and therefore, by the 5 *El. c. 1.* it is enacted, that it shall not be lawful for any one to slay any person attainted in a *præmunire*. But he is so far out of the king's protection, that he is disabled to bring an action for any injury whatsoever. And no one, knowing him guilty, can with safety give him aid, comfort, or relief. 1 *Haw. 55.*

PREBEND, is an endowment in land, or pension in money, given to a cathedral or conventual church in *prebendum*; that is, for the maintenance of a secular priest, or regular canon, who was a *prebendary*, as supported by the said *prebend*. Authors generally confound the two words *prebend* and *prebendary*; whereas the former signifies the office, or the stipend annexed to that office; and the latter signifies the officer, or person who executes the office, and enjoys the stipend.

PRECEDENCE, among the nobility, by statute 31 *H. 8. c. 10.* is thus regulated:—On the right side of the parliament-chamber, the archbishop of *Canterbury*, 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 according to their seniority. On the left side, on the higher part of the form, the lord chancellor, lord treasurer, lord president of the council, the lord privy seal, above all dukes, except those of the royal family. Next, the great chamberlain, the constables, the marshal, the lord admiral, the grand master or lord steward, and the king's chamberlain. Then the king's chief secretary, being of the degree of a baron; and all dukes, marquesses, earls, viscounts, and barons, after their ancience.

The

The rules of precedence may be reduced to the following table :

Archbishop of <i>Canterbury</i> .	Viscounts eldest sons.
Lord chancellor.	Earl's younger sons.
Archbishop of <i>York</i> .	Baron's eldest sons.
Lord treasurer.	Knights of the garter.
Lord president of the Council.	Privy counsellors.
Lord privy seal.	Chancellor of the exchequer.
Lord great chamberlain.	Chancellor of the dutchy.
Lord high constable.	Chief justice of the king's bench.
Lord marshal.	Master of the rolls.
Lord admiral.	Chief justice of the common pleas.
Lord steward of the household.	Chief baron of the exchequer.
Lord chamberlain of the household.	Judges and barons of the coif.
Dukes.	Knights bannerets royal.
Marqueesses.	Viscounts younger sons.
Duke's eldest sons.	Barons younger sons.
Earls.	Baronets.
Marqueesses eldest sons.	Knights bannerets.
Dukes younger sons.	Knights of the bath.
Viscounts.	Knights bachelors.
Earl's eldest sons.	Baronets eldest sons.
Marqueesses younger sons.	Knights eldest sons.
Secretary of state, if a bishop.	Baronets younger sons.
Bishop of <i>London</i> .	Knights younger sons.
Bishop of <i>Durham</i> .	Colonels.
Bishop of <i>Winchester</i> .	Serjeants at law.
Bishops.	Doctors.
Secretary of state, if a baron.	Esquires.
Barons.	Gentlemen.
Speaker of the house of commons.	Yeomen.
Lords commissioners of the great seal.	Tradesmen.
	Artificers.
	Labourers.

Note, married women and widows are intitled to the same rank among each other, as their husbands would respectively have been between themselves, except such rank as is merely professional or official; and unmarried women, to the same rank as their elder brothers would bear among men, during the lives of their fathers. 1 *Black.* 405.

By a late standing order of the house of lords, an exact pedigree of each peer and his family, shall, on the day of his first admission, be delivered to the house by garter the principal king at arms. 3 *Black.* 106.

PRECONTRACT of marriage, is a mutual promise or covenant

nant of a marriage to be had afterwards; and is either *per verba de presenti*, or *per verba de futuro*. Heretofore the spiritual judge would compel a contract *per verba de presenti*; that is, a contract of present marriage, to be carried into execution; but now, by statute 26 G. 2. c. 23. no suit shall be had in any ecclesiastical court, to compel the celebration of any marriage by reason of any contract of marriage, either *per verba de presenti*, or *per verba de futuro*.

PREGNANCY, is a plea in stay of execution, when a woman is convicted of a capital crime, alleging that she is with child; in which case, the judge must direct a jury of twelve matrons or discreet women to inquire of the fact: and if they bring in their verdict *quick with child*, (for barely *with child*, unless it be alive is not sufficient,) execution shall be stayed generally till the next session; and so from session to session, till either she be delivered or proves by the course of nature, not to have been with child. But if she once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, she shall not be intitled to the benefit of a further respite; for she may then be executed before the second child is quick in the womb. 4 Black. 395.

PREMISES in a deed, is that part in the beginning thereof, wherein are set forth the names of the parties, with their titles and additions; and wherein are recited such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded. And herein also is set down the consideration upon which the deed is made, and the certainty of the thing granted. 2 Black. 298.

It is also commonly used to denote the lands granted, or other subject matter of the deed or conveyance.

PREROGATIVE, (from *pre*, *ante*, and *rogare*, to ask or demand,) is a word of great extent, including all the rights which by law the king hath, as chief of the common wealth, and as intrusted with the execution of the laws. 4 New Abr. 149. Co. Lit. 90.

But although the king is intrusted with the executive part, and from him all justice is said to flow, yet he is to make the law of the land the rule of his government; that being the measure, as well of the power as of the subjects obedience; for as the law asserts, maintains, and provides for the safety of the king's royal person, crown, and dignity, and all his just rights, so it likewise declares and asserts the rights and liberties of the subject. 1 And. 153. Co. Lit. 19. 75. 4 Co. 124. 4 New. Abr. 149.

And all prerogatives must be for the advantage of the people, otherwise they ought not to be allowed by law. Moor. 672. 4 New Abr. 149.

For more on this subject, See Black. Com. 1 & 4 vols.

PRERO-

PREROGATIVE COURT of the archbishop, is that court wherein all testaments are proved, and all administrations granted, where the party dying within the province hath *bona notabilia* in some other diocese than where he dieth; and is so called from the archbishop's having a *prerogative* throughout his whole province for the said purposes. From which court an appeal lies to the delegates. 4 *Inst.* 335.

PRESCRIPTION, is a title acquired by use and time, and allowed by the law; as when a man claims any thing because he and his ancestors, or they whose estate he hath, have had, or used it all the time, whereof no memory is to the contrary: or it is, where for continuance of time, beyond the memory of man, a particular person hath a particular right against another. 1 *Inst.* 113.

There is a difference between *prescription*, *custom*, and *usage*; *prescription* hath respect to a certain *person*, who by intendment may have continuance for ever; as, for instance, he and all they whose estate he hath in such a thing, this is a prescription: but *custom* is local, and always applied to a certain place; as that time out of mind there hath been such a custom in such a place: and *prescription* belongeth to *one or a few* only, but *custom* belongeth to all: now *usage* differs from both; for it may be either to *persons or places*; as to the inhabitants of a town to have a way, and the like. 1 *Inst.* 114.

Prescription must be *time out of mind*; though it is not the length of time that begets the right of prescription, but it is a presumption in law, that a possession cannot continue so long quiet and not interrupted, and it was against right, or injurious to another. 1 *Inst.* 114.

Nothing but *incorporeal* hereditaments can be claimed by prescription, as a right of a way, a common, or the like; but no prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had. 2 *Black.* 264.

A prescription *must always be laid in him that is tenant of the fee*. A tenant for life, for years, at will, or a copyholder, cannot prescribe; for as prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe, whose estate commenced within the remembrance of man. And therefore the copyholder must prescribe under cover of the lord's estate, and the tenant for life under cover of the tenant in fee-simple. 2 *Black.* 265.

A prescription *cannot be for a thing which cannot be raised by grant*. For the law allows prescription only in supply of the loss of a grant; and therefore every prescription presupposes a grant to have existed. Thus a lord of a manor cannot prescribe to raise a tax or toll upon strangers; for as such claim could never have been

been

been good by any grant, it shall not be good by prescription. *Id.*

What is to arise by matter of record cannot be prescribed for, but must be claimed by grant entered on record; such as, for instance, the royal franchises of deodands, felons goods, and the like. These not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by any inferior title. But the franchises of treasure trove, waifs, estrays, and the like, may be claimed by prescription; for they arise from private contingencies, and not from any matter of record. Id.

Among things incorporeal, which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a *que estate*; that is to say, in himself and those whose estate he holds, or in him and his ancestors; for if a man prescribes in a *que estate*, nothing is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim any thing as the consequence, or appendix of an estate, with which the thing claimed hath no connection: but if he prescribes in himself and his ancestors, he may prescribe for any thing whatsoever that lies in grant; not only things that are appurtenant, but also such things as may be in gross. Therefore a man may prescribe, that he, and those whose estate he hath in such a manor, have used to hold an *advowson appendant* to that manor; but if the advowson be a distinct inheritance, and not appendant, then he can only prescribe in himself and his ancestors. So also a man may prescribe in a *que estate* for a *common appurtenant* to a manor; but if he would prescribe for a *common in gross*, he must prescribe in himself and his ancestors. 2 *Black.* 266.

PRESENTATION to a benefice, is the offering a clerk to the ordinary to be admitted. And this an *infant* may do, though of never so tender age; for the ordinary is judge of the fitness of the person presented.

Coparceners may join in a presentation; but if they cannot agree, then the eldest shall present first, and the rest in their turns.

Jointenants or *tenants in common* must all join; for if they present singly, the bishop may refuse the clerk.

If a *married woman* hath title to present, she and her husband must join in the presentation; and if she dies, he shall present as tenant by the *curtesy*.

A *widow* has only the third turn, after the heir has presented twice.

After presentation, the bishop has the right of examination of the person presented; and if he finds him insufficient, he may refuse

refuse him. The most common and ordinary cause of refusal is want of learning: but there are other causes; as if a man hath been convicted of perjury, or other grievous crime, if he be outlawed, excommunicate, or an heretic.

If the refusal be for heresy, want of learning, or other matter of ecclesiastical cognizance, the bishop, if the patron is a layman, must give notice to him of the refusal; otherwise lapse will not incur; but if the cause be temporal, the bishop is not bound to give notice.

If the bishop doth refuse without good cause, the patron hath a remedy against him by a *quare impedit* in the temporal court; and the clerk hath a remedy by *duplex querela* in the court spiritual.

PRESENTMENT of offences, is that which the grand jury find of their own knowledge, and present to the court, without any bill of indictment laid before them at the suit of the king; as the presentment of a nuisance, a libel, and the like; upon which, the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it. There are also presentations by justices of the peace, constables, surveyors of the highways, churchwardens, and others, of matters belonging to their respective offices.

PRESENTMENT of copyhold surrenders, is an information, in court, to acquaint the lord, or his steward, with a surrender made out of court; which surrender is not effectual till presented in court. By the general customs of manors, it is to be made at the next court baron immediately after the surrender; but by special custom, it may be at the second or other subsequent court. The surrender must be made in court by the same person that took the surrender, then presented by the homage. If a man who hath surrendered out of court dies before presentment, and the presentment is made after his death, according to the custom, this is sufficient. So also, if he to whose use the surrender is made, dies before presentment, yet, upon presentment made after his death, his heir, according to the custom, shall be admitted. The same law is, if those into whose hands the surrender was made, die before presentment; for, upon sufficient proof in court that such a surrender was made, the lord shall be compelled to admit accordingly. 2 Black. 369.

PRESSING seamen for the royal navy hath been a matter of some dispute; but it now seems to be settled that the king hath a power by the common law, to issue his commission to the admiralty to compel seamen into the service; and this power is implied in several late acts of parliament, referring thereunto as a thing well known. *Fost.* 154.

PRESUMPTION, is a supposition, opinion, or belief, previously formed, and is of three sorts; violent, probable, and light
or

or temerary. Violent presumption oftentimes amounts to full proof; as if one be run through the body with a sword in an house, whereof he instantly dies, and a man is seen to come out of that house with a bloody sword, and no other person was at that time in the house; probable presumption moveth little; but light or temerary presumption moveth not at all. 1 *Inst.* 6.

If all the witnesses to a deed be dead, then violent presumption, which stands for a proof, is continual and quiet possession; although the deed may receive credit from comparing of seals, writing, and other circumstances. *Id.*

PRESUMPTIVE HEIR, is spoken in distinction from an heir *apparent*. An heir *apparent* is one whose right of inheritance is indefeasible, provided he outlives the ancestor, as the eldest son or his issue. A *presumptive* heir is one who, if the ancestor should die immediately, would in the present circumstances of things be his heir, but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother, whose presumptive succession may be destroyed by the birth of a child; or a daughter whose present expectation may be cut off by the birth of a son. 2 *Black.* 208.

PRETENDED TITLES. See **TITLE, BUYING OF.**

PRETENDER. If any of the sons of the late pretender to the crown of this realm shall land, or attempt to land, in this kingdom, or be found in *Great Britain* or *Ireland*, he shall be attainted of high treason. And if any person shall correspond with any of them, or remit money for their use, he shall be guilty of high treason. 1 *An. st.* 2. c. 17. 17 *G.* 2. c. 39.

And there is an oath, 13 *W. c.* 6. commonly called the oath of abjuration, required to be taken by all persons in any office, trust, or employment, recognizing his majesty's right to the crown, under the act of settlement, engaging to support him, promising to disclose all conspiracies against him, and expressly renouncing any claim of the descendants of the late Pretender.

PRIMER FINE, or *præ fine*, is a sum due to the king, on suing out a *præcipe* or writ of covenant, in order to the levying a fine; being a noble for every five marks of land sued for; that is, one tenth of the annual value. It is called the *primer*, or *first fine*, because there is another fine due afterwards, in the course of the proceedings, called a *post-fine*. 2 *Black.* 350.

PRIMER SEISIN, *prima seisin*, the first seisin or possession. It was a branch of the king's prerogative, whereby he had the first possession, or profits for a year, of all lands and tenements holden of him *in capite*, whereof his tenant died seised in fee, his heir being then of full age; if the heir was under age, the king took the profits until the heir came of age.

PRINCIPAL AND ACCESSARY. *Principal* is the person who commits the offence; *accessary* is he who is not the chief actor,

actor, but is some way concerned therein, either before or after the felony committed. A man may be principal in two degrees; a principal in the first degree, is he that is the actor, or absolute perpetrator of the crime: and a principal in the second degree, is he who is *present*, aiding and abetting the fact to be done: which presence need not always be an actual immediate standing by, within sight or hearing of the fact: but there may be also a constructive presence; as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance; or where one man administers poison, which had been prepared by another, though not actually present when it was taken.

PRIORITY, is an antiquity of tenure, in comparison of another less ancient, which latter is termed *posteriority*. A tenant may hold by priority of one lord, and by posteriority of another. *Old Nat. Brev.* 94.

A prior *suit* depending, may be pleaded in abatement of a subsequent action or prosecution.

A prior *mortgage* ought to be first paid off. But there is no priority of time in *judgments*; but the judgment first executed shall be first paid.

If two *informations* be exhibited on the very same day, it seems that they mutually abate each other. 2 *Haw.* 275.

Debts ought to be paid by an executor or administrator, according to their priority; as debts due to the king, on record or specialty before judgments, statutes or recognizances; next to these, debts due on special contract; as for rent, or upon bonds, covenants, and the like, under seal; and lastly, debts on simple contracts; as upon notes unsealed, and verbal promises. 2 *Black.* 511.

PRIORY, is a society of religious persons, where the head is termed a prior or prioress; of which, in this kingdom, there were two sorts: 1. Where the prior was chief governor, as fully as an abbot within his abbey; of which kind were all the cathedral priors, and most of the order of *St. Austin*. 2. Where the priory was a cell, subordinate to some greater abbey, and the prior was placed and displaced at the pleasure of the abbot.

Alien priory, was a cell to some foreign monastery; for when manors or tithes were given, as was frequently done, to foreign monasteries, the monks built convenient houses here for the reception of a small convent, and then sent over such a number as they thought proper, constituting priors over them. In the wars between *England* and *France*, these estates were generally seized by the English, and were restored again upon a peace.

PRISAGE, was a custom due to the king, of the wines brought in by the merchants of *England*, of every ship having twenty tons or more. It was called *prisage*, because it was a
taking.

taking or purveyance for wine to the king's use ; it was also called *butlerage*, because the king's chief *butler* received it. 4 *Inst.* 30.

PRISON. See GAOL.

PRISON BREAKING, at the common law, was felony, for whatever cause the party was imprisoned. But by the statute *de frangentibus prisonam*, 1 *Ed. 2. ft. 2.* the severity of the common law is mitigated, which enacts, that no person shall have judgment of life or member for breaking prison, unless committed for some capital offence. So that, unless the commitment be for treason or felony, the breaking of prison is not felony, but is otherwise punishable, as a misdemeanor only, by fine and imprisonment. 4 *Black.* 130.

Any place whatever, wherein a person under a lawful arrest, for a supposed crime, is restrained of his liberty, whether in the stocks, or street, or in the common gaol, or the house of a constable, or a private person, is a prison, in this respect, for a prison is nothing else but a restraint of liberty ; and therefore this extends as well to a prison in law, as to a prison in deed. 2 *Inst.* 589.

PRIVILEGE, is defined to be a private or particular law, whereby a private person or corporation is exempted from the rigour of the common law ; or it is some benefit or advantage granted or allowed to any persons contrary to the course of law ; and is sometimes used for a place that hath a special immunity. A privilege is therefore *personal* or *real* ; *personal*, as of members of parliament and of convocation, and their menial servants, not to be arrested in the time of parliament or convocation, nor for certain days before or after ; so also of peers, ambassadors, and their servants : *real*, is that which is granted to a place ; as to the king's palaces, the courts at *Westminste*, and the universities, that their members and officers must be sued within their precincts and courts, and not elsewhere.

Formerly, one of the greatest obstructions to public justice, was the multitude of pretended privileged places, where indigent persons assembled together, to shelter themselves from justices, (especially in *London* and *Southwark*,) under the pretext of their having been ancient palaces of the crown, or the like ; all of which sanctuaries are now demolished by several acts of parliament. 4 *Black.* 129.

PRIVY. *Privies* are such as are partakers, or had any interest in any action or thing, or any relation to another. - These are either privies in *estate*, as donor and donee, lessor and lessee ; or privies in *blood*, as heir to the ancestor ; privies in *representation*, as executors to testators, administrators to intestates ; and privies in *tenure*, as lord and tenant. *Wood. b. 2. c. 3.*

Privies

Privies in estate or blood, are bound or barred presently for ever by a fine, if they claim the same title that their ancestors had, that levied the fine, notwithstanding their being under the impediments of infancy, coverture, insanity, or the like. *Id.*

PROBATE of wills, was originally of temporal cognizance; afterwards, the jurisdiction thereof belonged to the county court, where the bishop and sheriff jointly sat as judges, in matters both temporal and spiritual; and finally, after the separation of the ecclesiastical courts from the temporal, the jurisdiction of wills generally followed the courts ecclesiastical; yet to this day, lords of manors, and others, have the probate of testaments within their liberties, by special privilege.

Generally, the will is to be proved before the bishop of the diocese where the testator inhabited, or before his officer specially appointed; but in case the testator had goods in some other diocese than that wherein he died, to the value of 5*l.* or upwards, (which are commonly called *bona notabilia*;) the testament must be proved in the prerogative court of the archbishop of the province.

A will of lands is not subject to the ecclesiastical jurisdiction. But where a will concerns both lands and goods, the probate thereof ought to be intire in the spiritual court, and not of parcels; but the probate of the will for the lands, will not prejudice the heir at law, for it shall not be evidence at the common law, nor shall the examination of the witnesses, in the spiritual court, be given in evidence at the common law.

But a will of goods is not of any effect, until probate is made thereof; nor can any executor or other person give a will in evidence concerning personal estate, without producing the probate; for it is no will until it hath received a sanction by the spiritual judge, for he is to determine whether it be a will or no.

Where there are more executors than one, and some of them do refuse, and others of them prove the will, they who refuse may afterwards come in and have probate in like manner as the other. If they all refuse, administration shall be granted to whom the ordinary thinks fit, with the will annexed to such administration.

The manner of proving testaments is of two sorts; the one is called the vulgar, or *common form*; the other is termed the *solemn form*, or form of law. The common form is most commonly upon the executor's own oath, that he believes the writing exhibited to be the true last will and testament of the deceased; the solemn form is by witnesses first calling in all persons having interest, in case the will shall not be proved to be a good will.

After the will is approved of by the judge, the original is deposited in the registry of the ordinary; and a copy thereof, in parchment, is made out under the seal of the ordinary, and delivered

vered to the executor, together with a certificate of its having been proved before him : all which together is usually styled the probate.

PROCEDENDO, is a writ which lieth where a cause hath been called up from an inferior to a superior court, and such superior court finds the suggestion for removing it to be insufficient ; in which case, the superior court, by this writ, remits the cause to the court from whence it came, commanding the said inferior court to *proceed* to the final hearing and determining the same.

PROCESS, is that which *proceedeth* or goeth out upon former matter, either *original* or *judicial* : and this is in causes either *civil* or *criminal*. *Lamb.* 519.

Process in *civil* causes, is called *original* process, when it is founded upon the *original* writ ; and also to distinguish it from *mesne* or intermediate process, which issues pending the suit, upon some collateral interlocutory matter ; as to summon juries, witnesses, and the like. *Mesne* process, is also sometimes put in contradistinction to *final* process, or process of *execution* ; and then it signifies all such process as intervenes between the beginning and end of a suit. 3 *Black.* 279.

In *criminal* cases, upon an indictment for a misdemeanor not being felony, or a greater offence, the first process is a *venire*, or summons ; and if, by the return thereof, it appears that the party hath lands in the county whereby he may be distrained, then a *distress infinite* shall be awarded, from time to time, until he shall appear ; and by virtue thereof, he shall forfeit, on every default, so much as the sheriff shall return upon him in issues. But if it be returned upon the *venire* that he hath no lands, a writ of *capias* shall issue, to take his body ; and if he cannot be taken on the first *capias*, then a second and a third shall issue, called an *alias* and a *pluries capias* ; and last of all, an *exigent*, in order to outlawry. But on an indictment for treason or felony, a *capias* is the first process. 4 *Black.* 319.

Where the inhabitants of a parish are indicted or presented, the process is first a *venire*, and then a *distringas*. *Crown Circ.* 21.

PROCHEIN AMY, *propinquior amicus*, is he that appears in court for an infant, who sues any action, and aids the infant in pursuit thereof.

PROCLAMATION. From the king being the fountain of justice, hath been deduced the prerogative of issuing proclamations, which is vested in the king alone. These proclamations have then a binding force, when (as Sir *Edward Coke* observes) they are grounded upon, and enforce the law of the realm. For though the making of laws is intirely the work of a distinct part (the legislative branch) of the sovereign power, yet the manner,
time,

time, and circumstances of putting those laws in execution, must frequently be left to the discretion of the executive magistrate. And therefore his constitutions or edicts concerning these points, which we call proclamations, are binding upon the subject, where they do not either contradict the old laws, or tend to abolish new ones; but only enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary. 1 *Black.* 270.

Thus the established law is, that the king may prohibit any of his subjects from leaving the realm; a proclamation therefore forbidding this in general for three weeks, by laying an embargo upon all shipping in time of war, will be equally binding as an act of parliament, because founded upon a prior law. But a proclamation to lay an embargo in time of peace, upon all vessels laden with wheat, (though in the time of a public scarcity,) being contrary to law, the advisers of such proclamation, and all persons acting under it, found it necessary to be indemnified by a special act of parliament, 7 G. 3. c. 7.

A proclamation for disarming papists is also binding, being only in execution of what the legislature hath first ordained; but a proclamation for allowing arms to papists, or for disarming any protestant subjects, will not bind; because the first would be to assume a dispensing power, the latter a legislative one; to the vesting of either of which in any single person, the laws of *England* are absolute strangers. 1 *Black.* 271.

When any fine of land is passed, proclamation is solemnly made thereof, in the court of common pleas, where levied, after ingrossing it; and transcripts also are sent to the judges of assize, and justices of the peace of the county where the lands lie, to be openly proclaimed there.

On a suit commenced in chancery, if the defendant doth not appear, an attachment is issued against him; and if the sheriff returns that he is not to be found, then an attachment with proclamations issues, directing the sheriff to cause public proclamations to be made throughout the county, to summon the defendant, upon his allegiance, personally to appear and answer. If he still stands out in contempt, a commission of rebellion is awarded against him, for not obeying the proclamations according to his allegiance. 3 *Black.* 444.

When a defendant absconds, and cannot be found, there shall issue a writ, commanding the sheriff to proclaim him in five county courts successively; and if he then does not appear, he shall, by the judgment of the coroners of the county, be outlawed. 3 *Black.* 283.

The legitimation of money, and giving to it its denominative value, is one special part of the king's prerogative. Also, by his proclama-

proclamation, he may legitimate foreign coin, and make it current money of this kingdom. 1 *Inff.* 207.

The king, by proclamation, (with the advice of his privy council,) may call or dissolve parliaments. 4 *Inff.* 4.

On the riot act, 1 G. c. 5. if, after proclamation, any twelve or more of the rioters shall be found together, they shall be guilty of felony without benefit of clergy. And if any person shall oppose the reading of the proclamation, he shall be in like manner guilty.

PROCTOR, *procurator*, is one who is appointed to represent in judgment the party who empowers him, by writing under his hand called a *proxy*. They are chiefly in use in the courts of the civil or ecclesiastical law.

Proctors of the clergy, are those who are chosen and appointed to appear for cathedral or collegiate churches, as also for the common clergy of every diocese, to be their representatives in convocation.

PROCURATIONS, *procuraciones*, are certain sums of money paid yearly by the inferior clergy, to the bishop or archdeacon, for the charges of visitation. The procurations were anciently made, by *procuring* victuals, and other provisions in specie; but the demands of these in kind, being thought to be exorbitant, and divers complaints being made thereof to the provincial councils, and to the popes, it became at last universally settled, to pay a fixed sum in money, instead of a procuration in meat, drink, provender, and other accommodation. These being merely an ecclesiastical duty, are only suable in the spiritual court; and may be levied by sequestration, or other ecclesiastical process. *Gibf.* 1546.

PROCURATOR, is one who hath a charge committed to him by any person; in which general signification it hath been applied to a vicar or lieutenant, who acts instead of another; and we read of *procurator regni*, and *procurator reipublice*, which is a public magistrate: also *proxies* of lords in parliament, are, in our law books, called *procuratores*. The bishops are sometimes termed *procuratores ecclesiarum*; and the advocates of religious houses, who were to solicit the interest, and plead the causes of the societies, were denominated *procuratores monasterii*. And from this word proceeds the common word *proctor*.

PROCURATORIUM, was the proxy or instrument by which any person or community did constitute or delegate their proctor or proctors; to represent them in any judicial court or cause.

PROFANENESS. All blasphemies against God, as denying his being or providence; and all contumelious reproaches of Jesus Christ; all profane scoffing at the holy scripture, or exposing any part thereof to contempt or ridicule; and all open lewdness,
grossly

grossly scandalous; are punishable (not only by the spiritual court, but also) by the temporal courts, by fine and imprisonment; and also such corporal punishment as to the court in discretion shall seem meet, according to the heinousness of the crime. 1 *Haw.* 7.

By the 3 *Ja. c.* 21. if any person shall, in any stage play, interlude, show, May-game, or pageant, jestingly or profanely speak or use the holy name of God, or of Christ Jesus, or of the Holy Ghost, or of the Trinity, he shall forfeit 10*l.*

And by the 9 & 10 *W. c.* 32. if any person, educated in the christian religion, or professing the same, shall, by writing, printing, or advised speaking, deny any one of the persons in the Holy Trinity to be God; or maintain that there are more gods than one; he shall, for the first offence, be disabled to hold any office; for the second, he shall moreover be disabled to prosecute any action, or to be guardian, executor, administrator, or legatee, and shall be imprisoned for three years.

PROFERT IN CURIA, is where the plaintiff in an action declares on a deed, or the defendant pleads a deed, he must do it with producing the same in court, to the end that the other party may, at his own charges, have a copy of it; and until then he is not obliged to answer it. 2 *Lill. Abr.* 382. But by statute 4 & 5 *An. c.* 16. no advantage or exception shall be taken for want of a *profert in curia*; but the court shall give judgment according to the very right of the cause, without regarding any such omission and defect, except the same be specially and particularly set down and shewn for cause of demurrer.

PROFESSION, is used particularly for the entering into any religious order; by which the monk offered himself to God by a vow of three things; obedience, chastity, and poverty, which he promised constantly to observe: and this was called *sanctæ religionis professio*, and the monk a *religious professed*. And this entering into religion, whereby a man is shut up from all the common offices of life, is by our law termed a *civil death*.

PROHIBITION, is a writ properly issuing only out of the court of king's bench, being the king's prerogative writ; but, for the furtherance of justice, it may now also be had in some cases out of the court of chancery, common pleas, or exchequer, directed to the judge and parties of a suit in an inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, doth not belong to that jurisdiction, but to the cognizance of some other court. 3 *Black.* 112.

This writ may issue either to inferior courts of common law, as to the courts of the counties palatine, or principality of *Wales*, if they hold plea of land or other matters not lying within their respective franchises; to the county court, or court baron, when

they attempt to hold plea of any matter of the value of 40*s.*, to the court of chivalry, or of the admiralty, if they hold plea of a contract made or to be executed within this kingdom; or to the ecclesiastical court, if they attempt to try the validity of a custom, or if in handling of matters within their cognizance, they transgress the bounds prescribed to them by the laws of *England*; as where they require two witnesses to prove the payment of a legacy, or the like. *Id.*

For the obtaining of a prohibition, the party aggrieved in the court below applies to the superior court, setting forth in a suggestion upon record the nature and cause of his complaint. And sometimes affidavit is necessary to be made of the truth of the suggestion; the distinction in which case, is this: where the matter suggested appears upon the face of the libel or other proceedings, the court never requires an affidavit; but if it doth not appear upon the face of the proceedings, the court will require affidavit of the truth of the suggestion. *Bur. Mansf* 2036.

Upon the court being satisfied that the matter alleged by the suggestion is sufficient, the writ of prohibition immediately issues; commanding the judge not to hold, and the party not to prosecute the plea. And if either the judge or party shall proceed after such prohibition, an attachment may be had against them for the contempt by the court that awarded it, and an action will lie against them to repair the party in damages. 3 *Black.* 113.

But sometimes the point may be too nice and doubtful to be decided merely upon a motion; and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to *declare* in prohibition; that is, to prosecute an action, by filing a *declaration* against the other, upon a supposition, or fiction, that he hath proceeded in the suit below, notwithstanding the writ of prohibition. And if upon demurrer and argument, the court shall finally be of opinion, that the matter suggested is a good and sufficient ground of prohibition in point of law, then judgment, with nominal damages, shall be given for the party complaining; and the defendant, and also the inferior court, shall be prohibited from proceeding any farther. On the other hand, if the superior court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him who applied for the prohibition in the court above, and a writ of *consultation* shall be awarded; so called, because upon deliberation and consultation had, the judges find the prohibition to be ill founded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined in the inferior court. *Id.*

PROHIBITION TO STAY WASTE, (*prohibitio de vasto*,) is a writ judicial directed to the tenant, prohibiting him from making

making waste upon the land in controversy, during the suit. So also a prohibition shall be granted to any person who commits waste in the houses of the incumbent of a spiritual living, or that cuts down any trees on the glebe, or doth any other waste.

PROMISE, is where persons bind themselves by words to do or perform such a thing as is agreed on : it is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. Yet for the breach of it, the remedy is different ; for instead of an action of covenant, there lies only an action upon the case, the damages whereof are to be estimated and determined by the jury. As if a builder promises or undertakes to another, that he will build and cover his house within a time limited, and fails to do it, an action upon the case lies against the builder for this breach of his promise, and the plaintiff shall recover a pecuniary satisfaction for the injury sustained by such delay. So in the case of a debt by simple contract, if the debtor promises to pay it and doth not, this breach of promise intitles the creditor to his action on the case, instead of being driven to an action of debt. Some agreements indeed, though never so expressly made, are deemed of so important a nature, that they ought not to rest in verbal promise only ; and therefore by the 29 C. 2. c. 3. commonly called the statute of frauds and perjuries, it is enacted, that in the five following cases, no verbal promise shall be sufficient to ground an action upon, but at the least some note or memorandum of it shall be made in writing, and signed by the party to be charged therewith : 1. Where an executor or administrator promises to answer damages out of his own estate. 2. Where a man undertakes to answer for the debt, default, or miscarriage of another. 3. Where any agreement is made upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein. 5. Where there is any agreement that is not to be performed within a year from the making thereof. In all these cases, a mere verbal promise is void.

3 *Black.* 157.

PROMISSORY NOTE, or *note of hand*. See **BILL OF EXCHANGE**.

PROPERTY, is the highest right a man can have to any thing, being used for that right which one hath to lands or tenements, goods or chattels, which no ways depend on another. For preserving property the law hath three rules : 1. No man is to deprive another of his property, or disturb him in enjoying it. 2. Every person is bound to take due care of his own property, so as the neglect thereof may not injure his neighbour. 3. All persons must so use their right, that they do not in the manner of doing it damage their neighbour's property.

PROROGUE, signifies to prolong or put off to another day.

Prorogation of the parliament, is the continuance of it from one session to another ; whereas the adjournment of it is the continuance of the same session from day to day. 1 *Black.* 186.

PROTECTION, in a general sense, is taken for that benefit and safety which every subject hath by the king's laws : every man who is a loyal subject is in the king's protection ; and in this sense, to be out of the king's protection, is to be excluded the benefit of the law. In a special signification, a protection of the king is an act of grace, by writ issued out of chancery ; which lies where a man is to pass over the sea in the king's service : and by this writ, when allowed in court, he shall be quit of all manner of suits between him, and any other person until his return. 2 *Lill. Abr.* 398. But now these protections are seldom used, and are often ousted by act of parliament ; as where it is said, that in such an action, no essoin, *protection*, or wager of law, shall be allowed.

PROTEST, *protestatio*, hath two applications ; one by way of caution, to call witnesses, (as it were,) or openly affirm that he doth either not at all, or but conditionally, yield his consent to any act, or unto the proceeding of a judge in a court, wherein his jurisdiction is doubtful, or to answer on his oath further than by law he is bound. The other is by way of complaint, as to protest a man's bill of exchange. For which, see **BILL OF EXCHANGE**.

In the house of lords, every peer hath a right, with leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with the reasons for such dissent ; which is usually styled his *protest*.

PROTESTANDO, is a word used to avoid duplicity in pleading : it prevents the party that makes it from being concluded by the plea he is about to make. Every plea ought to be simple, intire, connected, and confined to one single point ; it must never be intangled with a variety of distinct independent answers to the same matter, which must require as many different replies, and introduce a multitude of issues upon one and the same dispute. Yet it is frequently expedient to plead in such a manner as to avoid any implied admission of a fact which cannot with propriety or safety be positively affirmed or denied : and this may be done by what is called a *protestation* ; whereby the party interposeth an oblique allegation or denial of some fact, protesting (*protestando*) that such a matter doth or doth not exist ; and at the same time avoiding a direct affirmation or denial : as if an award be set forth by the plaintiff, and he can assign a breach in one part of it by the defendant, namely, the non-payment of a sum of money, and yet is afraid to admit the performance of the rest of the award, or to aver in general a non-performance of any part of it, lest something should appear to have been performed ; he may save

save to himself any advantage he might hereafter make of the general non-performance, by alleging *that* by protestation, and plead only the non-payment of the money. 5 *Black.* 311.

PROTHONOTARY, is a chief officer or clerk of the common pleas and king's bench; the former hath three, and the latter but one; whose office is to record all civil actions, as the clerk of the crown-office doth criminal causes in that court. Those of the common pleas, enter and inroll all manner of declarations, pleadings, assises, judgments, &c.

PROVINCE. The ecclesiastical division of this kingdom is into two provinces; of *Canterbury* and *York*. A province is the circuit of an archbishop's jurisdiction, which is subdivided into bishopricks or dioceses. 1 *Black.* 111.

PROVINCIAL CONSTITUTIONS, in this kingdom, were decrees made in the provincial synods, held under divers archbishops of *Canterbury*, from *Stephen Langton*, in the reign of *Hen. 3.* to *Henry Chichele*, in the reign of *Hen. 5.* which were also adopted by the province of *York*, in the reign of *Hen. 6.*

PROVISO, in a deed, is generally taken for a *condition*, on the performance whereof the validity of the deed depends; but it differs from it in several respects; for a condition is usually created by the grantor or lessor, but a proviso by the grantee or lessee. 2 *Nelf. Abr.* 21.

A proviso always implies a condition, if there be no words subsequent, which may change it into a covenant. And where a proviso is a condition, it ought to do the office of a condition; that is, make the estate conditional, and shall have reference to the estate, and be annexed to it, but shall not make it void without entry, as a limitation will. *Cro. Eliz.* 242.

A lease was made for years, rendering rent at such a day, proviso, if the rent be arrear for one month after, the lease to be void. The question was, whether this was a condition or limitation; for if it was a condition, then the lease is not determined without entry. Adjudged, that it was a limitation, though the words were conditional, because it appeared by the lease itself, that it was the express agreement of the parties, that the lease shall be void on non-payment of the rent, and it shall be void without entry. *Mo.* 291.

Trial by proviso, is where the plaintiff forbears to bring his cause to trial, and the defendant takes a *venire facias*, directed to the sheriff, with a clause, "provided, that if the plaintiff taketh out any writ to that purpose, the sheriff shall summon only one jury upon them both." *T. L.*

PROVISOR, heretofore was one nominated by the pope to a benefice, before it became void, in prejudice of the right of the true patron, against which several statutes were made. By 25 *Ed. 3. fl. 6.* if any reservation or provision be made by the court

of *Rome*, of any dignity or benefice, in disturbance of the rightful donors, the king shall present for that time, if the patrons themselves shall not exercise their right. And if the persons lawfully presented, shall be disturbed by such provisors, then the said provisors shall be attached by their bodies, and imprisoned till they make fine to the king, and satisfaction to the party grieved. And by 27 *Ed. 3. c. 1.* commonly called the statute of provisors, they shall be put out of the king's protection, their lands and goods forfeited to the king, and their bodies imprisoned at the king's will.

PROVOST MARSHAL, is an officer of the navy, who hath the charge of prisoners taken at sea, and is sometimes used for like purposes at land, or to seize or arrest any within the jurisdiction of his office. 13 *C. 2. c. 9. Corwell.*

PROXIES, are persons appointed instead of others to represent them.

PUBERTY, is the ripeness of age, at which persons may consent to marry; which, by our law, is in women at the age of twelve, and men at fourteen.

PUBLIC WORSHIP: Every person above the age of sixteen years, having no lawful or reasonable excuse, who shall absent himself from church, chapel, or place of public worship, on *Sundays*, shall forfeit 12*d.* for every offence, and also 20*l.* a month. 1 *El. c. 2.* 23 *El. c. 1.* 29 *El. c. 6.*

And if any person shall disturb a preacher in his sermon, by word or deed, he shall be committed to gaol by two justices of the peace, for three months, and further to the next sessions. 1 *Mary, Seff. 2. c. 3.*

And if any persons shall willingly, and of purpose, come into any church, chapel, or other congregation, permitted by law, and disturb the same, or misuse any preacher or teacher, he shall, on conviction at the sessions, forfeit 20*l.* 1 *W. c. 18.*

PUISNE, Fr. younger, or born after.

PUNISHMENT, is the penalty of transgressing the law: and as debts are discharged to private persons by payment, so obligations to the public, for disturbing society, are discharged when the offender undergoes the punishment inflicted for his offence.

PUR AUTER VIE. An estate *pur auter vie*, is where a lease is made of lands or tenements to a man, to hold *for the life of another person*. Formerly, where the tenant had the estate granted to himself only (without mentioning his heirs) during the life of another person, and died during the life of that other person; in this case, he that could first enter upon the land, might lawfully retain the possession, during the life of such other person, by right of occupancy; but if the estate had been granted to a man and his *heirs*, there the heir might, and still may enter

enter and hold possession, and is called in law, a *special occupant*, as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this estate during the life of him by whose life it was holden. 2 *Black.* 259.

By the 29 *C. 2. c. 3.* an estate *pur auter vie* shall be deviseable by will; and if no devise be made thereof, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a *special occupancy*, as assets by descent, as in case of lands in fee simple: if there be no special occupant, it shall go to the executors or administrators of the party that had the estate thereof by grant, and shall be assets in their hands for payment of debts. And by 14 *G. 2. c. 20.* the surplus of such estate *pur auter vie*, after payment of debts, shall go in a course of distribution like a personal estate.

PURCHASE, (according to *Littleton*,) is the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors, or of his kindred, but by his own deed. *Litt. sect. 12.*

By *purchase*, the lawyers understand any method of acquiring an estate otherwise than by descent: it includes every other method of coming to an estate, but merely by inheritance, wherein the title is vested in a person, not by his own act or agreement, but by the simple operation of law. 1 *Black.* 215. 2 *Black.* 241.

Purchase, indeed, in its vulgar and confined acceptation, is applied only to such acquisitions of land, as are obtained by way of bargain and sale, for money, or some other valuable consideration. But this falls short of the legal idea of purchase; for if I *give* land freely to another, he is, in the eye of the law, a purchaser, and falls within *Littleton's* definition, for he comes to the estate by his own agreement, that is, he consents to the gift. *Id.*

A man who hath his father's estate settled upon him in tail, before he is born, is also a purchaser; for he takes quite another estate than the law of descents would have given him. *Id.*

Nay, even if the ancestor deviseth his estate to his heir at law, by will, with other limitations, or in any other shape than the course of descents would direct, such heir shall take by purchase. *Id.*

But if a man, seized in fee, deviseth his whole estate to his heir at law, so that the heir takes neither a greater nor a less estate by the devise, than he would have done without it, he shall be adjudged to take by descent, even though it be charged with incumbrances for the benefit of creditors and others, who have demands on the estate of the ancestor. *Id.*

The difference, in effect, between the acquisition of an estate by

by descent, and by purchase, consists principally in these two points: 1. That by purchase, the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor: for when a man takes an estate by purchase, he takes it not as a fee paternal or maternal, which would descend only to the heirs by the father's or mother's side; but he takes it as an ancient fee, or a fee of indefinite antiquity, whereby it becomes inheritable to his heirs general, first of the paternal, and then of the maternal line. 2. An estate taken by purchase, will not make the heir answerable for the acts of his ancestor, as an estate by descent will; for if the ancestor, by any deed, obligation, covenant, or the like, bindeth himself and his heirs, and dieth, this deed, obligation, or covenant, shall be binding upon the heir, so far forth only as he had any estate of inheritance vested in him (or in some other in trust for him) by descent from that ancestor, sufficient to answer the charge, whether he remains in possession, or hath aliened it before action brought; which sufficient estate is in law called *assets*, from the French word *assez*, enough. Therefore, if a man covenants for himself and his heirs, to keep my house in repair, I can then, and then only, compel his heir to perform this covenant, when he hath an estate sufficient for this purpose, or *assets* by descent from the covenantor: for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory, until he hath assets by descent. 2 *Black.* 243.

Where there is a purchaser for valuable consideration, without notice of a mortgage, the mortgagee cannot tack a bond to his mortgage, and can only be satisfied for his bond out of the general assets of the mortgagor; because in this case, the estate, being not assets by descent will not be liable to the bond debt. 3 *Atk.* 659.

PURGATION, is the purging or clearing a man's self of a crime, of which he is publicly suspected or accused; and anciently, was much in use in this kingdom, both with respect to civil and ecclesiastical offences. With respect to civil offences, it was of two sorts, either fire ordeal, or water ordeal; the former being confined to persons of higher rank, the latter to the common people. Fire ordeal was performed either by taking up in the hand, unhurt, a piece of red-hot iron, of one, two, or three pounds weight, or else by walking barefoot and blindfold over nine red-hot plough-shares, laid lengthwise at unequal distances; and if the party escaped being hurt, he was adjudged innocent; but if it happened otherwise, he was condemned as guilty. 4 *Black.* 342.

Water ordeal was performed, either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt thereby, or

or by casting the person suspected into a river or pond of cold water, and if he floated therein, without any action of swimming, it was deemed an evidence of his guilt; but if he sunk, he was acquitted. *Id.*

The ecclesiastical purgation was, when a man or woman lay under a common suspicion, or public fame of incontinence or other vice; if he denied that he was guilty, he had a purgation appointed; which was, that he himself should swear that he was innocent, and should bring a certain number of compurgators, who should swear that they believed what he swore was true. But this was abolished by the statute 13 C. 2. c. 12. which enacts, that no person shall be compelled to confess, or accuse, or purge himself of any criminal matter, whereby he may be liable to censure or punishment.

PURLIEU, comes from the French *pur*, clear, intire, and exempt; and *lieu*, a place: that is, a place intire, clear, or exempt from the forest; and signifies those grounds which *Henry the second*, *Richard the first*, or king *John*, added to their ancient forests, over other men's ground, and were disafforested by the statute of *charta de foresta*. 4 *Inst.* 303.

But nevertheless the purlieu, as to some purposes, is forest still, and is disafforested as to the particular owners of the land, and for their benefit, and not generally to give liberty to any man to hunt the wild beasts, and spoil the vert. And if those beasts do escape out of the forest into the purlieu, the king hath a property in them still against any man, but against the owners of the woods and lands in which they are; and such owners have a special property in them *ratione loci*, but yet so that they hunt them fairly, and not forestall them in their return towards the forest. *Manw.* 366.

PURPARTY, Fr. *pour part*, (*pro parte*,) is that part or share of an estate, first held in common by parceners, which is by partition allotted to any of them. To make purparty, is to divide and sever the lands which fall to parceners, which till partition they held jointly and undivided.

PURPRESTURE, (from the French *pourpris*, hence also *purprisum*, an inclosure,) is where an house is erected, or an inclosure made, upon any part of the king's demesne lands of his crown, or of an highway, or common street, or public water, or such like public things; whereby a person endeavours to make that private to himself, which ought to be public: and for this an indictment lies at the common law, in the nature of a common nuisance. 1 *Inst.* 277. 2 *Inst.* 38.

PURVEYANCE, *provisio*, was a right enjoyed by the crown of buying up provisions and other necessaries by the king's purveyors, for the use of the royal household, at an appraised valuation, in preference to all others, and even without consent of
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the owner; and also of forcibly impressing the carriages and horses of the subject, to do the king's business on the public roads, in the conveyance of timber, baggage, and the like, upon paying to the proprietor a settled price. These purveyors, in process of time, greatly abused their authority, and became a great oppression to the subject, so that at last the crown was prevailed upon to give up this branch of the prerogative, by the statute 12 C. 2. c. 24. and the parliament in recompence settled on the king and his successors part of the hereditary excise on ale and beer. 1 *Black.* 287.

PUTURE, Sir *Edward Coke* explains, as signifying *poture*, or drinking. It was a demand made by the officers of the forest, within the circuit of their perambulation, of all kinds of victuals for themselves, their servants, horses, and dogs. Others, who call it *puture*, explain it as signifying a demand in general; and derive it from the monks, who, before they were admitted, *pullabant*, that is knocked at the gates for several days together.

Q U A

QUAKERS, were originally so called from their quaking and trembling in their extasies of devotion. They are, together with the other dissenters, intitled to the benefits of the act of toleration. They are also, by act of parliament, dispensed with from the formality of taking an oath, their solemn affirmation being allowed instead of it: but they shall not be admitted to give evidence in a criminal case, unless they be sworn. Their tithes, both great and small, may be recovered before justices of the peace, to any amount not exceeding 10*l.*

QUANTUM MERUIT, (that is, as much as he has deserved,) is an action on the case, grounded upon the promise of another, to pay him for doing any thing so much as he should deserve or *merit*. If a man retains any person to do work, or other thing for him, as a taylor to make a garment, a carrier to carry goods, or the like, without any certain agreement, in such case, the law implies, that he shall pay for the same as much as they are worth, and shall be reasonably demanded, for which this action may be brought; wherein he is at liberty to suggest, that the defendant promised to pay him so much as he reasonably deserved, and then to aver, that his trouble was worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination

mination of the jury, who will assess such a sum in damages as they think he really merited. 3 *Black.* 161.

QUANTUM VALEBAT, is where one takes up goods or wares of a tradesman, without expressly agreeing for the price. In this case, 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. So it is, where the law obliges one to furnish another with goods or provisions; as an innkeeper his guests, and the like. 3 *Black.* 161.

QUARE CLAUSUM FREGIT. Before the statute 19 *H.* 7. c. 9. giving the process of *capias* in all actions on the case, a practice had been introduced of commencing the suit by bringing an original writ of trespass *quare clausum fregit*, for breaking the plaintiff's close *vi et armis*; which, by the old common law, subjected the defendant's person to be arrested by writ of *capias*: and then afterwards, by connivance of the court, the plaintiff might proceed to prosecute for any other less forcible injury. This practice, (through custom, rather than necessity, and for saving some trouble and expence in suing out a special original adapted to the particular injury,) still continues in almost all cases, except in actions of debt; though now, by virtue of the statutes, a *capias* might be had upon almost every species of complaint. 3 *Black.* 281.

QUARE EJECIT INFRA TERMINUM, is a writ that lieth for a lessee, where he is cast out of his farm, before his term is expired, against the feoffee of the land, or the lessor that ejects him; and the effect of it is, to recover his term again, and his damages. But since the introduction of fictitious ousters, whereby the title may be tried against any tenant in possession, (by what means soever he acquired it,) this action is fallen into disuse. 3 *Black.* 207.

QUARE IMPEDIT, is a writ which lies where one hath an advowson, and the parson dies, and another presents a clerk, or disturbs the rightful patron to present: in which case, the writ commands the disturber to permit the plaintiff to present a proper clerk, or otherwise to appear in court, and shew cause (*quare impedit*) why he hinders him. *T. L.*

It is most adviseable to bring the writ against both the bishop, the pretended patron, and the clerk. For if the bishop be left out, and the suit be not determined till the six months are past, the bishop is intitled to present by lapse, inasmuch as he is not party to the suit. If the patron be left out, the writ will abate; for the right of the patron is the principal question in the cause. And if the clerk be left out, and has received institution before the action brought, the true patron by this suit may recover his right of patronage, but not the present turn. 3 *Black.* 247.

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The bishop and the clerk usually disclaim all title, save only the one, as ordinary, to admit and institute; and the other, as presentee of the patron, who is left to defend his own right. *Id.* 249.

If the right, on trial, be found for the plaintiff, three things are to be inquired after: 1. If the church be full; and, if full, then of whose presentation; for if it be of the defendant's presentation, then the clerk is removeable by writ brought in due time. 2. Of what value the living is; in order to assess the damages, which are directed to be given by the statute 13 *Ed. 1. c. 5.* namely, to the amount of one year's value of the living. 3. In case of plenarty upon an usurpation, whether six months have passed between the avoidance, and the time of bringing this action; for if so, this is a sufficient bar to the action. *Id.*

QUARE INCUMBRAVIT, is a writ that lies, where two are in plea for the advowson of a church, and the bishop admits the clerk of one of them within the six months; then the other shall have this writ against the bishop, that he appear and shew cause *why he hath incumbered* the church. And if it be found by verdict, that the bishop hath incumbered the church, after a *ne admittas* delivered to him, and within six months after the avoidance, damages are to be awarded to the plaintiff, and the bishop directed to disincumber the church.

QUARE NON ADMISIT, is a writ that lies where a man hath recovered an advowson, and sends his clerk to the bishop to be admitted, and the bishop will not receive him; then he shall have the said writ against the bishop, and may recover against him ample satisfaction in damages.

QUARENTINE, is a space of forty days: thus where the law lays, that a widow shall remain in her husband's capital mansion house for forty days after his death, during which time her dower shall be assigned, these forty days are called the widow's *quarentine*. So where persons coming from infected countries, are obliged to wait forty days before they are permitted to land; this is called performing *quarentine*. 2 *Black.* 135.

Quarentine, likewise signifies a quantity of ground containing forty perches. *Leg. Hen. 1. c. 16.*

QUARTER SESSION, is a general court holden by the justices of the peace in every county or other district, having liberty to hold sessions, once in every quarter of the year, at certain times limited by statute, for the execution of the authority given them by the commission of the peace, and by divers acts of parliament. If such general court is holden at other times than the particular times so limited, it is then called a *general sessions*; if for the execution of some particular branch only of their office, it is then a *special sessions*.

The

The particular time in every quarter of the year, is as follows, viz. in the first week after the *Epiphany*, in the first week after the clause of *Easter*, in the first week after the translation of *St. Thomas* the Martyr, and in the first week after the feast of *St. Michael*. If any of the said feast days falleth on a *Sunday*, the sessions shall be holden in the week following, and not in that same week. 2 *H. 5. ft. 1. c. 4.* 2 *H. Hist. 49.*

QUEEN ANNE'S BOUNTY. See **FIRST FRUITS.**

QUE ESTATE, *quorum statum*, as much as to say, *whose estate* he hath; which is a plea where a man, intitling another to lands, saith, that he and they *whose estate he hath* have enjoyed the same. A man cannot prescribe in any thing by a *que estate* that lies in grant, and cannot pass without deed or fine; but *in him and his ancestors* he may, because he comes in by descent without any conveyance. 1 *Inst. 121.*

So in the case of an advowson appendant to a manor, he may prescribe that he and they whose estate he hath in the manor, have used to hold the same; but if it be an advowson in gross, or a distinct inheritance, and not appendant, then he can only prescribe in him and his ancestors. 2 *Black. 266.*

QUINTO EXACTUS, is one that hath been five times proclaimed in the county court, in order to outlawry; and if he doth not then appear, he is by the judgment of the coroners returned outlawed.

QUI TAM, is when an information is exhibited against any person, on a penal statute at the suit of the king and the party who is informer, where the penalty for breach of the statute is to be divided between them; and such process is called a *qui tam*, from those words in the declaration respecting the prosecutor, when the proceedings were in Latin, "*qui tam pro domino rege quam pro seipso prosequitur.*"

QUIT CLAIM, *quieta clamatio*, is the quitting, releasing, or giving up all claim or title.

QUIT RENTS, *quieti redditus*, are so called because the tenant thereby goes *quit* and free of all other services. When these payments were reserved in silver or white money, they were anciently called *white rents*, or *blanch farms*, *redditus albi*; in contradistinction to rents reserved in work, grain, or the like; which were called *redditus nigri*, or *black maile*. 2 *Black.*

42.

QUOD CUM, in indictments or the like, being only by way of recital, (*that whereas* such a one being so and so,) and not a positive charge, is insufficient. 2 *Harw. 227.*

QUOD EI DEFORCEAT. Anciently if the owners of a particular estate, as for life, in dower, by the curtesy, or in fee tail, were barred of the right of possession by a recovery had against them, through their default or non-appearance in a possession

feffory action, they were absolutely without any remedy by the common law; as a writ of right doth not lie for any, but such as claim to be tenants of the fee simple. Therefore, the statute of the 13 *Ed. 1. c. 4.* gives a new writ for such persons, after their lands have been so recovered against them by default, called a *quod ei deforceat*; which, though not strictly a writ of right, so far partakes of the nature of one, as that it will restore the right to him, who has been thus unwarily deforced by his own default. 3 *Black. 193.*

QUOD PERMITTAT, is a writ that lies for one that is disseised of his common of pasture; so of a turbarry, piscary, fair, market, and the like. The heir of the person disseised may have this writ against the heir of the disseisor: so a person may have a *quod permittat* against a disseisor in the time of his predecessor. *T. L.*

QUOD PERMITTAT PROSTENERE, is a writ commanding the defendant to permit the plaintiff to abate the nuisance complained of, (*quod permittat prosternere*,) or otherwise to appear in court, and shew cause why he will not. On this writ the plaintiff shall have judgment to abate the nuisance, and to recover damages: but the proceedings on this writ being tedious and expensive, it is now disused, and hath given way to a special action on the case.

QUO MINUS, is a writ in the exchequer, wherein the plaintiff suggests that he is the king's farmer or debtor, and that the defendant hath done him the injury complained of, *quo minus sufficiens existit*, by which he is the less able to pay to the king his debt or rent. This writ was formerly allowed only to such persons as were real tenants or debtors to the king; but now the practice is become general, for the plaintiff to surmise that he is the king's debtor, although he is no way indebted to him, and the words are mere matter of form, and the truth thereof never inquired into, but the form is retained to give jurisdiction to the court of exchequer.

QUO WARRANTO, is in nature of a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right: it lies also in case of non-user, or long neglect of a franchise, or misuser, or abuse of it; being a writ commanding the defendant to shew *by what warrant* he exerciseth such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. 3 *Black. 262.*

This was originally returnable before the king's justices at *Westminster*, but afterwards only before the justices in eyre, by virtue of the statutes of *quo warranto*, 6 *Ed. 1. c. 1.* and 18 *Ed. 1. s. 2.*; but since those justices have given place to the king's temporary commissioners of assize, (the judges on the several circuits,)

cuits,) this branch of the statutes hath lost its effect; and writs of *quo warranto* (if brought at all) must now be prosecuted and determined before the king's justices at *Westminster*: and in case of judgment for the defendant, he shall have an allowance of his franchise; but in case of judgment for the king, for that the party is intitled to no such franchise, or hath disused or abused it, the franchise is either seized into the king's hands, to be granted out again to whomever he shall please; or, if it be not such a franchise as may subsist in the hands of the crown, there is merely judgment of ouster, to turn out the party who usurped it. *Id.*

The judgment on a writ of *quo warranto* (being in the nature of a writ of right) is final and conclusive, even against the crown; which, together with the length of its process, probably occasioned that disuse into which it is now fallen, and introduced a more modern method of prosecution by *information* filed in the court of king's bench, by the attorney general, *in the nature of a writ of quo warranto*, wherein the process is speedier, and the judgment not quite so decisive against the crown. This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seize it for the crown; but hath been long applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor; the fine being nominal only. 3 *Black.* 263.

This proceeding, by virtue of the statute 9 *An. c.* 20. is now applied to the decision of corporation suits, between party and party, without any intervention of the prerogative, which permits an *information in nature of a quo warranto* to be brought, with leave of the court, at the relation of any person desiring to prosecute the same, (who is called the *relator*;) against any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough, or town corporate; provides for its speedy determination, and directs that, if the defendant be convicted, judgment of ouster (as well as a fine) may be given against him, and that the relator shall pay or receive costs, according to the event of the suit. 3 *Black.* 264.

R A C

RACK, an engine to extort confession from persons accused, which is in use at this day in countries governed by the civil law: but the trial of guilt or innocence, by this

this method, is utterly unknown to the laws of *England*; though once, when the dukes of *Exeter* and *Suffolk*, and other ministers of *Hen. 6.* had laid a design to introduce the civil law into this kingdom, as the rule of government, for a beginning thereof, they erected a rack for torture, which was called in derision, the duke of *Exeter's* daughter, and still remains in the tower of *London*, where it was occasionally used as an engine of state, more than once, in the reign of queen *Elizabeth*. But when upon the assassination of *Villiers*, duke of *Buckingham*, by *Felton*, it was proposed in the privy council to put the assassin to the rack, in order to discover his accomplices; the judges, being consulted, declared unanimously, that no such proceeding was allowable by the laws of *England*. 4 *Black.* 326.

RACK RENT, is the full extended yearly value of a tenement let to farm.

RANSOM, *redemptio*, is properly the sum paid for redeeming a captive or prisoner of war. Sometimes, in our law, it is taken for a sum of money paid for pardoning some great offence, and setting the offender at liberty, who was under imprisonment.

When a statute saith, that such a person shall pay fine and ransom to the king, in legal understanding such fine and ransom are all one; for if they were divers, then should the party pay two sums, one for the fine, another for the ransom, which was never done. 1 *Inst.* 127.

If a ship was taken by the enemy, and ransomed, the ransom money must be raised out of the profits, notwithstanding any former mortgage of the ship; for if the ship had not been redeemed, the whole mortgage money must have been lost; and insurers always pay a part of the ransom money. 2 *Eq. Abr.* 690.

RAPE OF WOMEN, is where a man hath carnal knowledge of a woman by force, and against her will. Also if any person shall unlawfully and carnally know and abuse any woman child under the age of ten years, whether with her consent or against it, he shall be punished as for a rape. And it is not a sufficient excuse in the ravisher, to prove that the woman is a common strumpet; for she is still under the protection of the law, and may not be forced. Nor is it any excuse, that she consented after the fact. 1 *Haw.* 108.

The party ravished may give evidence on oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony; as if the witness be of good fame; if she presently discovered the offence, and made pursuit after the offender; shewed circumstances and signs of the

the injury, whereof many are of that nature, that only women are the most proper examiners and inspectors; if the place where in the fact was done, was remote from inhabitants or passengers; if the offender fled for it; these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself. But, on the other side, if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was supposed to be committed was near to inhabitants, or common recourse of passengers, and she made no outcry where it is probable she might be heard by others; or if a man prove himself to be in another place, or in other company at the time she charges him with the fact; or if she is wrong in the description of the place, or swears the fact to be done in a place where it was impossible the man could have access to her at that time; as if the room was locked up, and the key in the custody of another person; these, and the like circumstances, carry a strong presumption that her testimony is false or feigned. 1 *H. H.* 633.

Of old time rape was felony, for which the offender was to suffer death; afterwards the offence was made lesser, and the punishment changed from death to the loss of those members whereby he offended; that is, it was changed to castration, and loss of his eyes, unless she that was ravished, before judgment, demanded him for her husband. Afterwards, by the statute 3 *Ed. 1. c. 13.* it was made a trespass, subjecting the offender to two years imprisonment, and a fine at the king's will. By 13 *Ed. 1. c. 34.* it was again made felony; and at last, by 18 *El. c. 7.* was excluded from the benefit of clergy. 2 *Infl.* 180.

RASURE, from *rado*, to shave, is where part of the writing is scraped or scratched out, and where a deed is altered in any material part by the plaintiff himself, or by a stranger without the privity of the obligee, be it either by rasure, interlineation, or addition, or by drawing the pen through a line, or through the middle of any word material, this will vacate the deed, unless a memorandum be made thereof at the time of the execution and attestation. And if the obligee himself alter the deed after the execution thereof, although it be in words not material, yet this shall vacate the deed: but if a stranger, without his privity, alter the deed in any point not material, this shall not vacate the deed. 11 *Co.* 27.

If a deed contain divers distinct and absolute covenants, if any of the covenants be altered by rasure, addition, or interlineation, this misfeazance *ex post facto* shall vacate the whole deed; for though they be several covenants, yet it is but one deed. *Id.* 28.

RATIONABILI PARTE BONORUM, is a writ that lieth where the wife or sons and daughters of the deceased cannot have their reasonable part of the deceased's goods, after the debts are paid, and funeral expences satisfied. *F. N. B.* Of which goods the children, if there were any, should have one part; and the wife, if she survived, another part; if only a wife, or only children, they should respectively in either case take one moiety, and the administrator the other. *Bracton. 60.*

RAVISHMENT. SEE RAPE.

RAVISHMENT OF WARD, was a writ that lay for the guardian by knight's service, or in socage, against a person who took from him the body of his ward. By the statute 12 C. 2. c. 24. this writ is taken away as to lands held by knight's service, but not where there is guardian in socage, or appointed by will. But the proceedings by this kind of writ are now antiquated, and the most usual method of redressing all complaints relative to wards and guardians, is by application to the court of chancery, which is the supreme guardian, and has the superintendent jurisdiction of all the infants in the kingdom. 3 *Black. 141.*

REAL ACTIONS, are those which concern the realty only, being such whereby the plaintiff (who in this case is called the demandant) claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee simple, fee tail, or for term of life. By these actions formerly all disputes concerning real estates were decided; but they are now mostly laid aside in practice, upon account of the great nicety required in their management, and the inconvenient length of their process, a much more expeditious method of trying titles being since introduced by other actions personal and mixed. 3 *Black. 117.*

REALTY, relates to *real* property, as lands and tenements, in contradistinction to *personalty*, which concerns things belonging to a man's person. A *real action*, is that whereby the plaintiff claims title to lands, tenements, rents, commons, or other hereditaments; a *personal action* is such whereby a man claims a debt, or personal duty, or damages in lieu thereof. 3 *Black. 117.*

REASONABLE PART, was the portion of goods of a person deceased, which, by our ancient law, belonged to his wife and children; which the owner could not bequeath by will, nor the ordinary dispose of in case of intestacy. For which, see **RATIONABILI PARTE BONORUM.**

REBELLION, commission of, is when, on disobedience to the several processes of the court of chancery for causing the defendant to appear, the court issues a writ called a *commission of rebellion*, directed to several commissioners therein named, to attach

attach him, wherever he may be found, as a rebel and contemner of the king's laws and government. 3 *Black.* 444.

REBUTTER, (from *bouter*, Fr. *repellere*, to put back,) is the answer of the defendant to the plaintiff's *surrejoinder*. But it is seldom that the parties go so far in pleading as to a rebutter.

RECAPTION, that is, *retaking*, is when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and *retake* them, wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace; for this right of recaption shall not be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person to take him, except he be feloniously stolen; but must have recourse to an action at law. 3 *Black.* 4.

There is also a writ of recaption, which is, where goods have been distrained for rent, or other services, and are again distrained for the same thing, pending the plea in the county court, or before the justices. *F. N. B.*

RECEIPTS. By the 23 *G. 3. c. 49.* certain stamp duties are imposed on receipts given on the payment of money, where the sum amounts to 2*l.*, or upwards; subject nevertheless to several exceptions, as set forth in the act, and also in the act of 24 *G. 3. c. 7. sess. 1. s. 6, 7.*

RECEIVING STOLEN GOODS, knowing them to be stolen, is a high misdemeanor at the common law, and by several statutes is made felony and transportation, and in some particular instances, felony without benefit of clergy.

RECITAL, in a deed, is the setting forth such considerations and matters of fact as are necessary to explain the reasons upon which the transaction is founded. 2 *Black.* 298.

So in the assignment of leases and mortgages, it is usual to recite part of the ancient or former deeds in the premises. *Wood. b. 2. c. 3.*

Yet a recital is not conclusive, because it is not a direct affirmation. 1 *Inst.* 352.

RECOGNIZANCE; is an obligation of record, which a man enters into before some court of record, or magistrate duly authorized, with condition to do some particular act; as to appear at the assizes or quarter sessions, to keep the peace, to pay a debt, or the like. It is in most respects like another

bond, the difference being chiefly this, the bond is the creation of a fresh debt, or obligation *de novo*; the recognizance is an acknowledgement of a former debt upon record; the form whereof is, "that *A. B. doth acknowledge to owe to our sovereign lord the king, (to the plaintiff, to C. D., or the like,) the sum of ten pounds,*" with condition to be void on performance of the thing stipulated: in which case the king, the plaintiff, C. D., or the like, is called the cognizee, "*is cui cognoscitur;*" as he that enters into the recognizance is called the cognizor, "*is qui cognescit.*" This being either certified to, or taken by the officer of some court, is witnessed only by the record of that court, and not by the party's seal; so that it is not in strict propriety a deed, though the effects of it are greater than of a common obligation; being allowed a priority in point of payment, and binding the lands of the cognizor from the time of inrollment on record. There are also other recognizances of a private kind, in nature of a *statute staple*, by virtue of the statute 23 *H. 8. c. 6.* which also are a charge upon real property. 2 *Black. 341.*

RECORD, is a memorial or remembrance in rolls of parchment of the proceedings and acts of a court of justice, which hath power to hold plea, according to the course of the common law, of real or mixed actions, or of actions *quare vi et armis*, or of personal actions, whereof the debt or damage amounts to 40*s.* or above, which are called courts of record, and are created by act of parliament, letters patent, or prescription. † *Infl. 260.*

It is derived of *recordari*, to keep in remembrance; but in legal acceptation, records are restrained to the rolls of such courts only as are courts of record, and not the rolls of inferior or any other courts which proceed not according to the law and custom of *England*. And the rolls being the records or memorials of the judges of the courts of record, import in them such uncontrollable credit, as they admit no averment, plea, or proof to the contrary. And if such a record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself: the reason whereof is apparent, for otherwise, there would never be any end of controversies. *Id.*

During the term wherein any judicial act is done, the record remaineth in the breast of the judges of the court, and therefore the roll is alterable during that term as the judges shall direct; but when the term is past, then the record is in the roll, and admits no alteration, averment, or proof to the contrary. *Id.*

Every court of record is the king's court; wherein if the judges do err, a writ of error lieth. But the county court, the hundred court, the court baron, and such like, are no courts of record, and therefore the proceedings therein may be denied

denied and tried by jury, and upon their judgments a writ of error lieth not, but a writ of false judgment; for that they are no courts of record, because they cannot hold plea of debt or trespass, if the debt or damage do amount to 40s., or of any trespass *vi et armis*. 1 *Inst.* 117.

A *debt* of record is a sum of money, which appears to be due by the evidence of a court of record: thus, when any specific sum is adjudged to be due to the plaintiff from the defendant, on an action or suit at law, this is a contract of the highest nature, being established by the sentence of a court of judicature. Recognizances also, and statutes merchant and of the staple, if forfeited by non-performance of the condition, are ranked among debts of record; because the contract, on which they are founded, is witnessed by the highest kind of evidence; namely, by matter of record. 2 *Black.* 405.

RECORDARE, is a writ commanding the sheriff to make a record of the proceedings in the county court, by writ or without writ; and to send the record up to the king's bench or common pleas: it is in the nature of a certiorari. The plaintiff may remove the plaint in the county court without cause shewed; but the defendant cannot remove it without cause expressed in the writ, as upon a plea of freehold, or the like. But if the plaint is in another court, neither the plaintiff nor defendant can remove it without cause shewed. 2 *Inst.* 339.

RECOVERY:

1. *Recovery, what.*
2. *Who may suffer a recovery.*
3. *Of what things.*
4. *Manner of suffering a recovery.*
5. *Effect of a recovery suffered.*

1. *Recovery, what:*

COMMON recoveries were invented by the ecclesiastics to elude the statutes of mortmain; and afterwards encouraged by the finesse of the courts of law, in order to put an end to all fettered inheritances, and bar not only all estates tail, but also all remainders and reversions expectant thereon. *Black. b. 2. c. 21. f. 4.*

A common recovery is so far like a fine, that it is a suit or action, either actual or fictitious; and in it the lands are recovered against the tenant of the freehold; which recovery, by a supposed adjudication of the right, binds all persons, and vests a free and absolute fee simple in the recoverer. *Id.*

And a common recovery is now looked upon as the best assurance, except an act of parliament, that purchasers can have.

There must be three persons at least to make a common recovery; a *recoveror*, a *recoveree*, and a *vouchee*. The *recoveror* is the plaintiff or demandant, that brings the writ of entry. The *re-*

recoveree is the defendant or tenant of the land, against whom the writ is brought. The *vouchee* is he whom the defendant or tenant *voucheth* or calls (*vocat*) to warranty of the land in demand, either to defend the right, or to yield him other lands in value, according to a supposed agreement. *Wood. b. 2. c. 3.*

And this being by consent and permission of the parties, it is therefore said that a recovery is *suffered*.

2. *Who may suffer a recovery.*

TENANT *for years* cannot suffer a recovery, for he is not tenant of the freehold. *Wood. Ibid.*

And by the 14 *Eliz. c. 8.* no tenant *for life*, of any sort, can suffer a recovery, so as to bind them in remainder or reversion.

But if he, or the tenant to the *præcipe*, (that is, the recoveree, so called from those words in the writ, when the proceedings were in Latin, *præcipe quod reddat*,) vouches the remainder man, and he appears and vouches the common vouchee, it is good. *Blackst. b. 2. c. 21. f. 4.*

It is now fully settled, that a *tenant in tail* may, if he pleases, either turn his estate tail into a fee, or alienate it for his own benefit, by duly suffering a common recovery. But he must have a sufficient estate and power to qualify him to suffer such recovery: he must either be tenant in tail in *possession*, or he must have a concurrence of the tenant for life; by which tenant for life is meant, not the lessee of the land under a beneficial lease, but the original tenant for life claiming under the family settlement, and having a life estate settled upon him, prior (in order of succession) to the other's remainder in tail. *Bur. Mansf. 1072.*

By the 11 *H. 7. c. 20.* no woman, after her husband's death, shall suffer a recovery of lands, settled on her in tail by way of jointure, by her husband or any of his ancestors.

A *mortgagee* cannot suffer a recovery, so as to bar the mortgagor of the equity of redemption.

- If tenant in tail makes a mortgage or a lease for years, or charges the land with any other incumbrance, and afterwards suffers a recovery, this lets in all the incumbrances. 1 *Wilf. 276.*

3. *Of what things.*

A COMMON recovery may be had of such things, for the most part, as pass by a fine. An use may be raised upon a recovery, as well as upon a fine; and the same rules are generally to be observed and followed for the guiding and directing the uses of a recovery, as are observed for the guidance and direction of a fine. *West. Symb. sect. 2, 3. 1 Co. 15.*

If lands are *copyhold*, a common recovery, suffered in the com-
mon

mon pleas, will not pass such lands ; but if lands are customary freeholds, and pass by surrender in a borough court, a recovery in the common pleas of such lands may be good. 1 *Atk.* 474.

4. *Manner of suffering a recovery.*

In order to suffer a common recovery, the tenant of the freehold agrees with the demandant (some friend) that he, the demandant, shall bring his action real against the said tenant, as though he, the demandant, had good right to the land, and the tenant no right of entry to the same ; but after a disseisin which a stranger (commonly one *Hugh Hunt*) had unjustly made, whereas indeed the demandant never had possession thereof, nor the stranger. The tenant, appearing to the writ, vouches or calls to warranty some person (commonly the crier of the court, who thereupon is styled the *common vouchee*) who is supposed to warrant the title. This vouchee appears, as though he would defend the title : whereupon the demandant desires leave of the court to imparl, or confer with the vouchee in private ; which is allowed him. And soon afterwards, the demandant returns to court, but the vouchee disappears, or makes default : whereupon judgment is given for the demandant to recover the land against the defendant or tenant in tail, and he to recover in value against the common vouchee. But this recovery in value is only imaginary ; and the lands are now absolutely vested in the said recoveror by judgment of law, and seisin thereof is delivered by the sheriff of the county ; so that this collusive recovery operates merely in the nature of a conveyance in fee simple, and is taken for a bar of the tail for ever. *Wood. b. 2. c. 3.*

A recovery is either with a *single* voucher, (as above,) or with a *double* voucher ; that is, where the tenant voucheth one, who voucheth over the common vouchee : and this is the most common, and the safest way. Also, there may be more vouchees, or more vouchers over, where three or more are vouched ; but the last is always the common vouchee. *Id.*

The common recovery with *single* voucher is, to bar the tenant in tail and his heirs of such estate tail which is in his *possession*, (not where he is put to a writ of right,) with the remainder dependant upon the same, and the reversion expectant, which others have ; and of all leases and incumbrances, derived out of such remainder or reversion. The common recovery with *double* voucher is, to bar the first voucher and his heirs of every such estate as *at any time was in him or any of his ancestors*, whose heir he is of such estate ; and all others, of such right to remainder or reversion, as was at any time dependent or expectant upon the same ; and of all leases and incumbrances derived out of them : and it will also be a bar of such estate, whereof the tenant was then

then seised in reversion or remainder, expectant or dependant upon the same. *Id.*

In a recovery with *single* voucher, the *præcipe* or writ of entry must be brought against the tenant in tail in possession, and he to vouch the common vouchee. But in a recovery with *double* voucher, a tenant of the freehold must be made by fine or deed, who is commonly called the tenant to the *præcipe*, and the writ must be brought against him, and he to vouch the tenant in tail, and he the common vouchee, who pleads, and after makes default; and then judgment is given for the demandant against the tenant to the *præcipe*, and he to recover in value against the first vouchee, and he again to recover in value against the second or common vouchee. *Id.*

5. Effect of a recovery suffered.

THE effect of a common recovery is, that it is an absolute bar, not only of all estates tail, but of remainders and reversions, expectant on the determination of such estates. So that a tenant in tail may, by this method of assurance, convey the lands held in tail to the recoveror, his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions. *Black. b. 2. c. 21. f. 4.*

But *strangers* are not barred by a recovery, or by non-claim, as in a fine; but only parties or privies to the estate in possession, remainder, or reversion. *3 Co. 5.*

If tenant in tail, by marriage settlement or otherwise, on the part of the mother, with reversion in fee in himself, on the part of the mother also, suffers a recovery to the use of himself in fee, this destroys the title by descent on the part of the mother, and gains him an absolute fee, descendible to his heirs general, and not to the heirs on the part of his mother. *Str. 1179.*

A *feme covert*, with her husband, is bound by a recovery; but, as in a fine, she ought to be examined. *Wood. b. 2. c. 3.* And by a rule of court, an affidavit thereof made and annexed to the warrant of attorney.

A widow of the tenant to the *præcipe* in a recovery is not intitled to dower, forasmuch as he is only a mere instrument for the purpose of form only. *Bur. Mansf. 117.*

By the 34 & 35 *H. 8. c. 20.* no recovery had against tenant in tail of the *king's gift*, (the remainder or reversion being in the *king*,) shall be barred by a common recovery; nor the remainder or reversion, which is at the time of the recovery in the *king*.

By the 21 *H. 8. c. 15.* a *lessee for years* shall not be ousted by a recovery, but shall enjoy his term against the recoveror, according to his lease.

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If a recovery be suffered without any good consideration, and without any uses declared, this, like other conveyances, enures only to the use of him who suffers it. And if any consideration appears, yet as a common recovery conveys an absolute estate, without any limitations, to the recoveror, this assurance could not be made to answer the purposes of family settlement, unless directed by other more complicated deeds, wherein particular uses can be more particularly expressed. If such deed is made previous to the recovery, it is called a deed to *lead* the uses of the recovery; if subsequent, it is called a deed to *declare* the uses. *Black. b. 2. c. 7.*

RECREANT, cowardly, faint-hearted. A term used in the ancient trial by battel, when one of the combatants yielded the contest; in which case, he from thenceforth became infamous, and lost his *liberam legem*, so as never to be put upon a jury, nor admitted as a witness in any cause. *3 Black. 340.*

RECTOR, *governor*, is he that hath that part of the revenues of a church, which heretofore was appropriated to some of the monasteries; as a *vicar* hath the other part, which was set out for the maintenance of him that was to supply the cure; or if the church was never appropriate, nor had any vicar, then the rector, as sole incumbent, hath the whole revenues.

RECUSANT, is one who refuseth to go to church, and worship God after the manner of the church of England; a *popish* recusant, is a papist who so refuseth; and a *popish recusant convict*, is a papist legally convicted thereof. See **PAPISTS**.

REDDENDUM, is a clause in a deed, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted; as, "rendering therefore yearly, the sum of 10s. or a pepper corn, or two days ploughing," or the like. Under the pure feudal system, this render, *redditus*, or rent, consisted in chivalry, principally of military services; in villenage, of the most slavish offices; and in socage, it usually consists of money, though it may consist of services still, or of any other certain profit. To make a *reddendum* good, if it be of any thing newly created by the deed, the reservation must be to the grantor, and not to any stranger to the deed. But if it be of ancient services, or the like, annexed to the land, then the reservation may be to the lord of the fee. *2 Black. 299.*

RE-ENTRY, is the resuming or retaking a possession lately had: as if a man makes a lease of lands to another, he thereby quits the possession; and if he covenants with the lessee, that for non-payment of rent at the day, it shall be lawful for him to re-enter; this is as much as if he conditioned to take again the land into his own hands, and to recover the possession by his own act, without the assistance of the law. But words in a deed give

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no re-entry if a *clause* of re-entry be not added. *Wood's Inst.* 140.

In a feoffment, lease, &c. one may reserve a rent on condition, that if the rent is behind he shall re-enter, and hold the lands till he is satisfied or paid the rent in arrear; and in this case, if the rent is behind, he may re-enter; though when the feoffee, &c. pays or tenders on the land all the arrears, he may enter again. *Lit.* 327. And the feoffor, &c. by his re-entry, gaineth no estate of freehold, but an interest, by the agreement of the parties, to take the profits in the nature of a distress. Here the profits shall not go in part of satisfaction of the rent; but it is otherwise, if the feoffor was to hold the land till he was paid by the profits thereof. *Id.*

All persons who would re-enter on their tenants for non-payment of rent, are to make a demand of the rent; and to prevent the re-entry, tenants are to tender their rent. *1 Inst.* 201.

If there is a lease for years, rendering rent, with condition, that if the lessee assigns his term the lessor may re-enter; and the lessee assigns, and the lessor receiveth the rent of the assignee, not knowing or hearing of the assignment, he may re-enter, notwithstanding the acceptance of the rent. *3 Rep.* 65. *Cro. El.* 553.

REFUSAL, *of an executorship*, is where one that is named executor in a will declines the acceptance of that office; in which case, the refusal must not be by word only, but must be entered and recorded in court. But if he hath already meddled with the goods, he cannot afterwards refuse. *Swinb.* 384.

Refusal, of a clerk presented to a benefice, is when the bishop on a presentation will not admit him; as if he be an heretic, excommunicate, outlawed, under age, or of evil life and conversation. In which case, if the refusal is for any matter of ecclesiastical cognizance, the ordinary is to give notice to the patron, because the patron, being usually a layman, is not supposed to have knowledge of it, else the bishop cannot collate by lapse; but if the cause be temporal, the bishop is not bound to give notice. If an action at law is brought by the patron against the bishop for refusing his clerk, the bishop must assign the cause; and if the cause be of a temporal nature, and the fact admitted, (as for instance, outlawry,) the judges of the king's courts must determine its validity; but if the fact be denied, it must be determined by a jury. If the cause be of a spiritual nature, (as *heresy*, particularly alleged,) the fact, if denied, shall also be determined by a jury; and if the fact be admitted or found, the court, upon consultation and advice of learned divines, shall decide its sufficiency. If the cause be want of learning, the bishop need not specify in what points the clerk is deficient, but the court shall

shall write to the metropolitan to re-examine him, and certify his qualification; which certificate of the archbishop is final. 1 *Black.* 389.

REGARD (court of) is a forest court to be holden every third year, for the lawing or expeditation of mastiffs; which is done by cutting off the claws of the forefeet, to prevent them from running after deer. No other dogs but mastiffs were permitted to be kept within the king's forest; it being supposed that the keeping of these, and these only, was necessary for the defence of a man's house. 3 *Black.* 72.

REGARDANT, is a word relating to the state of villenage. For there is a *villein regardant*, and a *villein in gross*. A *villein regardant*, is where a man is seised of a manor, unto which there is a *villein* annexed; such *villein* is called *regardant*, because he has the charge to do all the base and inferior services; and his service is not certain, but he must have *regard* to that which he is commanded unto. A *villein in gross*, is not annexed to any manor, but belongs to the *person* of the lord, and is transferrable by deed from one to another. 1 *Inst.* 120.

REGISTER, is an officer of some court, who hath the custody of the records and archives of that court; and the repository where these records are kept, is called the *registry*.

Register is also the name of a *book*, wherein are entered most of the forms of writs original and judicial used at common law, called the *register of writs*; which is one of the most ancient and authoritative books of the common law.

In every parish is to be kept a *register book*, wherein the births, marriages and burials in such parish are to be recorded: and the register of marriages is particularly enforced by the statute 26 G. 2. c. 33. in order to prevent clandestine marriages; the forging or altering of which, or making any false entry therein is made felony without benefit of clergy.

And by the 23 G. 3. c. 67. a stamp duty is imposed upon the entry of every burial, marriage, birth, or christening in the register of any parish or place. And the same to extend to Quakers [and by the 25 G. 3. c. 75. to all protestant dissenters]. But shall not extend to persons buried from a workhouse, or hospital, or at the sole expence of any charity, nor to the entry of the birth or christening of any child whose parents shall at that time receive any parish relief.

In some of the large counties, as in *Yorkshire* and *Middlesex*, public register offices are erected, wherein memorials of the wills and deeds of lands are to be entered, in order to guard against fraudulent charges and incumbrances.

REGRATING, (from *re* again, and the French *grater*, to *grate* or *scrape*,) signifies the scraping or dressing of cloth or other goods, in order for selling the same again. This offence was described by

by the statute 5 & 6 Ed. 6. c. 14. to be the buying of corn or other dead victual in any market, or within four miles of the place, and selling the same again in the same market, or in some other within four miles thereof. Which statute being now repealed by the 12 G. 3. c. 71. the same remains an offence at the common law, punishable at the discretion of the court, by fine and imprisonment.

REHEARING, in chancery, is when either of the parties thinks himself aggrieved by the decree; in which case, he may petition the lord chancellor for the cause to be heard over again: but a petition for rehearing must be signed by two of the counsel, certifying that they apprehend the cause is proper to be reheard. 3 Black. 453.

REJOINDER, is the defendant's answer to the plaintiff's replication, and ought to follow and enforce the defendant's plea; otherwise it is a departure from his plea, which the law will not allow. As if the defendant in his plea to the declaration pleads performance of covenants, and the plaintiff replies, that the defendant did not such an act according to the covenant; and then the defendant *rejoins*, that he offered to do it, and the plaintiff refused it; this is a departure, because the matter is not pursuant, for it is one thing to do a thing, and another to offer to do it; therefore this should have been offered in the plea at first. 1 Inst. 304.

RELATION, is where, in consideration of law, two different times or things are accounted as one; and by some act done, the thing subsequent is said to take effect by *relation* from the time preceding: as if one deliver a writing to another, to be delivered to a third person, as the deed of him who made it, when such third person hath paid a sum of money; now when the money is paid, and the writing delivered, this shall be taken as the deed of him who made and delivered it at the time of its first delivery, to which it hath *relation*. And so things relating to a time long before shall be as if they were done at that time. *Terms of the Law*.

This devise is most commonly to help acts in law, and make a thing take effect, and shall relate to the same thing, the same intent, and between the same parties only; for it shall never do a wrong, or lay a charge upon a person that is no party. 1 Co. 99.

And when the execution of a thing is done, it shall have relation to the thing executory, and makes all but one act or record, although performed at several times. So a judgment had in full term shall have relation to the first day of the term, as if given on that very day, unless there is a memorandum to the contrary; as where there is a continuance till another day in the same term. 3 Salk. 212.

Judgment against an heir, on the obligation of his ancestor, shall

shall have relation to the time of the writ first purchased; and from that time it will avoid all alienations made by the heir. *Cro. Car.* 102.

And if one be bail for the defendant, and before judgment he lease his lands, they shall be liable to the bail and judgment by relation. *Poph.* 112. 132.

It was formerly holden, that where the defendant in a suit, after the teste of the *feri facias*, but before the sheriff had executed it, sold the goods, and delivered them to the buyer, the sheriff might take them in execution in the hands of the buyer; for when such execution was made, it should have relation to the teste of the *feri facias*. 1 *Leon.* 304.

But now by *st.* 29 *Car.* 2. c. 3. s. 16. writs of execution shall bind the property of the goods only from the time of their delivery to the officer.

Sale of goods of a bankrupt, by commissioners, shall have relation to the first act of bankruptcy, and be good, though the bankrupt sell them afterwards. 1 *Ja. c.* 15.

RELATOR, a rehearser or teller: it is also applied to an *informant*; as by statute 9 *An. c.* 20. which permits an information in nature of a *quo warranto* to be brought with leave of the court against a person intruding into any franchise or office in a corporation; the informant is thereupon styled the *relator*. So where the attorney general files an information *ex officio* in case of the misapplication of a charity, the person applying for the prosecution is called the *relator*.

RELEASE :

1. A RELEASE, is a discharge or conveyance of a man's right in lands or tenements to another that hath some former estate in possession. The words generally used are, "remised, released, and for ever quit claimed." 2 *Black.* 324.

When a man hath in himself the possession of lands, he must at the common law convey the freehold by feoffment and livery; but if he hath only a right or a future interest, he may convey that right or interest by a mere release to him that is in possession of the land. *Id.* 325.

2. Release is of two sorts: a release as to lands, goods, and chattels; and a release of actions, whether real, personal, or mixed. *Litt. j.* 444.

3. In releases of all the right which a man hath in certain lands, it behoveth him to whom the release is made, that he hath the freehold in the lands in deed or in law, at the time of the release made; for in every case where he, to whom the release is made, has the freehold in deed or in law, at the time of the release, there the release is good. *Litt. j.* 447.

4. Some actions are *mixed* in the realty, and in the personalty; as an action of waste sued against tenant for life, this action

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is in the realty, because the place wasted shall be recovered ; and also in the personalty, because damages shall be recovered for the wrongful waste done by the tenant : and therefore, in this action, a release of actions real is a good plea in bar, and so is a release of actions personal. *Litt. f. 492.*

5. No right passes by the release, but the right which the releasor had at the time of the release made ; if he has no right, the release is void. *Litt. f. 446.*

6. By the release of all *actions*, causes of action are released ; but within a submission of all actions to arbitration, causes of action are not contained. *1 Inst. 285.*

7. By the release of all *quarrels*, all causes of actions are released, although no action be then depending for the same. *1 Inst. 292.*

8. If a man release to another all manner of *demands*, this is the best release of all, and the most effectual to bar actions, rights of action, and includes in it most of the others : by this release, all rights and titles to lands, conditions before broken or after, contracts, covenants broken, rents, annuities, debts, duties, obligations, recognizances, statutes, judgments, executions, all manner of actions, real and personal, are barred and discharged. *Litt. f. 508. 1 Inst. 291.*

9. Where two are bound jointly in a bond or obligation, and the obligee releases to one of them, this shall discharge the other. *1 Inst. 232.*

So if two commit a trespass against a man, his release to one of them shall discharge the other ; for against joint trespassors there can be but one satisfaction. *Id.*

10. Where there are general words only in a release, they shall be taken most strongly against the releasor ; as where a release is made to two persons of all actions, it releases all several actions which the releasor has against them, as well as all joint actions. So if an executor releases all actions, it will extend to all actions that he has in both rights. But where there is a particular recital in a *deed*, and then general words follow, the general words shall be qualified by the particular recital. *L. Raym. 235.*

But if a release is given on a particular consideration recited, notwithstanding that release concludes with general words, yet the law, in order to prevent surprize, will construe it to relate to the particular matter recited, which was under the contemplation of the parties, and intended to be released. *2 Vez. 310.*

11. The effect of a release is various : sometimes it extinguishes the thing in the possession of the releasee ; as rents, commons, and the like. Sometimes it transfers the estate ; as of one joint-tenant to another. Sometimes it enlarges an estate, being made by a reversioner to the lessee in privity, with apt enlarging words. *Litt. f. 305, 6. 1 Inst. 193.*

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A release made to tenant in tail, or tenant for life, of the right of the land, shall enure to him that has the remainder or reversion ; and so on the contrary. *Litt. f. 452, 3. 1 Inst. 267.*

RELIEF, was a certain sum of money that the heir, on coming of age, paid unto the lord, on taking possession of the inheritance of his ancestor, by payment whereof, the heir *relieved* (*relevabat*) ; that is, as it were, raised up again the lands, after they had fallen into the hands of the superior. And, on payment of the relief, the heir had *livery* of the lands ; that is, the lands were to be delivered to the heir ; and in case of refusal, the heir might have a writ to recover the same from the lord ; which recovery out of the hands of the lord, was called, *ouster le main*.

REMAINDER :

1. *Of remainders in general.*
2. *Of contingent remainders.*
3. *Of remainders created by will, commonly called executory devises.*

1. *Of remainders in general.*

AN estate in remainder, is an estate limited to take effect and be enjoyed after another estate is determined. As if a man seized in fee simple granteth lands to one for twenty years, and after the determination of the said term, then to another and his heirs for ever ; here the former is tenant for years, remainder to the latter in fee. In the first place, an estate for years is created or carved out of the fee, and given to the former, and the residue or remainder of it is given to the latter. But both these interests are in fact only one estate ; the present term of years, and the remainder afterwards, when added together, being equal only to one estate in fee. *Black. b. 2. c. 11. f. 2.*

So if lands be granted to one for twenty years, and after the determination of the said term to another for life, and after the determination of the said life estate to a third person, and his heirs for ever ; this makes the first person tenant for years, remainder to the second for life, remainder over to third in fee. Now here the estate of inheritances undergoes a division into three portions : the first is an estate for years carved out of it, after that an estate for life, and after that an estate in fee. And here also the first estate, and both the remainders, (for life and in fee,) are one estate only, being nothing but parts or portions of one entire inheritance ; and if there were never so many remainders, it would still be the same thing, upon a principle grounded on mathematical truth, that all the parts are equal, and no more than equal to the whole. *Id.*

And hence it is easy to collect, that no remainder can be limited after the grant of an estate in fee simple ; because a fee simple

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ple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee, hath in him the whole of the estate; a remainder therefore, which is only a portion, or residuary part of the estate, cannot be reserved after the whole is disposed of. *Id.*

From hence we may be enabled to comprehend certain rules that have been laid down concerning the creation of remainders. And,

(1) There must necessarily be some particular estate precedent to the estate in remainder; as an estate for years to one, remainder to another for life; or, an estate for life to one, remainder to another in tail. This precedent estate is called the *particular* estate, as being only a small *part* of the inheritance; the residue or remainder whereof is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason; that the word *remainder* is a relative term, and implies that some part of the thing is previously disposed of; for where the whole is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it be, will be an estate in possession. *Id.*

Therefore an estate created to commence at a distant period of time, without any intervening estate, is properly no remainder: it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests, which were considered in the light of mere contracts by the ancient law, to be executed either now or hereafter, as the contracting parties should agree; but an estate of freehold must be created to commence immediately. For it is an ancient rule of the common law, that no estate of freehold can be created to commence *in futuro*; but it ought to take effect presently either in possession or remainder; because at common law, no freehold in lands can pass without livery of seisin; which must operate either immediately, or not at all. It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance, which imports an immediate possession. *Id.*

So that where it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate, and that of the particular tenant, are one and the same estate in law: as where a man grants to one a lease of an estate for years, remainder to another in fee, and makes livery of seisin to the lessee; here,

here, by the livery, the freehold is immediately created, and vested in the remainder man, during the continuance of the lessee's term of years. The whole estate passes at once from the grantor to the grantees, and the remainder man is seised of his remainder at the same time that the termor is possessed of his term; the enjoyment of it must indeed be deferred till hereafter; but it is, to all intents and purposes, an estate commencing *in presenti*, though to be occupied and enjoyed *in futuro*. *Id.*

And as no remainder can be created without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. But a *lease at will* is not held to be such a particular estate as will support a remainder over; for an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance; and a portion must be first taken out of it in order to constitute a remainder. *Id.*

(2.) A second rule to be observed is this: that the remainder must commence, or *pass out of the grantor*, at the time of the creation of the particular estate; as where there is an estate to one for life, with remainder to another in fee, here the remainder in fee passes from the grantor at the same time that seisin is delivered of the life estate in possession: and it is this which induces the necessity at common law of livery of seisin being made on the particular estate, whenever a freehold remainder is created; for if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seisin, not thereby to strengthen his estate, but in order to convey the freehold from, and out of the grantor; otherwise the remainder is void. *Id.*

(3.) A third rule respecting remainders is this: that the remainder must *vest in the grantee* during the continuance of the particular estate, or at the very instant when it determines: as if one be tenant for life, remainder to another in fee tail; here the remainder is vested at the creation of the particular estate for life: or if two be tenants for their joint lives, remainder to the survivor in fee; here, though during their joint lives the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor; therefore both these are good remainders. But if an estate be limited to one for life, remainder to the eldest son of another in tail, and the tenant for life dies before the other hath a son; here the remainder will be void; and even supposing he should afterwards have a son, he shall not take by this remainder; for as it did not vest before, or at the end of the particular estate, it never can vest at all: and this depends upon the principle before laid down, that the precedent particular estate, and the remainder, are one estate in law; they must therefore subsist at one and the same instant of time, either during the continuance of the first estate, or

at the very instant when that determines, so that no other estate can possibly come between them. *Id.*

2. Of contingent remainders.

ON consideration of the premises, arises the doctrine of CONTINGENT remainders; for remainders are either *vested* or *contingent*. *Vested* remainders, (or remainders *executed*, whereby a present interest passes to the party, though to be enjoyed *in-futuro*,) are, where the estate is invariably fixed to remain to a determinate person after the particular estate is spent; as if one be tenant for twenty years, remainder to another in fee, this is a *vested* remainder, which nothing can defeat or set aside. 2 *Black. b. 2. c. 11. f. 2.*

Contingent or *executory* remainders, (whereby no present interest passes,) are where the estate in remainder is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious and uncertain *event*; so that the particular estate may chance to be determined, and the remainder never take effect. *Id.*

First, they may be limited to a dubious and uncertain *person*: as if one be tenant for life, with remainder to the eldest son (then unborn) of another in tail; this is a contingent remainder, for it is uncertain whether he will have a son or no; but the instant that a son is born, the remainder is no longer contingent, but vested; though if the tenant for life had died before the contingency happened, that is, before the son was born, the remainder would have been gone, except in the case of a posthumous child; which by the 10 & 11 *W. c. 16.* may take in remainder as if born in the father's life time. *Id.*

This species of contingent remainders, to a person not in being, must however, be limited to some one that may by common possibility exist at or before the time that the particular estate determines: as if an estate be made to *A.* for life, remainder to the heirs of *B.*; now if *A.* dies before *B.*, the remainder is at an end; for *B.* cannot have an heir whilst he is living; but if *B.* dies first, the remainder then immediately vests in his heir, who will be intitled to the land on the death of *A.* This is a good contingent remainder; for the possibility of *B.*'s dying before *A.* is a common possibility; but a remainder to the right heirs of *B.*, if there be no such person as *B.* at that time, is void: for here, two contingencies must happen; first, that such a person as *B.* shall be born; and, secondly, that he shall also die during the continuance of the particular estate; which makes it a remote and very improbable possibility. *Id.*

A remainder may be also contingent where the person to whom it is limited is fixed and certain; but the *event* upon which it is to take effect is vague and uncertain: as where land

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is given to *A.* for life, and in case *B.* survives him, then with remainder to *B.* in fee; here *B.* is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving *A.*: during the joint lives of *A.* and *B.* it is contingent; and if *B.* dies first, it never can vest in his heirs, but is gone for ever; but if *A.* dies first, the remainder to *B.* becomes vested. *Id.*

Contingent remainders of either kind, if they amount to a freehold, cannot be limited on an estate for years, or any other particular estate less than a freehold. For unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him without vesting somewhere; and in case of a contingent remainder, it must vest in the particular tenant, else it can vest nowhere. *Id.*

Contingent remainders may be defeated by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested. Therefore where there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or otherwise, destroy and determine his own life estate, before any of those remainders vest; the consequence of which is, that he utterly defeats them all; as if there be tenant for life, with remainder to his eldest son unborn in tail; and the tenant for life, before any son is born, surrenders his life estate, he by that means defeats the remainder in tail to his son; for his son not being *in esse* when the particular estate determined, the remainder could not then vest; and as it could not vest then, it never can vest at all. In these cases, therefore, it is necessary to have TRUSTEES appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his determines. If therefore his estate for life determines otherwise than by his death, their estate, for the residue of his natural life, will then take effect, and become a particular estate in possession, sufficient to support the remainders depending in contingency. *Id.*

For though contingent remainders by law must vest during, or at the instant the particular estate determines, yet it doth not hold in the case of *trustees*. The ground the law goes upon is, that a freehold cannot be in abeyance, because there must be a tenant of the freehold to perform services, and to answer to a *precipe*, and all writs to be brought concerning the realty; but this holds not in the case of an equitable estate, because the trustee is tenant of the freehold to perform the services and answer to writs aforesaid: so neither doth it hold in case of a *copyhold*; for there no *precipe* can be brought, being parcel of

the manor only, and the freehold is in the lord. 1 *Atk.* 590.
3 *Atk.* 12.

These trustees to preserve contingent remainders have an estate, and not only a right of entry; and may bring a bill to stay waste, or the like, before the contingent remainder man shall be *in esse*. 1 *Vez.* 555.

And trustees of the *legal* estate of inheritance are sufficient trustees to support contingent remainders. 2 *Vez.* 230.

3. *Of remainders created by will; commonly called executory devises.*

In last wills and testaments greater latitude is allowed, and in them remainders may be created contrary to the rules laid down for the construction of deeds; but these are not allowed to be strictly remainders, but are called by another name, that of EXECUTORY DEVISES, or devises hereafter to be executed. 2 *Black. b. 2. c. 11. f. 2.*

An executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency: it differs from a remainder in three very material points; as,

(1.) That it needs not any particular estate to support it; as when a man deviseth a future estate to arise upon a contingency, and till that contingency happens, doth not dispose of the fee simple, but leaves it to descend to his heir at law: so if one devises land to an unmarried woman and her heirs upon her day of marriage, here is, in effect, a contingent remainder, without any particular estate to support it. This limitation, though it would be void in a deed, yet is good in a will, by way of *executory devise*; for since by a devise, a freehold may pass without livery of seisin, (as it must do if it passes at all,) therefore it may commence *in futuro*, and needs no particular estate to support it. And hence it is, that such an executory devise, not being a present interest, cannot be barred by a recovery suffered before it commences. *Id.*

And if it appears that the testator, however improperly his will may be penned, manifestly intended a strict settlement, though there are no words in the will to preserve contingent remainders, a court of equity will direct trustees to be inserted in a conveyance to be settled by the master; and whenever the court makes use of the words *strict settlement* in an order, it implies a direction to the master to have *trustees to preserve contingent remainders* inserted. 1 *Atk.* 593. 2 *Atk.* 279.

(2.) By executory devise a fee simple, or other less estate, may be limited after a fee simple; and this happens where a man deviseth his whole estate in fee, but limits a remainder thereon to commence on a future contingency; as if a man deviseth lands to one and his heirs, but if the devisee dies before the age
of

of twenty-one, then to another and his heirs; this remainder, though void in a deed, is good by way of executory devise. But in both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a moderate term of years; for courts of justice will not indulge even wills, so as to create a perpetuity. The utmost length that has hitherto been allowed, is that of a life in being, and until the eldest child shall attain the age of twenty-one years. 2 *Black. b. 2. c. 11. f. 2.*

(3.) By an executory devise a remainder may be limited of a chattel interest, after a particular estate for life created in the same, which could not be done by deed; for by law the first grant of it to a man for life, was a total disposition of the whole term; but afterwards it was allowed, that a term of years might be given to one for life, and limited over in remainder to another. Yet, in order to prevent the danger of perpetuities, it was settled, that though such remainders may be limited to as many persons successively as the deviser thinks proper, yet they must be all in being during the life of the first devisee; for then they are like candles all lighted and consuming together, and the ultimate remainder is in reality only to that remainder man who happens to survive the rest. *Id.*

And it is now settled, that if a man, either by deed or will, limits his books, furniture, or the like, to one for life, with remainder over to another, this remainder is good: but where an *estate tail* in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation; for this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the intail; and therefore the law vests in him at once the entire dominion of the goods, being analogous to the fee simple which a tenant in tail may acquire in a real estate. *Id. c. 25.*

REMEDY, *remedium*, is the action or means given by the law for recovery of a right; and whenever the law giveth any thing, it gives also a remedy for the same.

REMITTER, is where one that hath right to lands, but is out of possession, hath afterwards the freehold cast upon him by some subsequent defective title, and enters by virtue of that title: in this case, the law *remits* him to his ancient and more certain right, and by an equitable fiction supposes him to have gained possession in consequence and by virtue thereof; and this, because he cannot possibly obtain judgment at law, to be restored to his prior right, since he is himself the tenant of the land, and therefore hath no person against whom to bring his action. 3 *Black. 190.*

RENT, *render, redditus*, is a *certain profit issuing yearly out of lands and tenements corporeal*. It must be a *profit*; yet there is no occasion for it to be, as it usually is, a sum of money; for spurs, capons, horses, corn, and other matters, may be rendered by way of rent. It may also consist in services, or manual operations; as to plough so many acres of ground, to attend the king or the lord to the wars; which services, in the eye of the law, are *profits*. This profit must also be *certain*, or that which may be reduced to a certainty. It must also issue *yearly*, though it need not be every year, but it may be every second, third, or fourth year. It must *issue out of* the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always part of the thing granted. It must issue out of *lands and tenements corporeal*; that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrain. 2 *Black.* 41.

There are at common law three kinds of rents; *rent service, rent charge, and rent seck*. *Rent service*, is where the tenant holdeth his land of his lord by fealty and certain rent; or by homage, fealty, and certain rent; or by other service and certain rent: and it is called a *rent service*, because it hath some corporal service incident to it, which, at the least, is fealty. *Rent charge*, is so called because the land for payment thereof is *charged* with a distress. *Rent seck, redditus ficcus*, a dry rent, is where the land is granted without any clause of distress for the same. 1 *Inst.* 141, 2, 3.

There are also other species of rent; such as *rents of assize*, which are the certain established rate of the freeholders and ancient copyholders of a manor, so called, because they are *assized* and certain, and thereby distinguished from *redditus mobiles*; farm rents for life, years, or at will, which are variable and uncertain. Those of the freeholders are frequently called *chief rents, redditus capitales*; and both sorts are indifferently denominated *quit rents, quieti redditus*; so called because the tenant thereby goes *quit* and free of all other services. When these payments were reserved in silver, or *white* money, they were anciently called *white rents, or blanch farms, redditus albi*; in contradistinction to rents reserved in work, grain, or the like, which were called *redditus nigri, or black maile*. 2 *Black.* 42.

Fee farm rent, is a rent charge issuing out of an estate in fee, of at least one fourth of the value of the lands at the time of its reservation; for a grant of lands, reserving so considerable a rent, is indeed only letting lands to *farm* in *fee* simple, instead of the usual methods for life or years. *Id.* 43.

The difference between the several kinds of rents, in respect of the method for recovering them, is now totally abolished, they

they being all recoverable by distress, in pursuance of the several acts of parliament for that purpose.

Strictly, the rent is demandable and payable before the time of sun-set of the day whereon it is reserved; though some have thought it not absolutely due till midnight. 2 *Black.* 43.

But for rent in arrear, one cannot distrain until after the last day on which it is due; for till then it is not in arrear. And therefore some use to reserve the last half year's rent at some time before the expiration of the term, that, if the rent is not paid, they may have opportunity to distrain for it during the term. 1 *Inst.* 47.

REPAIRS. A tenant for life or years may cut down timber trees to make reparations, although he be not compelled thereto; as where a house is ruinous at the time the lease is made, and the lessee suffers it to fall, he is not bound to rebuild it; and yet, if he fell timber for reparations, he may justify the same. *Co. Litt.* 54.

And where a lessee covenants, that from and after the amendment and reparation of the houses by the lessor, he, at his own charges, will keep and leave them in repair; in this case the lessee is not obliged to do it, unless the lessor first make good the reparations. And if it be well repaired at first when the lease began, and after happen to decay, the lessor must *first* repair, before the lessee is bound to keep it so. *Cro. Jac.* 645.

REPLEADER, is where issue is joined on a fact totally immaterial, or insufficient to determine the right, so that the court upon the finding, cannot know for whom judgment ought to be given; in which case, the court will, after verdict, award a *repleader*; that is, that the parties *plead again*; unless it appears from the whole record that nothing material can possibly be pleaded in any shape whatever; and then a repleader would be fruitless. And whenever a repleader is granted, the pleadings must begin *de novo* at that stage of them, whether it be the plea, replication, rejoinder, or whatever else, wherein there appears to have been the first defect or deviation from the regular course. When a repleader is awarded, it must be without costs. 3 *Black.* 395. *Bur. Mansf.* 304.

REPLEVY:

1. IT is worthy of observation, how provident the law is that men's beasts, cattle, or other goods, be not unjustly or excessively distrained; and if they be, that deliverance be speedily made of them by replevy (or *taking back the pledge*); otherwise, the husbandry of the realm, and men's other trades, might be overthrown or hindered. 2 *Inst.* 137.

2. To which purpose, it is enacted by the 1 & 2 *P. & M. c.* 12. that the sheriff of every county shall, at his first county day, or in two months after he hath received his patent of office, appoint

appoint and proclaim in the shire town, four deputies at the least dwelling not above twelve miles one distant from another, to make replevies.

3. In order to obtain a replevy, application must be made to the sheriff, or one of his deputies, and security given that the party replevying will pursue his action against the distrainer; for which purpose, by the ancient law, he is required to put in pledges to prosecute, *plegios de prosequendo*; and that if the right be determined against him, he will return the distress again, for which purpose he is to find pledges to make return, *plegios de retorno habendo*. These pledges are discretionary, and at the peril of the sheriff. 3 *Black.* 147.

And in the case of distress for rent in particular, it is enacted by the 11 G. 2. c. 19. that the sheriff or other officer having authority, to grant replevies, shall, in every such replevy, take in his own name, from the plaintiff and two sureties, a bond in double the value of the goods distrained, to be ascertained on the oath of one witness, and conditioned for prosecuting the suit with effect, and without delay, and for duly returning the goods distrained, in case a return shall be awarded before any deliverance be made of the distress; and the sheriff shall assign such bond to the avowant or person making confession; which, if forfeited, may be sued in the name of the assignee.

4. Although the cattle distrained be put into a castle or fortress, yet the sheriff must nevertheless make replevin and deliverance; for if occasion be, he may take the power of the county with him for that purpose. But if the cattle are driven out of the county, or concealed, so that the sheriff cannot make replevin, then a writ of *withernam* shall go to the sheriff to take so many of the distrainer's cattle, and keep them until he shall have the original distress forthcoming. 1 *Roll's Abr.* 565.

5. After the goods are delivered back to the party replevying, he is then bound to bring his action of replevin against the distrainer; which may be prosecuted in the county court, be the distress of what value it may: but either party may remove it to the superior courts of king's bench or common pleas, the plaintiff at pleasure, and the defendant upon reasonable cause. 3 *Black.* 149.

6. Upon the action brought, and declaration delivered, the distrainer who is now the defendant, makes *avowry*; that is, avows taking the distress in his own right, and sets forth the reason of it; as for rent arrear, damage done, or other cause: or else, if he justifies in another's right, as his bailiff or servant, he is said to make *cognizance*; that is, he acknowledges the taking, but insists that such taking was legal, as he acted by the command of one who had a right to distrain. And on the truth and

and legal merits of this avowry or cognizance, the cause is determined. *Id.*

7. If it be determined for the plaintiff, namely, that the distress was wrongfully taken, he hath already got his goods back into his own possession, and shall keep them, and moreover recover damages. But if the defendant prevails, by the default or nonsuit of the plaintiff, then he shall have a writ *de retorno habendo*, whereby the goods or chattels (which were distrained, and then replevied) are returned again into his custody, to be sold, or otherwise disposed of, as if no replevin had been made. *Id.*

If the distress was for damage feasant, the distrainor may keep the goods so returned, until tender shall be made of sufficient amends. *Id.* 146.

8. On a *retorno habendo* awarded, the party desiring to have the cattle or goods returned must shew them to the sheriff; for otherwise, the sheriff may not know them. *Caf. Hardw.* 121.

REPLICATION, is the exception or answer made by the plaintiff to the defendant's plea. For if the plea made by the defendant to the plaintiff's declaration, doth not amount to an issue or total contradiction of the declaration, but only evades it, then the plaintiff may *reply* or *plead again*, either traversing the plea, that is, totally denying it; as if on an action of debt upon bond, the defendant pleads that he paid the money when due, here the plaintiff in his replication may totally traverse this plea, by denying that the defendant paid it; or he may allege new matter in contradiction to the defendant's plea; as when the defendant pleads no award made, the plaintiff may reply and set forth an actual award, and assign a breach of it. To the replication the defendant may *rejoin*, or put in an answer, called a *rejoinder*; unto which the plaintiff may answer again by a *sur-rejoinder*. 3 *Black.* 309.

The replication must not vary from the declaration, but must pursue and maintain the cause of the plaintiff's action; otherwise it will be a departure in pleading, a going to another matter, a saying and unsaying, which the law will not allow. 1 *Inst.* 304.

REPORTS of cases, are histories of the several cases and decisions of the courts, with a short summary of the proceedings, which are preserved at large in the record, the arguments on both sides, and the reasons the court gave for its judgment, taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain the records; which always, in matters of consequence and nicety, the judges direct to be searched. 1 *Black.* 71.

There are likewise *reports*, when the court of chancery, or other

other court, refer the stating of some case or other matter to a master of chancery, or other referee; his certificate therein is called a report, on which the court makes an absolute order. *Pract. Solic.* 67.

REPRIEVE, from *repandre*, to take back, is the withdrawing of judgment for a time, whereby the execution is suspended. This may be at the discretion of the judge, either before or after sentence; as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their sessions be ended and their commission expired; but this is rather by common usage than of strict right. A reprieve may also be from the necessity of the law; as where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay judgment, yet it is to respite the execution till she be delivered. 4 *Black.* 394.

REPRISAL, letters of. See MARQUE.

REPUTATION, is the vulgar opinion concerning any particular matter of which there is not positive proof. It is not what this or that man says, but what hath generally been said or thought by many. And some special matter must be averred to induce a reputation. 2 *Lill. Abr.* 464.

Land may be reputed part of a manor, though not really so. There may be a parish in reputation, an office in reputation, and the like. 3 *Nelf. Abr.* 137.

REQUEST, of things to be done. Where one is to do a collateral thing agreed upon by contract, there ought to be a request to do it. But if a duty is due, or a debt exists before a promise made, it is payable without request; for then the request is not any cause of the action. So where an action of debt is brought for money due upon a bond, there needs no special request; but otherwise it is of a thing collateral. 2 *Lill.* 464.

REQUESTS, court of, was a court of equity, of the same nature with the court of chancery, but inferior to it; principally instituted for the relief of such petitioners, as in cases of equity addressed themselves by supplication to his majesty. Of this court the lord privy seal was chief judge, assisted by the *masters of requests*. It had its beginning about the 9 *Hen.* 7. and being thought oppressive and arbitrary, was abolished by act of parliament 16 *Car. c.* 10. 4 *Inst.* 97.

RESCOUS, is an old French word, coming from *rescouer*, *recuperare*, to recover; and denotes an illegal taking away and setting

setting at liberty of a distress taken, or of a person arrested by process or course of law. 1 *Inst.* 160.

Also it is used for a writ which lies for a rescue, called *breve de rescussu*.

If goods be distrained without cause, or contrary to law, the owner may make rescue; but if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out, for they are then in custody of the law. 3 *Black.* 12.

An hinderance of a person to be arrested that hath committed felony, is a misdemeanor, but no felony; but if the party be arrested, and then rescued, if the arrest was for felony, the rescuer is a felon; if for treason, a traitor; if for trespass, finable. 2 *Haw.* 140.

But on an indictment for a rescue, the principal must be first attainted before the rescuer can be punished, for it may turn out that there has been no offence committed.

RESIDENCE. Regularly, personal residence is required of ecclesiastical persons upon their cures; and to that end, by the common law, if he that hath a benefice with cure be chosen to a temporal office, he may have the king's writ for his discharge. 2 *Inst.* 625.

By the 25 *H. 8. c.* 13. persons wilfully absenting themselves from their benefices for one month together, or two months in the year, shall forfeit 10*l.* for every month's absence, except chaplains to the king, or others therein mentioned, during their attendance in the household of such as retain them; and also except all heads of houses, magistrates, and professors in the universities, and all students under forty years of age, residing there *bonâ fide* for study.

By the 13 *Eliz. c.* 20. and divers other subsequent statutes, if any beneficed clergyman be absent from his cure above four score days in one year, he shall not only forfeit one year's profit of his benefice, to be distributed among the poor of the parish, but all leases made by him of the profits of such benefice, and all covenants and agreements of like nature, shall cease and be void; except in the case of licenced pluralists, who are allowed to demise the living on which they are non-resident to their curates only.

By the 1 *W. c.* 26. if a man presented by either of the universities to a popish living, shall be absent above sixty days in one year, the living shall thereby become void.

It is not only non-residence if a man dwell in an house in another parish, but it is also non-residence to dwell in another house in the same parish; because the statute of non-residence was made, not only that the cure should be served, and hospitality maintained, but also that the parsonage house should be upholden,

upholden, and preserved in a condition fit for incumbents to live in, that their successors thereby may receive no prejudice.

But if a man hath no parsonage house, or remove by advice of his physician for better air, in order to the recovery of his health, or be removed and detained by imprisonment, or thelike, he is not punishable by the said statute; for the words of the statute are, if he shall *absent himself wilfully*.

RESIDUARY LEGATEE, is he to whom the residue of the personal estate is given by will, after payment of the debts and particular legacies.

RESIGNATION of a benefice, is where a parson, vicar, or other beneficed clergyman, voluntarily gives up and surrenders his charge and preferment to those from whom he received them.

Resignation is of no avail till accepted by the ordinary; and therefore all presentations made to benefices resigned, before such acceptance, are void.

After acceptance of the resignation, lapse shall not run but from the time of notice given by the bishop to the patron. The church indeed is void immediately upon acceptance, and the patron may present if he pleases; but as to lapse, he has time to present until six months shall be expired after notice.

General bonds of resignation have been held not to be within the statute of simony, and therefore allowed to be good, both at law and in equity, unless there appeared some unfair use was intended to be made thereof. But in the case of *Ffytche* against the bishop of *London*, in the house of lords, it was determined otherwise. See *Burn's Ecclesiastical Law*, tit. SIMONY.

RESPONDEAT OUSTER, is to *answer over* in an action on the merits of a cause, after his plea in abatement of the action hath been over-ruled as frivolous.

RESPONDENTIA, (from *respondeo*, to answer,) is where the master of a ship, in a foreign country, takes up money to enable him to carry on his voyage, and pledges the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage; in which case the borrower, personally, is bound to *answer*, and is therefore said to take up money at *respondentia*; as where money is borrowed on the security of the ship itself, where the keel or *bottom* of the ship, (a part in the name of the whole,) is pledged, it is called *bottomry*. 2 *Black.* 458.

RESTITUTION, is where one being attainted of treason or felony, (whereby the blood is stained or corrupted,) he or his heirs is restored to his lands or possessions. The king by his charter may restore lands or goods forfeited to him by any attainer; but if by attainer the blood is corrupted, this can only be restored by act of parliament. *Wood. b. 4, c. 5.*

In

In the case of stolen goods, by statute 21 *Hen. 8. c. 11.* on conviction of an offender, the prosecutor is intitled to have his goods again, by writ to be granted by the justices, notwithstanding the property of them is endeavoured to be altered by sale in market overt. And though this may seem somewhat hard upon the buyer, yet since it is come to this, that either the owner or buyer must suffer, the law prefers the right of the owner who has done a meritorious action, by pursuing the felon to punishment, to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction. And it is now usual for the court, upon the conviction of a felon, to order (without any writ) immediate restitution of such goods as are brought into court. Or the party himself may retake his goods wherever he happens to find them, unless a new property be fairly acquired therein. 4 *Black. 362.*

RESTITUTION OF TEMPORALTIES, is a writ directed to the sheriff to restore the temporalties to a bishop elected, confirmed, and consecrated. *Wood. b. 4. c. 4.*

RESULTING USE, is when an use limited by a deed expires, or cannot vest, it then returns back to him who raised it. As if a man makes a feoffment to the use of his intended wife for life, with remainder to the use of her first-born son in tail; here, till he marries, the use results back to himself; after marriage, it is executed in the wife for life; and, if she dies without issue, the whole results back to him in fee. 2 *Black. 335.*

RETAINER of debts. An executor, among debts of equal degree, is allowed to pay himself first, by retaining in his hands so much as his debt amounts unto. And the reason is, because an executor cannot, without an apparent absurdity, commence a suit against himself; and therefore, if he could not retain, he would be in a worse condition than any other creditor; but an executor of his own wrong is not allowed to retain. 3 *Black. 18.*

RETAINING of a servant, is the hiring of him: so retaining of a *counsel*, is the engaging of him in the cause.

RETORNO HABENDO, is a writ that lies where cattle are distrained and replevied, and the person that took the distress justifies the taking, and proves it to be lawful; upon which the cattle are to be returned to him. This writ also lieth when the plaint in replevin is removed by *recordare* into the king's bench or common pleas, and he, whose cattle are distrained, makes default, and doth not prosecute his suit. *F. N. B.*

RETRAXIT, is where the plaintiff cometh in person in the court where his action is brought, and saith he will not proceed in it; and this is a bar to that action for ever; whereas, after a nonsuit the plaintiff may begin again. 8 *Co. 58.*

RETURN,

RETURN, is of various kinds in our law; but it is most commonly used for the return of writs, which is the certificate of the sheriff made to the court of what he hath done, touching the execution of any writ directed to him; and where a writ is executed, or the defendant cannot be found, or the like, this matter is indorsed on the writ by the officer, and delivered into the court whence the writ issued, at the day of the return thereof, in order to be filed; which return, is always made to be at least fifteen days from the date or teste of the writ. 2 *Lill. Abr.* 476.

The name of the sheriff must always be to the return of writs, otherwise it doth not appear how they come into court. If a writ be returned by a person to whom it is not directed, the return is not good; it being the same as if there were no return at all upon it; and after a return is filed, it cannot be amended; but before, it may. *Id.* 477.

In each term there are stated days for the return of writs, which are generally at about the distance of a week from each other; on some one of which days, all original writs are made returnable, and therefore are generally called the *returns* of that term.

If the sheriff makes no return, the court will order an attachment against him for his contempt; if he make an insufficient return, the court will amerce him; but if he make a false return, the party grieved may have his action against him. *Wood. b. 1. c. 7.*

There are also returns of bailiffs of liberties, returns of jurors by the sheriff for trial of causes, returns of commissions by commissioners, and many others of various kinds.

REVERSAL of a judgment, may be either for matter foreign to, or not apparent on the face of the record, or for a mistake in the record itself, by a writ of error; which lies from all inferior criminal jurisdictions to the court of king's bench, and from the king's bench to the house of peers. 4 *Black.* 392.

REVERSION :

A **REVERSION**, (from *revertio*, to return,) is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. Sir *Edward Coke* describes a reversion to be the returning of land to the grantor or his heirs, after the grant is over; as if there be a gift in tail, the reversion of the fee simple is in the donor; in a lease for life, or for years, the reversion is in the lessor. For the fee simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is therefore

fore never created by deed or writing, but arises from construction of law; whereas a remainder can never be limited, unless by either deed or will. 2 *Black.* 175.

When the particular estate determines, then the reversion comes into possession, which before was separated from it; for he that hath the possession, cannot have the reversion, because by uniting them, the one is *merged* or sunk in the other. 2 *Lill. Abr.* 484.

In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealments of their deaths, it is enacted by the 6 *Ann. c.* 18. that all persons, on whose lives any lands or tenements are holden, shall, (upon application to the court of chancery, and order made thereupon,) once in every year, if required, be produced to the court, or to commissioners appointed by the said court; or upon neglect or refusal, they shall be taken to be actually dead, and the person intitled to such expectant estate may enter upon and hold the lands and tenements till the party shall appear to be living.

A reversioner may bring an action upon the case for spoiling of trees, or other damage to the reversion; but he cannot bring an action of trespass, for that is founded on the possession. 3 *Lev.* 209.

On an action brought by a reversioner against the defendant for erecting a wall whereby the lights were obstructed, it was objected, that a temporary nuisance cannot be an injury to the inheritance, for it may be abated before the reversioner comes into possession; but, by the court, it is a present injury; for if the reversioner wanted to sell the reversion, this obstruction would lessen the value of it. And the wrong doer is liable to a double action; by the possessor, and by the reversioner, in respect of their several interest. *Bur. Mansf.* 2141.

A reversion expectant upon an estate tail is not assets for payment of debts; because it lieth in the will of tenant in tail to dock and bar it at his pleasure: otherwise it is of a reversion on an estate for life or years. 1 *Inst.* 171. 6 *C.* 58.

REVERTER. A *formedon in reverter* is, where there is a gift in tail, and afterwards by the death of the donee, or his heirs without issue of his body, the reversion falls in upon the donor, his heirs or assigns; in which case, the reversioner shall have a writ of *formedon (secundum formam doni)* to recover the lands; wherein he shall suggest the gift, his own title to the reversion derived from the donor, and the failure of issue upon which his reversion takes place. 3 *Black.* 192.

REVIEW. A bill of a review may be had in a court of equity, upon apparent error in judgment, appearing upon the

the face of the decree; or, by special leave of the court, upon oath made of the discovery of new matter or evidence, which could not possibly be had or used at the time when the decree passed. But no new evidence or matter then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a bill of review. 3 *Black.* 454.

REVIVOR, is when a bill in chancery hath been exhibited against one who answers, and before the cause is heard, (or if heard, and the decree is not inrolled,) either party dies; in this case, a *bill of revivor* must be brought, to put the proceedings again in motion, without which they remain at a stand. 3 *Black.* 448.

REVOCAION, or new declaration, is a deed made pursuant to some proviso contained in a former deed or conveyance; giving power to revoke or call back something granted; and by a new declaration, to create a new estate of the lands; after which revocation and declaration, the lands shall settle accordingly. These provisos, containing power of revocation in voluntary conveyances, are become very frequent, and pass by raising of uses according to the 27 *Hen. 8. c. 10.* for being coupled with an use, they are allowed to be good, and not repugnant to the former estates. But in case of a feoffment, or other conveyance, whereby the feoffee or grantee is in by the common law, such proviso would be merely repugnant and void. *Wood. b. 2. c. 3.*

These revocations are favourably interpreted, because many men's inheritances depend upon them. *Id.*

Some things may be revoked of course, though they are made irrevocable by express words; as a letter of attorney, a submission to an award, a testament or last will; for these of their own nature are revocable. *Id.*

But by the statute of frauds and perjuries, 29 *C. 2. c. 3.* no devise of *lands* shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, signed in the presence of three or four witnesses.

RIDER, is a schedule or small piece of parchment added to some part of a record; as when, on the third reading of a bill in parliament, a new clause is added, this is tacked to the bill on a separate piece of parchment, and is called a rider.

RIGHT, writ of, is in its nature the highest writ in the law, and lieth only of an estate in fee simple, and not for him who hath a less estate. This writ lies concurrently with all other real actions, in which an estate of fee simple may be recovered: and it also lies *after* them, being as it were an appeal to the mere right, when judgment hath been had as to the possession in an inferior possessory action. But though a writ

writ of right may be brought, where the demandant is intitled to possession, yet it rarely is adviseable to be brought in such cases; as a more expeditious and easy method is had, without meddling with the property, by proving the demandant's own, or his ancestor's possession, and their illegal ouster, in one of the possessory actions. But in case the right of possession be lost by length of time, or by judgment against the true owner in one of these inferior suits, there is no other choice; this is the only remedy that can be had, and it is of so forcible a nature, that it overcomes all obstacles, and clears all objections that may have arisen to cloud and obscure the title. 3 *Black.* 193.

There are also some other writs, which though not strictly writs of right, yet are in the nature of writs of right; as the writ of right of advowson, of ward, of dower, of formodon, of escheat. This writ ought to be first brought in the court baron of the lord of whom the lands are holden, and then it is open or *patent*: but if he holds no court, or hath waived his right, it may be brought in the king's courts originally; and then it is a writ of right *close*, being directed to the sheriff, and not to the lord. But now, the manner of proceeding by writ of right is almost antiquated and not of use, and the title of lands is usually tried upon actions of ejectment or trespass. 3 *Black.* 192.

RIGHTS AND LIBERTIES of the subject, are co-eval with our form of government, and were asserted and confirmed by the great charter of liberties, called *magna charta*, in the time of king *Henry the second*, and many other succeeding kings of this realm. Afterwards they were confirmed by a parliamentary declaration called the *petition of rights*, in the reign of king *Charles the first*; and finally asserted and demanded as the *just rights of the subject*, by the *declaration of rights*, in the act of settlement of the crown at the revolution.

RIOT. When three or more persons shall assemble themselves together, with an intent mutually to assist one another against any who shall oppose them, in the execution of some enterprize of a private nature, with force or violence, against the peace, or to the manifest terror of the people, whether the act intended were of itself lawful or unlawful; if they only meet to such a purpose or intent, although they shall afterwards depart of their own accord, without doing any thing, this is an *unlawful assembly*; if after their first meeting, they shall move forward towards the execution of any such act, whether they put their intended purpose in execution or not, this is a *rout*; and if they execute such a thing in deed, then it is a *riot*. 1 *Haw.* 155.

To constitute a riot, there must be three persons at the least; and therefore, if the jury do acquit all but two, and find them

guilty, the verdict is void, unless they be indicted *together, with other rioters unknown*: because it finds them guilty of an offence whereof it is impossible that they should be guilty; for there can be no riot where there are no more persons than two. 2 *Haw.* 441.

If a number of persons, being met together at a fair, or market, or church aisle, or on any other lawful and innocent occasion, happen on a sudden quarrel to fall out, they are not guilty of a riot, but of a sudden affray only; but if upon a dispute happening, they form themselves into parties, with promises of mutual assistance, and then make an affray, they are guilty of a riot. 1 *Haw.* 156.

Also it is possible for three persons, or more, to assemble with an intention to execute a wrongful act, and also actually to perform their intended enterprize, without being riotous; as if a man assemble a meet company, to carry away a piece of timber or other thing, whereto he pretends a right, which cannot be carried without a great number, if the number be not more than are needful for such purpose, although another man hath better right to the thing so carried away, and that this act be wrong and unlawful, yet it is of itself no riot, except there be withal threatening words used, or other disturbance of the peace. *Dalt.* c. 137.

Much more may any person, in a peaceable manner, assemble a meet company to do any lawful thing, or to remove or cast down any common nuisance. Thus every private man, to whose house or land any nuisance shall be done, may in peaceable manner assemble a meet company, with necessary tools, and may remove the nuisance. But if in removing the nuisance, they use any extraordinary words, (as to say they will do it, though they die for it, or such like words,) or shall use any other behaviour, in apparent disturbance of the peace, it is then a riot; and therefore where there is cause to remove any such nuisance, or to do any like act, it is the safest not to assemble any multitude of people, but only to send one or more persons; or if a greater number, yet no more than are needful, and only with meet tools, to remove the same; and that such persons tend their business only, without disturbance of the peace, or threatening speeches. *Id.*

By the common law, any private person may lawfully endeavour to suppress a riot, by staying those, whom he shall see engaged therein, from executing their purpose; and also by stopping others whom he shall see coming to join them: and also the sheriff, constable, or other peace officer, may and ought to do all that in them lies towards the suppressing of a riot, and may command all other persons to assist therein. 1 *Haw.* 159.

And by statute 34 *Ed.* 3. c. 1. one justice of the peace hath power

power to restrain rioters, and cause them to be imprisoned according to the nature of their offence : but if the rioters are above the number of twelve, the power of a justice is very much enlarged, by the 1 *G. ft. 2. c. 5.* commonly called the *riot act* ; by which it is enacted, that on notice or knowledge of any persons tumultuously assembled, to the number of twelve or more, he shall (together with such help as he shall command) resort to the place ; and there he shall, with a loud voice, command, or cause to be commanded, silence to be, while proclamation is making ; and after that, shall make or cause proclamation to be made, in the words or to the effect following : “ Our sovereign
 “ lord the king chargeth and commandeth all persons being as-
 “ sembled, immediately to disperse themselves, and peaceably to
 “ depart to their habitations, or to their lawful business, upon
 “ the pains contained in the act made in the first year of king
 “ George the first, for preventing tumults and riotous assemblies.
 “ God save the king.” And if any person shall with force oppose or hinder any person, whereby the proclamation shall not be made ; or if any twelve or more shall continue together for one hour after proclamation made, or after such hindrance ; the same shall be felony without benefit of clergy. And if any rioters, (though under the number of twelve, and whether any proclamation be made or not,) shall demolish or pull down, or begin to demolish or pull down, any church or chapel, or any building for religious worship, registered according to the act of toleration, or any dwelling house, barn, stable, or other out-house, they shall be guilty of felony without benefit of clergy ; and the hundred shall answer damages as in cases of robbery.

The punishment of rioters by the common law is fine and imprisonment.

By statute 13 *H. 4. c. 7.* and 2 *H. 5. c. 8.* two justices, together with the sheriff, may go with the power of the county, if need be, to suppress any riot, and arrest the rioters, and record upon the place the nature and circumstances of the riot ; which record alone is a sufficient conviction of the offenders, and the justices thereupon may fine and imprison them.

RIVERS washing away their banks. See ALLUVION.

ROBBERY, is a felonious and forcible taking from the person of another, of goods or money to any value, by violence, or putting him in fear. 1. There must be a *taking*, otherwise it is no robbery ; but it is sufficient, although the taking be not strictly from the person of another, if it be done in his presence ; as where a robber by menaces and violence puts a man in fear, and drives away his cattle or other goods before his face. 2. It is not material of what *value* the thing taken is ; a penny, as well as a pound, thus forcibly extorted, makes a robbery. 3. The taking must be by *force*, or a previous putting in *fear*, which

makes the violation of the person more atrocious than privately stealing. This previous violence, or putting in fear, is the criterion that distinguishes robbery from other larcenies. For if a man privately steals 6*d.* from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent; neither is it capital, as private stealing, being under the value of 12*d.* Not that it is necessary, although it be usual, to lay in the indictment that the robbery was committed by putting in fear; it is sufficient, if laid to be done by violence. And when it is laid to be done by putting in fear, this doth not imply any great degree of terror or affright in the party robbed: it is enough that so much force, or threatening by word or gesture, be used, as might create an apprehension of danger, or induce a man to part with his property without or against his consent. Thus, if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be put in fear, yet this is undoubtedly a robbery. 4 *Black.* 243.

In case of a robbery committed, the hundred is liable to answer damages, 27 *El. c.* 13. And a 40*l.* reward is given for apprehending a robber, and prosecuting him to conviction. 4 *W. c.* 8.

ROBERDSMEN, followers of *Robert Hood*, who in the reign of king *Riuhard* the first committed great outrages on the borders of *England* and *Scotland*, in woods and deserts, by robbery, burning of houses, felony, waste, and spoil, and principally by and with vagabonds, idle wanderers, night-walkers, and draw-latches. And although he lived in *Yorkshire*, yet men of his quality took their denomination of him, and were called *Robberdsmen* throughout all *England*. And divers acts of parliament were made against them. 3 *Inst.* 197.

ROGUES. See VAGRANTS.

ROMESCOT, a tribute of a penny for every family, paid yearly at *Rome*; otherwise called *Peter-pence*.

ROSETUM, (from the British *rbos*,) a low watry place of reeds and *rushes*.

ROUT, is where three or more persons meet to do an unlawful act upon a common quarrel; as forcibly breaking down fences upon a right claimed of common or of a way, and make some advances towards it. And the difference between an *unlawful assembly*, a *rout*, and a *riot*, is this: An *unlawful assembly* is when three or more do assemble themselves together to do an unlawful act; as to pull down inclosures, to destroy a warren and the game therein, and depart without doing it, or making any motion towards it: a *rout* is, when, after their meeting, they move forward towards the execution of any such act, whether they put their intended purpose in execution or not: a *riot* is, where they actually

actually commit an unlawful act of violence, either with or without a common cause of quarrel; as if they beat a man, or kill game in another man's liberty, or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner. 4 *Black.* 140.

RUBRICK, in the book of common prayer, is that part which contains rules and directions for the celebration of divine service; so called, because it was anciently written in red letters.

RULE OF COURT. For breach and contempt of a rule of court, an attachment lies; and if a rule of court is made betwixt parties by their consent, though the court would not have made such rule without their consent, yet if either party refuses to obey such a rule made, the court will, upon motion, grant an attachment against the party that disobeys the rule.

But generally, an attachment is not grantable for disobedience to any rule, unless the party hath been served with it personally; as for disobeying a rule at *nisi prius*, till it is made a rule of court. 1 *Salk.* 71. 83.

Persons submitting their differences to be determined by arbitrators, may agree that their submission be made a rule of any of his majesty's courts of record at *Westminster*; in which case, if either party shall refuse to perform the award, the submission may be entered of record in such court; and, on motion for that purpose, the court will grant an attachment. 9 & 10 *W.* c. 15.

RUNCARIA, land full of brambles and briars. 1 *Inst.* 5.

RURAL DEANS, are very ancient officers of the church, but now almost grown out of use, though their deaneries still subsist as an ecclesiastical division of the diocese, or archdeaconry. Their office was, to execute the bishop's processses, to inspect the lives and manners of the clergy and people within their district, and to report the same to the bishop; to which end, that they might have knowledge of the state and condition of their respective deaneries, they had power to convene rural chapters.

S A B

SABBATH BREAKING. See LORD'S DAY.

SABULONARIUM, a gravel pit, or liberty to dig gravel or sand: also money paid for the same.

SAC, *saca*, an ancient privilege which a lord of a manor claims

claims to have in his court, of holding plea in causes of trespass arising amongst his tenants, and of imposing fines and amercedments touching the same. It is sometimes used to signify the amercedment itself.

SACRAMENT. See **LORD'S SUPPER.**

SACRILEGE, robbing of the church, or stealing things out of a sacred place.

SAFE CONDUCT, is a privilege granted by the crown to foreigners to come into and abide in the realm, and send their goods from one place to another, according to the terms expressed in the several instruments. These letters by ancient statutes must be granted under the king's great seal, and inrolled in chancery. But passports under the king's sign manual, or licences from his ambassadors abroad, are now more usually obtained, and allowed to be of equal validity. 1 *Black.* 259.

And during the continuance of the safe conduct, either express or implied, the foreigner is under the protection of the king and the law; and more especially, as it is one of the articles of *magna charta*, that foreign merchants shall be intitled to safe conduct and security throughout the kingdom; therefore any violation of either the person or property of such foreigner, may be punished by indictment in the name of the king. 4 *Black.* 69.

SAIL CLOTH. By the 9 *G. 2. c. 37.* every maker of *British* sail cloth shall stamp his name and place of abode in words at length on every piece; on pain of forfeiting 10*l.*

SALE, is a transferring the property of goods and chattels from one to another, for valuable consideration.

If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment. 2 *Black.* 446.

Where no place or time of delivery is appointed, it is always implied that the delivery be made immediately, and payment upon the delivery, unless it be inconsistent with the nature of the thing delivered, or it be otherwise specially agreed. 3 *Salk.* 61.

If the buyer doth not come at the time agreed on, and pay and take the goods, the seller ought to go and request him; and then if he doth not come and pay, and take away the goods in convenient time, the agreement is dissolved, and the seller is at liberty to sell them to any other person. 1 *Salk.* 113.

But if any part of the price be paid down, if it be but a penny, or any portion of the goods be delivered by way of earnest, the property is bound by it, and the vendee may recover the goods by action, as well as the vendor may the price of them. 1 *Salk.* 113. 2 *Black.* 448.

But by 29 *C. 2. c. 3.* no contract for the sale of goods of the value

value of 10*l.*, or more, shall be valid, unless the buyer actually receives part of the goods sold, by way of earnest on his part; or unless he gives part of the price to the vendor, by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party, or his agent, who is to be charged with the contract.

And with regard to goods under the value of 10*l.*, no contract, or agreement for the sale of them, shall be valid, unless the goods are delivered within one year, or unless the contract be made in writing, and signed as aforesaid. 2 *Black.* 448.

If the vendee tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining in them. 2 *Black.*

If a man sells a horse, he may keep him till he is paid; and if the horse dies in his stable after sale, and before he is delivered, the feller may nevertheless recover the money, because the property was in the buyer. *Ibid.*

But by *Holt, Ch. J.* an earnest does not alter the property, but only binds the bargain, the property remaining in the vendor till payment of the money or delivery of the goods. 12 *Mod.* 344. *M. 11. W. 3. K. & Anon.*

In contracts for sale, it is always understood, that the feller undertakes that the commodity he sells is his *own*; and if it proves otherwise, an action on the case lies against him for damages. 2 *Black. Ibid.*

In contracts for provisions, it is always implied that they are wholesome; and if they be not, the same remedy may be had. *Ibid.*

Lord Coke says, by the *civil law*, every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no express warranty; but the common law bindeth him not, unless there be a warranty either in deed or in law; for (says he) *caveat emptor*. 1 *Inst.* 102.

And Sir *William Blackstone* says, with regard to the goodness of the wares purchased, the feller is not bound to answer; but if he that selleth any thing, doth, upon the sale, warrant it to be good, the law annexeth a tacit contract to this warranty, that, if it be not so, he shall make compensation to the buyer; otherwise it is an injury to good faith, for which an action on the case will lie to recover damages. 2 *Black. Ibid.*

But the warranty must be upon the sale; for if it be made after, and not at the time of the sale, it is a void warranty: for it is then made without any consideration; neither doth the buyer then take the goods upon the credit of the feller. *Ibid.*

Also the warranty can only reach to things in being at the time of the warranty made, and not to things *in futuro*; as that a horse

horse is found at the buying of him, not that he will be found two years hence. *Ibid.*

But if the seller knew the goods to be unsound, and hath used any art to disguise them, or if they are in any respect different from what he represents them to the buyer, this artifice shall be equivalent to an express warranty, and the seller is answerable for their goodness. *Ibid.*

A general warranty will not extend to guard against defects that are plainly and obviously the object of one's senses; as if a horse be warranted perfect, and wants a tail or an ear, unless the buyer in this case be blind. *Ibid.*

But if cloth is warranted to be of such a length, when it is not, there an action on the case lies for damages; for that cannot be discovered by sight, but only by a collateral proof, the measuring it. *Ibid.*

Also, if a horse is warranted sound, and he wants the sight of an eye, though this seems to be the object of one's senses, yet as the discernment of such defects is frequently matter of skill, it hath been held that an action on the case lieth to recover damages for this imposition. *Ibid.*

In the case of *Payne* against *Cave*, *E. 29 G. 3.* it was determined, that a bidder at an auction, under the usual conditions that the highest bidder shall be the purchaser, may retract his bidding any time before the hammer is down; for the auctioneer is the agent only of the vendor, and the assent of both parties is necessary to make the contract binding. Every bidding is nothing more than an offer on one side, which is not binding until assented to by the seller, which is signified on his part by knocking down the hammer. *Cas. by Durnf. & East. vol. 3. 148.*

SALET, a head piece, or scull of iron, or other metal.

SALICETAM, a place where willows grow.

SALINA, a, salt pit or place where salt is made.

SALT. By several statutes a duty is laid on all salt made in *Great Britain*, and also on foreign salt imported; which is put under the management of the officers of the customs and excise.

SALTATORIUM, a deer leap.

SALVAGE, is an allowance made for saving ships or goods from danger of seas, enemies, or the like. And by the statute of the 12 *An. st. 2. c. 18*, where a ship shall be in danger of being stranded or lost, all head officers and others near the sea shall summon as many persons as shall be necessary for assistance; who shall, in case of assistance given, have a reasonable salvage, to be ascertained by three neighbouring justices.

SALVAGIUS, wild, savage; as *salvagijs catus*, a wild cat.

SANC-

SANCTUARY. Anciently, if a person accused of any crime (except treason and sacrilege,) had fled to any church or church-yard, and within forty days after went in sackcloth, and confessed himself guilty before the coroner, and declared all the particular circumstances of the offence, and thereupon took the oath in that case provided; namely, that he abjured the realm, and would depart from thenceforth at the port that should be assigned him, and would never return without leave from the king; he, by this means, saved his life, if he observed the conditions of the oath, by going with a cross in his hand, and with all convenient speed, to the port assigned, and embarking: for if, during this forty days privilege of sanctuary, or in his way to the sea side, he was apprehended and arraigned in any court for this felony, he might plead the privilege of sanctuary, and had a right to be remanded, if taken out against his will: but by this abjuration his blood was attainted, and he forfeited all his goods and chattels. The immunity of these privileged places was very much abridged by the statutes 27 H. 8. c. 19. and 32 H. 8. c. 12. And now, by the statute 21 J. c. 28. all privilege of sanctuary, and abjuration consequent thereupon, is utterly taken away and abolished. 4 *Black.* 332.

SATISFACTION, is the giving of recompence for an injury done; or the payment of money due on bond, judgment, or other security. A sum given in the testator's life-time, is a satisfaction for the same sum left in his will. And it is a rule generally, that alegacy in a will greater, or as great as the debt, shall be taken to be a satisfaction for that debt. 2 *Atk.* 48. 301.

SCANDAL. See **SLANDER.**

SCANDALUM MAGNATUM, is a slander of the great men of the realm; which, by divers ancient statutes, is made a more heinous offence, than when the like is spoken of a common person: for which offence, an action on the case lies, as well on the behalf of the crown to inflict the punishment of imprisonment on the slanderer, as on behalf of the party to recover damages for the injury sustained.

SCEPP, an ancient measure, the quantity now not known. Baskets in some places are called *skips*; so a bee-hive is called a *bee-skip*.

SCHARNPENNY, from the Saxon *scarn*, which signifies *dung*, was a payment in some manors by the tenants in lieu of folding up their cattle in the lord's yard for the benefit of their dung. In some of the northern counties they still call cow's dung by the name of *cow scarn*; and a *scarny-boughs* denominates a drab, or dirty dunghill wench.

SCHISM, Gr. a rent or division in the church. It is spoken commonly of dissenters separating from the church of *England*.

SCIRE FACIAS, is a judicial writ, and properly lieth after a year

a year and a day after judgment given; whereby the sheriff is commanded to summon or give notice (*scire faciat*) to the defendant, that he appear and shew cause why the plaintiff should not have execution. 1 *Inst.* 290.

If judgment is against a testator, there must issue a *scire facias* against the executor, (though within the year,) to shew cause why execution should not be awarded. *Wood. b. 4. c. 4.*

If one recovers against a feme sole, and she is married within the year and day, a *scire facias* must go against the husband to the shew cause. *Id.*

SCIREWIGHT, *schiregeld*, a fine imposed by the sheriff on such persons as neglected to attend the county court.

SCOLD. A common scold, *communis rixatrix*, (for our law-latin confines it to the feminine gender,) is a public nuisance to her neighbourhood; for which offence she may be indicted, and, if convicted, shall be sentenced to be placed in a certain engine of correction called the trebucket, castigatory, or cucking stool, which in the Saxon signifies the scolding stool, though now it is frequently denominated the ducking stool; because the residue of the judgment is, that, when she is so placed therein, she shall be plunged in water for her punishment. 4 *Black.* 169.

An indictment of a common scold is good, although it conclude to the common nuisance of *divers* (and not of *all*) the king's subjects; which is contrary to the general rule in other cases. And she may be convicted without setting forth the particulars in the indictment. 1 *Haw.* 198. 2 *Haw.* 227.

SCOT ALE, was where any officer of a forest kept an ale-house within the forest, by colour of his office, causing people to come to his house, and there spend their money for fear of his displeasure; which, by transposing the words, may be otherwise called an *ale shot*.

SCOT AND LOT, a customary contribution laid upon persons according to their respective abilities; in which respect they are at this day said to pay *scot and lot*.

SCOTLAND, by the articles of the union, is now become part of the kingdom of *Great Britain*: the principal of which articles are; that the succession to the monarchy shall be the same in both kingdoms: that the united kingdom shall be represented by one parliament; that sixteen peers be chosen to represent the peerage of *Scotland* in parliament, and forty-five members to sit in the house of commons; that the laws relating to trade, and the excise, shall be the same in both kingdoms; that when *England* raises 2,000,000*l.* by a land tax, *Scotland* shall raise 48,000*l.*

SCUTAGE, a tax on those that held lands by knights service, towards furnishing the king's army.

SEA. The main sea beneath the low water mark, and round *England*,

England, is part of *England*; for there the admiralty hath jurisdiction. 1 *Inst.* 260.

But between the high water mark and low water mark, the common law and the admiral have jurisdiction by turns; one upon the water, the other upon land. But if the water is within a county, the common law claims jurisdiction. 5 *Co.* 107.

Though the land be within the body of a county at the reflux, yet when the sea is full, the admiral hath jurisdiction upon the water as long as the sea flows; so as at one place there is *divisum imperium* at several times. 3 *Inst.* 113.

By statute 6 *G. 2. c.* 37. maliciously cutting down or destroying any sea banks, is made felony without benefit of clergy.

SEAL. The use of seals, as a mark of authenticity to letters and other instruments in writing, is very ancient, and was allowed to be sufficient without signing the name, which few could do of old time. Among our Saxon ancestors, usually they who could write subscribed their names, and, whether they could write or not, they affixed the sign of the cross; which custom, for those that cannot write, is for the most part kept up to this day. The Normans used sealing only, without writing their names. The impressions of these seals were sometimes a knight on horseback, sometimes other devices; but coats of arms were not introduced into seals, or indeed into any other use, till about the reign of *Richard* the first, who brought them from the croisade in the Holy Land, where they were first invented and painted on the shields of knights, to distinguish the variety of persons of every christian nation who resorted thither; and who could not, when clad in complete armour, be otherwise known or ascertained. 2 *Black.* 305.

Sealing of a deed, is an essential part of it; for if a writing is not sealed, it cannot be a deed.

And for a long time, sealing was held to be sufficient without signing, and so the common form of attesting deeds, "sealed and delivered," continues to this day, notwithstanding the statute of frauds and perjuries, 29 *C. 2. c.* 3. revives the Saxon custom, and expressly directs signing, in all grants of lands, and many other species of deeds. *Id.* 305, 306.

But on an issue directed out of chancery, whether there was a *devise* or not, *Raymond*, chief justice, ruled, that sealing a will is assigning within the statute. *Str.* 764.

If a seal is broken off, it will make the deed void; and when several are bound in a bond, the pulling off the seal of the one, makes it void as to the others. 2 *Lev.* 220.

But in a deed of covenants, where the parties covenant severally, the breaking off the seal of one, shall avoid the deed only against himself. But if the deed be rased or obliterated in any part

part which concerns them all, or in the date, it shall avoid the deed as to them all. *Cro. Eliz.* 408. 546.

It is essential to a corporation or body politic to have a *common seal*; for though the particular members may express their particular consents to any act by words, or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals which compose the community, and makes one general assent of the whole. 1 *Black.* 475.

SEAMEN:

1. For the encouragement of navigation and commerce, and for a supply of seamen for his majesty's navy, it is enacted by the 12 *C. 2. c.* 18. commonly called the navigation act, that no goods shall be imported into, or exported out of, any part of his majesty's dominions in *Asia, Africa, or America*, in any vessels but such as belong to the people of *England or Ireland*, or are of the built of, and belong to any of the said dominions, and whereof the master and three fourths of the mariners at least are *English*, on pain of forfeiture of both ship and goods. And no alien, not being naturalized, shall exercise the occupation of a merchant or factor in any of the said places.

And no goods of the produce of *Asia, Africa, or America*, shall be imported into *England or Ireland*, in any other vessel but such as belongs only to the people of *England or Ireland*, or of his majesty's dominions in *Asia, Africa, or America*, and whereof the master and three-fourths at least of the mariners are *English*, on pain of like forfeiture of both ship and goods.

And no foreign goods shall be imported but only from the place of their growth or manufacture, or from those ports where they can only, or have been usually first shipped for exportation, on like pain of forfeiture.

But by the 13 *G. 2. c.* 3. his majesty, in time of war, shall have power by proclamation to permit all merchant ships and privateers to be manned with foreign seamen during such war, so as they do not exceed three fourths of the whole number. And service by a foreign seaman, during the time of war, on board any of his majesty's ships of war, or any merchant ship, or privateer, for the space of two years, shall have the effect of a naturalization.

2. And by 13 *G. 2. c.* 17. every person of the age of fifty-five years, or upwards, and under eighteen, and also every foreigner, who shall serve in any merchant ship or privateer, shall be exempted from being *impressed*.

And every landman who shall betake himself to the sea service, shall be exempted from being impressed for two years from the time of his first going to sea.

And every person, not having before used the sea, who shall
bind

bind himself apprentice to the sea service, shall be exempted from being impressed for three years from the time of such binding.

And the admiralty shall make out protections accordingly.

3. A seaman shipwrecked or cast on shore, having a testimonial from a justice of the peace, setting forth the time and place of his landing, and the place to which he is to go, and limiting the time of his passing, shall not be liable to be apprehended as a *vagrant*. 17 G. 2. c. 5.

4. No master of a ship shall set sail, without first agreeing with the seamen for their *wages*, which agreement shall be in writing, and signed by both parties; which said agreement, in case of disputes, the master shall be obliged to produce. 2 G. 2. c. 36.

For convenience of seamen, the admiralty hath been allowed to hold plea for mariners wages. And in this case, in a suit for wages, the seamen may all join; and in that court, the ship itself is liable, as well as the master; and the admiralty hath jurisdiction of their contracts, though they be in writing, and made at land: but if the agreement be special, out of the common way; or if it be under seal, so as to be more than a parol agreement; that court hath no jurisdiction, but the common law shall have cognizance. *Burr. Mansf.* 1948. 1950.

But it was never allowed that the *master* should sue in the admiralty; nor is it reasonable, where he commences the voyage as master; for though the mariners contract upon the credit of the ship, the master contracts on the credit of the owners. 1 *Salk.* 33.

To prevent desertion, no master shall advance to any seaman above half his wages, while beyond the sea, on pain of forfeiting double the sum advanced, to be recovered in the admiralty by the informer. 8 G. c. 24.

And if the ship be lost or taken before the end of the voyage, the wages are not payable: and this is, in order to oblige the seamen to use their utmost endeavours to preserve the ship. *Burr. Mansf.* 1845.

5. A ship was taken by a French privateer, and the master ransomed her for 300*l.* and was carried prisoner to *Dunkirk*. He libelled in the admiralty against the ship for payment of the money, and it was held that he well might; for the taking and pledge being on the high seas, the ship, by the law of the admiralty, shall answer for the redemption of the master by his own contract. *L. Raym.* 24.

6. The master may hypothecate or pawn the ship, but he cannot sell. And if he be driven by tempest into port, and there borrows money to refit, the ship is liable to condemnation in the admiralty, notwithstanding that the contract was made at land, for the cause of pledging arose upon the sea. *L. Raym.* 152.

7. A sea-

7. A seaman may make a *nuncupative testament*, without the strict formalities required of others by the 29 C. 2. c. 3.

SECRETARY OF STATE, is a great officer under the king; but it doth not seem, that in that capacity he is in any considerable degree the object of our laws, or hath any very important share of magistracy conferred upon him; except that he is allowed the power of commitment, in order to bring offenders to trial. 1 *Black.* 338.

SECTA, *suit*, or *action*. This word (*à sequendo*) anciently signified the *followers* or witnesses of the plaintiff. For in former times, the law would not put the defendant to the trouble of answering the charge, till the plaintiff had made out at least a probable case. But the actual production of the *suit*, the *secta*, or *followers*, is now totally disused, though the form of it still continues in the end of the declaration, which always concludes, *and thereupon he bringeth suit*. 3 *Black.* 295.

SECTA AD MOLENDINUM, *suit* to another's mill; where the persons resident in a particular place, by usage, time out of mind, have been accustomed to grind their corn at a certain mill; and afterwards any of them go to another mill, and withdraw their *suit* from the ancient mill: and for this injury, the owner shall have a writ *de secta ad molendinum*, commanding the defendant to do his *suit* at that mill, or shew good cause to the contrary. In like manner, a man may have a writ of *secta ad ferrum*, for *suit* due to his public oven or bakehouse, or to his *torrale*, his kiln, or malthouse; when a person's ancestors have erected a convenience of that sort for the benefit of the neighbourhood, upon an agreement proved by immemorial custom, that all the inhabitants should use and resort to it when erected, An action upon the case will also lie, to repair the party injured in damages. 3 *Black.* 235.

SECTA CURIÆ, *suit* of court, a service performed by the tenant at the lord's court.

SECURITAS PACIS, is a writ that lies for one that is threatened with bodily harm by another, and is usually granted out of the chancery or king's bench, against peers of the realm, or other offenders of high degree, requiring the justices of the peace, or others to whom it is directed, to take recognizance from the persons complained of, that they will keep the peace towards the complainant, and certify the same into the court from whence the writ did issue.

SE DEFENDENDO, is where one who hath no other possible means of preserving his life from one who combats with him on a sudden quarrel, kills the person by whom he is reduced to such an inevitable necessity. And not only he, who upon an assault, retreats to a wall, or some such strait, beyond which he can go no further before he kills another, is judged by the law

to act upon unavoidable necessity; but also he, who being assaulted in such a manner, and in such a place, that he cannot go back without manifestly endangering his life, kills the other without retreating at all. 1 *Haw.* 75.

SEISIN, in the common law, signifies possession: so to seise, is to take possession of a thing. There is a seisin in *fact*, and a seisin in *law*: a seisin in *fact* is, when an actual possession is taken; a seisin in *law* is, where lands descend, and one hath not actually entered on them. 1 *Inst.* 31.

SELF DEFENCE. See SE DEFENDENDO.

SELF MURDER. See FELO DE SE.

SEQUESTER, is a term used in the civil law for renouncing; as when a widow comes into court and disclaims having any thing to do, or to intermeddle with her deceased husband's estate, she is said to sequester.

SEQUESTRATION, signifies the separating or setting aside of a thing in controversy, from the possession of both the parties that contend for it; and it is twofold, voluntary and necessary. Voluntary, is that which is done by consent of each party; necessary, is what the judge of his authority doth, whether the party will consent or not.

There is also a sequestration in the court of chancery against a person for non-appearance upon a bill exhibited, or for not yielding to a decree, or the like. In which case, a commission is usually directed to certain persons therein named, empowering them to seize the defendant's real and personal estate into their hands; or it may be, some particular part or parcel of his lands, and to receive and sequester the rents and profits thereof, until the defendant shall have answered the plaintiff's bill, or performed some other matter which has been ordered and enjoined him by the court, for not doing whereof he is in contempt. *Curf. Canc.* 89.

A sequestration is also a kind of execution for debt, especially in the case of a beneficed clerk, of the profits of the benefice, to be paid over to him that had the judgment, till the debt is satisfied.

SERJEANT, is a word diversely used, and applied to sundry offices and callings. First, a *serjeant at law*, *serviens ad legem*, which is the highest degree taken in the common law. The court of common pleas is set apart for serjeants to plead therein, yet they are not so limited as to be restrained from pleading in any other court. Of these one or more are especially called the *king's serjeants*, to plead for him in all his causes, especially in cases of criminal jurisdiction. There are also *serjeants at arms*, whose office is to attend on the person of the king, to arrest persons of condition offending. They may not be above thirty in number, two of whom by the king's allowance attend on the two houses of parliament.

ment. One of them also attends on the lord high chancellor in chancery, one on the lord treasurer, one on the lord mayor of London, on extraordinary solemnities. They were anciently called *virgatores*, because they carried silver rods gilt. There are likewise *serjeants at mace*, in divers towns corporate; who with their maces attend on the mayor or other head officer. Heretofore, there were also *serjeants of the forest*, *serjeants of hundreds*, *serjeants of manors*, *serjeants of the peace*; the word *serjeant*, *serviens*, being indeed nothing but another word for *servant*, or rather indeed the same word varied a little in the orthography.

SERGEANTY, *sergeanti*, *servicium*, signifies in law a service that cannot be due from a tenant to any lord, but to the king only; and it is of two kinds, *grand serjeanty* and *petit serjeanty*. *Grand serjeanty*, is where a person holds his lands of the king by such services as he ought to do in person; as to carry the king's banner, or his lance, or to carry his sword before him at his coronation, or to do other like services: and it is called *grand serjeanty*, because it is a greater and more worthy service than the service in the common tenure of escuage. *Petit serjeanty*, is where a man holds his land of the king, to render to him yearly, a bow, a sword, a lance, a pair of gloves of mail, a pair of gilt spurs, or such other small things belonging to war. And such service is but socage in effect, because such tenant by his tenure, ought not to go nor do any thing in his proper person, but to render and pay yearly certain things to the king, as if a man ought to pay a rent. *Litt.* § 153. 160. Though all tenures are turned into common socage, by the 12 C. 2. c. 4. yet the honorary services of grand serjeanty still remain, being therein excepted.

SERVANTS :

1. SERVANTS are either *menial*, who are domestics, living *intra mœnia*, within the walls of the house; or they are such as are no part of the master's family, but are hired to do some particular kinds of business.

2. If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that a servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons as well when there is work to be done, as when there is not. But the contract may be made for a longer or smaller time. *1 Black.* 425.

3. If a servant be under age, his agreement with the master to his disadvantage shall not prejudice him; but if it be to his advantage, it is good in law. *Dalt. c.* 58.

4. If a woman who is a servant shall marry, yet she shall serve out her time, and her husband cannot take her out of her master's service. *Dalt. c.* 58.

5. If

5. If any person hire or retain my servant, being in my service, for which the servant departeth from me, and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them; but if the new master did not know that he is my servant, no action lies, unless he afterwards refuse to restore him upon information and demand. 1 *Black.* 429.

6. If a servant fall sick, or be hurt or disabled by the act of God, or in doing his master's business, his master may not put him away, nor abate any part of his wages. *Dalt. c. 53.*

7. A servant assaulting his master or other person having oversight of him, shall be imprisoned for a year, or such less time as two justices before whom he shall be convicted shall think fit. 5 *El. c. 4.*

8. A master is allowed by law with moderation to chastise his servant being under age; but if the master or mistress beats any servant of full age, it may be a good cause of discharge, on complaint to the justices. 1 *Black.* 428.

9. A master may abet and assist a servant in any action at law against a stranger: whereas, in general, it is an offence against public justice to encourage suits and animosities, by helping to bear the expence of them, and is called in law maintenance. *Id.* 429.

10. A master may bring an action against any man for beating or maiming his servant; but in such case, he must assign, as a special reason for so doing, his own damage by the loss of his service, and this loss must be proved upon the trial: and the servant also may maintain an action for the battery or imprisonment. 3 *Black.* 142.

11. So a master may justify an assault and battery in defence of his servant, for otherwise he might lose his service; as a servant may justify an assault and battery in defence of his master. *Wood. b. 1. c. 6.*

12. The master is indictable for a nuisance done by his servant; as for throwing dirt in the highway: and the servant also is indictable; for a servant is not excused the commission of any crime by the command or coercion of his master. 1 *How.* 3.

If an innkeeper's servant rob his guests, the master is bound to restitution. 1 *Black.* 435.

If a smith's servant lames a horse in shoeing him, an action lies against the master, and not against the servant. *Id.* 431.

13. If I pay money to a banker's servant, the bankor is answerable for it: but if I pay it to a man's servant, whose usual business it is not to receive money for his master, and he embezzles it, I must pay it over again. *Id.* 430.

So if a steward lets a lease of a farm without the owner's knowledge,

ledge, the owner must stand to the bargain; for this is the steward's business. *Id.*

A wife, a friend, a relation, that use to transact business for a man, are to this purpose his servants, and the principal must answer for their conduct; for the law implies, that they are under a general command; and without such a doctrine as this, no mutual intercourse between man and man could subsist with any tolerable convenience. *Id.*

If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust; for here is no implied order to the tradesman to trust my servant: but if I usually send him upon trust, or sometimes on trust, and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish, when he comes by my order, and when upon his own authority. *Id.*

14. Formerly, if a servant kept his master's fire negligently, so that his neighbour's house was burned down thereby, an action lay against the master: but now, by 6 *An. c. 3.* no action shall be brought against any in whose house a fire shall accidentally begin; for their own loss is sufficient punishment for their own, or their servant's carelessness: but if the fire happens through a servant's negligence, such servant shall forfeit 100*l.* to be distributed among the sufferers; and in default of payment, shall be committed to some workhouse, and there kept to hard labour for eighteen months.

15. If a servant is robbed of the master's money, the master or the servant may bring the action against the hundred. *Wood. b. 1. c. 6.*

16. If a servant sells his master's horse or other goods in a fair or market, with secret faults which the master knew of, the buyer can have no advantage against the master, unless he bid the servant sell to that person certain. *Wood. b. 1. c. 6. 1 Roll's Abr. 95.*

17. By hiring and service for a year, a servant gains a settlement in the parish where he served the last forty days.

18. Disputes concerning wages or misbehaviour, between master and servant, are in most cases determinable before justices of the peace.

19. No master can put away his servant, or servant leave his master, either before, or at the end of his term, without a quarter's warning, unless upon reasonable cause to be allowed by a justice of the peace: but they may part by consent, or make a special contract. 5 *El. c. 4.*

20. The contract is not dissolved by the death of the master; the servant is obliged to serve the executor, and the executor is to pay him. *Burr. Settle. Cas. 182.*

And

And by the 25 G. 3. c. 43. and 25 G. 3. c. 70. certain duties are imposed on several descriptions of male and female servants, which are to be under the management of the commissioners of the window duties.

SESSION OF PARLIAMENT, is the sitting of the parliament on the great affairs of the nation; which session continues till it be either prorogued or dissolved, and breaks not off by adjournment; therefore, upon an adjournment, all things continue in the state they were in before the adjournment; but a prorogation puts an end to the session: in which case, such bills as are begun, and not perfected, must be resumed *de novo* (if at all) in a subsequent session. 4 *Inst.* 27.

SESSION OF THE PEACE, is a court of record, holden before two or more justices, whereof one is of the quorum, for execution of the authority given to them by the commission of the peace, and certain acts of parliament. The *general* sessions and *quarter* sessions are not synonymous; for the *quarter* sessions are a species only of the *general* sessions; and such sessions only are properly called *general quarter sessions*, which are holden in the four quarters of the year, in pursuance of the statute 2 *Hen.* 5. and any other sessions, holden at any other time for the general execution of the justices authority; which, by the said statute, they are authorized to hold oftener than at the times therein specified, if need be, may be properly called *general* sessions; and those holden on a special occasion, for the execution of some particular branch of their authority, are called special sessions. 2 *Haw.* 42.

The jurisdiction of the quarter sessions extends to the trying and determining all felonies and trespasses whatsoever, though they seldom, if ever, try any greater offence than small felonies within the benefit of clergy; their commission providing, that if any cause of difficulty arises, they shall not proceed to judgment but in the presence of one of the judges. 4 *Black.* 271.

A SET-OFF, is when the defendant acknowledges the justice of the plaintiff's demand on the one hand, but on the other sets up a demand of his own, to counterbalance that of the plaintiff, either in the whole, or in part; as if the plaintiff sues for 10*l.* due on a note of hand, the defendant may set off 9*l.* due to himself for merchandize sold to the plaintiff. 3 *Black.* 304.

This depends on the statutes 2 G. 2. c. 22. and 8 G. 2. c. 24. which enact, that where there are mutual debts between the plaintiff and defendant, one debt may be set against the other, and either pleaded in bar, or given in evidence upon the general issue at the trial; which shall operate as payment, and extinguish so much of the plaintiff's demand. *Id.* 305.

If the set-off is pleaded, the defendant must pay the remaining balance into court. *Id.* 304.

SEVERAL action, is where two or more persons are severally charged in any action.

So a *several covenant*, is a covenant by two or more severally; and in a deed where the covenants are several between divers persons, they are as several deeds written on one piece of parchment.

Several fishery, is an exclusive right of fishing in a public river.

Several inheritance, is an inheritance conveyed so as to descend, or come to two persons severally by moieties.

Several tail, is that whereby land is given and intailed severally to two.

SEVERALTY, estate in, is that which is holden by the tenant in his own right only, without any other person being joined or connected with him in point of interest, during the continuance of his estate. 2 *Black.* 179.

SEVERANCE of *joint tenancy*, may be made by destroying any of its constituent *unities*. 1. That of *time*, which respects only the original commencement of the joint estate, cannot indeed (being now past) be affected by any subsequent transactions. But, 2. The jointenants estate may be destroyed without any alienation, by merely *disuniting* their possessions; and therefore, if two jointenants agree to part their lands, and hold them in severalty, they are no longer jointenants; also, one jointenant may, by writ of partition, compel another to divide. 3. By destroying the *unity of title*; as if one jointenant alienes and conveys his estate to a third person, here the jointenancy is severed, and turned into a tenancy in common. 4. By destroying the *unity of interest*. And therefore, if there be two jointenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure.

Severance of corn, is the cutting and carrying it off from the ground: and sometimes the setting out the tithes from the rest of the corn, is called severance.

SEWER, is a fresh water trench, or little river, defended with banks on both sides, to carry the water into the sea, and thereby preserve the land against inundations.

Commissions of sewers are appointed under the great seal. Formerly, they were wont to be granted *pro re nata* at the pleasure of the crown, but now at the discretion and nomination of the lord chancellor, lord treasurer, and chief justices, pursuant to the statute 23 *H. 8. c. 5.* 3 *Black.* 73.

Their jurisdiction is to overlook the repairs of sea banks, and sea walls, and the cleansing of rivers, public streams, ditches, and other conduits, whereby any waters are carried off; and is confined to such county or particular district as the commission shall expressly name. *Id.*

Their court is a court of record; and they may fine and imprison

son for contempts, and in the execution of their duty may proceed by jury, or upon their own view; and may take order for the removal of any annoyances, or the safeguard and conversation of the sewers within their commission, either according to the laws and customs of *Romney* marsh, or otherwise at their own discretion. *Id.*

They may also assess such rates, or scots; upon the owners of lands within their district, as they shall judge necessary; and if any person refuses to pay them, the commissioners may levy the same by distress of his goods and chattels; or they may by the statute 23 *Hen. 8. c. 5.* sell his freehold lands, (and by the 7 *An. c. 10.* his copyhold also,) in order to pay such scots or assessments. *Id.* 74.

But their conduct is under the control of the court of king's bench, which will prevent or punish any illegal or tyrannical proceedings. *Id.*

To pull down or destroy any lock, sluice, floodgate, or other works, on a navigable river, is, by the 8 *G. 2. c. 20.* made felony without benefit of clergy. And by 4 *G. 3. c. 12.* damaging any such works, is made felony and transportation for seven years.

SEXTON, *segsten, segerstane, (sacrista,)* is the keeper of the holy things belonging to the divine worship. He is a person so far regarded by the common law, as one who hath a freehold in his office; and therefore, though he may be punished, yet he cannot be deprived by ecclesiastical censures. 1 *Black. 395.*

Also a part of the office of a sexton is digging graves. *Caf. by Durnf. and East. vol. 3. 118.*

SHAW, a grove of trees, a wood.

SHEEP. By the 14 *G. 2. c. 6.* stealing or killing any sheep or lamb, with intent to steal the carcase, or any part thereof, is felony without benefit of clergy; and a reward of 10*l.* is given to the prosecutor.

And by the 28 *G. 3. c. 38.* every person who shall export any five sheep or lambs, shall forfeit 3*l.* for every sheep or lamb, and shall also suffer solitary imprisonment for three months, without bail, and until the forfeiture be paid; but not to exceed twelve months for such non-payment. And for every subsequent offence 5*l.* a piece, and a like imprisonment for six months, and until the forfeiture be paid; but not to exceed two years for the non-payment thereof. And all ships or vessels employed therein shall be forfeited.

SHERIFF :

1. **SHERIFF**, *shire-reeve*, the reeve, bailiff, or officer of the shire, is an officer of great antiquity in this kingdom. He is called in Latin *vice-comes*, as being deputy of the earl or *comes*, to whom the custody of the county was committed at the first division

vision of the kingdom into shires. But the earls in process of time, by reason of their high employments and attendance on the king's person, not being able to transact the business of the county, were delivered of that burden, reserving to themselves the honour, but the labour was laid on the sheriff. So that now the sheriff doth all the king's business in the county; and though he be still called *vice-comes*, yet he is intirely independent of, and not subject to the earl; the king by his letters patent committing the custody of the county to the sheriff, and to him alone. 1 *Black.* 339.

2. By several statutes, none shall be sheriff, except he have sufficient land within the county to answer the king and his people. And by the militia act, 26 G. 3. c. 107. no man, during the time that he is acting as a *militia officer*, shall be obliged to serve the office of sheriff. Also an *attorney* is exempted from the office of sheriff, by reason of his attendance on the courts at *Westminster*. Burr. Mansf. 2109.

3. At the common law, the sheriff was chosen by the county; but this was afterwards altered by statute; and the custom now is, that the great officers of state, together with the judges, meet in the exchequer chamber, and there agree upon three persons to be proposed to the king, who afterwards appoints one of them to be sheriff.

4. At the entering upon his office, the sheriff shall take the following oath, to be administered in pursuance of a writ of *dedimus potestatem*: " I A. B. do swear, that I will well and truly serve the king's majesty in the office of sheriff, in the county of _____, and promote his majesty's profit in all things that belong to my office, as far as I legally can or may. I will truly preserve the king's rights, and all that belongeth to the crown. I will not assent to decrease, lessen, or conceal the king's right, or the rights of his franchises. And whenever I shall have knowledge that the rights of the crown are concealed or withdrawn, be it in lands, rents, franchises, suits, or services, or in any other matter or thing, I will do my utmost to make them be restored to the crown again; and if I may not do it myself, I will certify and inform the king thereof, or some of his judges. I will not respite or delay to levy the king's debts, for any gift, promise, reward, or favour, where I may raise the same without great grievance to the debtors. I will do right, as well to poor as to rich, in all things belonging to my office. I will do no wrong to any man, for any gift, reward, or promise, or for favour or hatred. I will disturb no man's right, and will truly and faithfully acquit, at the exchequer, all those, of whom I shall receive any debts or duties belonging to the crown. I will take nothing whereby the king may lose, or whereby his right
" may

“ may be disturbed, injured, or delayed. I will truly return,
 “ and truly serve all the king’s writs, according to the best of
 “ my skill and knowledge. I will take no bailiffs into my ser-
 “ vice, but such as I will answer for, and will cause each of
 “ them to take such oaths as I do, in what belongeth to their
 “ business and occupation. I will truly set and return reasona-
 “ ble and due issues of them that be within my bailiwick, ac-
 “ cording to their estate and circumstances, and make due panels
 “ of persons able and sufficient, and not suspected, or procured,
 “ as is appointed by the statutes of this realm. I have not sold
 “ or let to farm, nor contracted for, nor have I granted or pro-
 “ mised for reward or benefit, nor will I sell or let to farm, or
 “ contract for, or grant for reward or benefit, by myself, or any
 “ other person for me or for my use, directly or indirectly, my
 “ sheriffwick, or any bailiwick thereof, or any office belonging
 “ thereunto, or the profits of the same, to any person or persons
 “ whatsoever. I will truly and diligently execute the good laws
 “ and statutes of this realm; and in all things well and truly be-
 “ have myself in my office, for the honour of the king, and the
 “ good of his subjects, and discharge the same according to the
 “ best of my skill and power: So help me God” 3 G. 4. 15.

5. After he is sworn, he ought at, or before the next county
 court to deliver a writ of discharge to the old sheriff, who is to
 set over all the prisoners in the gaol, severally by their names (to-
 gether with all the writs) precisely by view and indenture between
 the two sheriffs; wherein must be comprehended all the actions
 which the old sheriff hath against every prisoner, though the exe-
 cutions are of record. And till the delivery of the prisoners to
 the new sheriff, they remain in the custody of the old sheriff, not-
 withstanding the letters patent of appointment, the writ of dis-
 charge, and the writ of delivery. Neither is the new sheriff
 obliged to receive the prisoners, but at the gaol only. But the
 office of the old sheriff ceases, when the writ of discharge cometh
 to him. 3 Co. 72.

6. As keeper of the king’s peace, the sheriff is the first man in
 the county, and superior in rank to any nobleman therein, during
 his office. He may apprehend and commit to prison all persons
 who break the peace, or attempt to break it; and may bind any
 one in a recognizance to keep the king’s peace. He may, and is
 bound *ex officio* to pursue and take all traitors, murderers, felons,
 and other misdoers, and commit them to gaol for safe custody.
 He is also to defend his county against any of the king’s enemies
 when they come into the land: and for this purpose, as well as
 for keeping the peace and pursuing felons, he may command all
 the people of his county to attend him; which is called the *posse
 comitatus*, or power of the county; which summons, every person
 above fifteen years of age, and under the degree of a peer, is
 bound to attend upon warning, on pain of fine and imprison-
 ment.

ment. Yet he cannot exercise the office of a justice of the peace, for then this inconvenience would arise, that he should command himself to execute his own precepts. 1 *Black.* 343.

7. He hath jurisdiction in causes both criminal and civil; for which purpose he hath two courts; his *tourn* for criminal causes, which is therefore the king's court; the other is his *county court*, for civil causes; and this is the court of the sheriff himself.

8. The *under-sheriff* is appointed by the high sheriff, because he shall answer for him; and he shall take the like oath as the high sheriff, *mutatis mutandis*. 3 *G. c.* 15.

The under-sheriff usually performs all the duties of the office; a very few only excepted, where the personal presence of the high sheriff is necessary. But no under-sheriff shall abide in his office above one year; nor shall he practise as attorney during the time he continues in such office. 1 *Black.* 345.

9. The *Bailiffs* also are appointed by the sheriff; and every bailiff, when he gives security upon entering into his office, shall make it part of the condition of such security, that he will deliver a copy of the clauses in the statute of 32 *G.* 2. c. 28. concerning the carrying of prisoners for debt to alehouses. And he shall take the following oath of office, before a judge of assize or two justices of the peace: " I *A. B.* shall not use or exercise the
" office of bailiff corruptly during the time that I shall remain
" therein, neither shall or will accept, receive, or take, by any
" colour, means, or device whatsoever, or consent to the taking
" of any manner of fee or reward of any person or persons, for
" the impanelling, or returning of any inquest, jury, or tales, in
" any court of record, for the king, or betwixt party and party,
" above 2*s.* or the value thereof, or such fees as are allowed and
" appointed for the same by the laws and statutes of this realm,
" but will, according to my power, truly and indifferently, with
" convenient speed, impanel all jurors, and return all such writ
" or writs, touching the same, as shall appertain to be done by
" my duty or office, during the time that I shall remain in the
" said office: So help me God." 27 *Eliz. c.* 12.

10. By several statutes, the sheriffs have the keeping of gaols. And in all *civil* causes, as in cases of imprisonment for debt, the sheriff or gaoler, at the election of the party, shall be answerable for escapes suffered by the gaoler; but if the gaoler suffer a *felon* voluntarily to escape, this, inasmuch as it reacheth to life, is felony only in the gaoler; but the sheriff may be indicted, fined and imprisoned. 1 *Hale's Hist.* 597.

11. Where the sheriff levies money on a *fiery facias*, the plaintiff may have an action of debt against him for the money, because it was received by him to the plaintiff's use, and the defendant is discharged of it: and it lies against his executors if he die. 3 *Salk.* 323.

12. In causes where the king is party, and in causes criminal, the sheriff or his officer may break open a door to execute process, after demand and refusal to open, and signifying the cause of his coming; but not in a civil cause at the suit of a subject, unless where the execution is once lawfully begun; as where the out-doors are open, the sheriff entering may proceed and break open inner doors. *Foss.* 319.

13. By the 13 & 14 C. c. 21. no sheriff (except of *London, Middlesex, Westmorland*, and towns which are counties of themselves) shall keep any tables at the assizes, except for his own family or retinue, or give any present to the judges for their provision, or any gratuity to their officers or servants, nor shall have more than 40 men in livery, nor less than twenty in *England* and twelve in *Wales*.

14. By several old statutes, sheriffs are to continue in their office no longer than one year, except in *London, Middlesex*, and towns being counties of themselves, and where the office is a man's freehold or inheritance: yet it hath been said, that a sheriff may be appointed during the king's pleasure; and so is the form of the writ. And none that hath been sheriff, shall be so again within three years, if there be other sufficient. 1 *Ric.* 2. c. 11.

15. If the sheriff shall die before his office shall be expired, the under-sheriff shall execute the same in the deceased sheriff's name, till a new sheriff be sworn; and shall be answerable for the execution thereof as the deceased sheriff would have been. 3 *G.* c. 15.

SHIPS. Wilfully destroying a ship, with intent to prejudice the insurers; plundering a ship in distress; stealing goods of the value of 40s. from on shipboard; burning or destroying any of his majesty's shipping or stores; are, by a variety of statutes, made felony without benefit of clergy.

SHIREMAN, was anciently the governor of the shire; the *cars* having been so denominated from his presiding over, and having the custody of the shire committed to him.

SHOOTING at any person, in any dwelling-house or other place, though death doth not ensue, is felony without benefit of clergy, by the black act, 9 *G.* c. 22.

SHOP-BOOK, is not allowed of itself to be given in evidence for the owner: but a servant who made the entry may have recourse to it to refresh his memory; and if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence. But by the statute 7 *J.* c. 12. this species of evidence is confined to such transactions as have happened within one year before the action brought; unless between merchant and merchant in the usual intercourse of trade. 3 *Black.* 368.

SHOPLIFTERS, are those that steal goods privately out of
shops &

shops; which being of the value of 5*s.* though no person be in the shop, is felony without benefit of clergy.

SHORTLING and MORTLING, are words to distinguish *fells* of sheep; *shortling* being the fells after the fleeces are *shorn* or clipped off; and *mortling*, the fells flead off after they *die* or are killed.

SHROUD; stealing of it is felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral. But stealing the corpse itself, which has no owner, (though a matter of great indecency,) is not felony, unless some of the grave cloaths be stolen with it. 2 *Black.* 419. 4 *Black.* 236.

SHRUBS, destroying. By the 6 *G. c.* 36 & 48. and 13 *G. 3. c.* 33. wilfully to spoil or destroy any trees, roots, shrubs, or plants, is, for the two first offences, liable to pecuniary penalties; and for the third, the offender shall be guilty of felony, and transported for seven years. And if it is by night, the stealing of any of them to the value of 5*s.* is felony for the first offence.

SIDESMEN, or more properly *synodsmen*, are church officers, anciently appointed to assist the churchwardens in making presentments of ecclesiastical offences at the bishop's *synod* or visitation. By *Can.* 90. they are to be chosen yearly in *Easter* week, by the minister and parishioners, if they can agree; otherwise to be appointed by the ordinary of the diocese. But for the most part this whole office is now devolved upon the churchwardens.

SIGNIFICAVIT, is a writ issuing out of chancery, upon a certificate given by the ordinary of a person's standing excommunicate by the space of forty days, for the imprisoning him till he submit himself to the authority of the church. And it was so called, because *significavit* is an emphatical word in the writ. There are also some other writs in the register of the same denomination, setting forth that *signification* had been made to the court in certain particular cases: but this concerning excommunication is the writ that generally obtains the name of a *significavit*, and is the same with that which is otherwise termed an *excommunicato capiendo*.

SIGNING, of deeds, is not of very great antiquity in this kingdom, sealing alone having been held to be sufficient for that purpose; and so the common form of attesting deeds, "sealed and delivered," continues to this day, notwithstanding the statute of frauds and perjuries, 29 *C. 2. c.* 3. expressly directs *signing* in all grants of lands, and many other species of deeds; in which, therefore, signing seems to be now as necessary as sealing, though it hath been sometimes held that the one includes the other. 2 *Black.* 306.

SIMILITUDE of *hand-writing*. Though from the reversal of colonel *Sydney's* attainder by act of parliament in 1689, it may be collected, that the mere similitude of hand-writing in two papers shewn to a jury, without other concurrent testimony, is no evidence
that

that both were written by the same person ; yet, undoubtedly, the testimony of witnesses, well acquainted with the party's hand-writing, that they believe the paper in question to have been written by him, is evidence to be left to a jury. 4 *Black.* 358.

SIMONY, is a corrupt contract for a presentation to any benefice of the church, for money, gift, or reward. It is so called from the resemblance it is said to bear to the sin of *Simon Magus*, though the purchasing of holy orders seems to approach nearer to this offence. It was by the canon law a very grievous crime ; unto which, divers acts of parliament have added other restrictions.

By one of the canons of 1603, every person, before his admission to any ecclesiastical promotion, shall, before the ordinary, take an oath, that he hath made no simoniacal payment, contract, or promise, directly or indirectly, by himself or any other, for the obtaining of the said promotion; and that he will not afterwards perform or satisfy any such kind of payment, contract, or promise, made by any other without his knowledge or consent.

By the statute 31 *El. c.* 6. if any person shall, for any reward or promise thereof, directly or indirectly give or bestow any benefice with cure of souls, dignity, prebend, or living ecclesiastical, the same shall be void, and the king shall present for that turn : and every person giving or taking such reward, shall forfeit double the value of one year's profit of the benefice: and every person accepting such benefice simoniacally, shall be disabled to have or enjoy the same.

And by the 12 *An. st.* 2. *c.* 12. if any person, for money or profit, shall procure in his own name, or in the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract.

General bonds of resignation upon notice, have been held not to be within these statutes; because there doth not appear a corrupt or simoniacal contract in the condition; and because a man may bind himself to resign upon good and valuable reasons; as in case of plurality, or non-residence, or when the patron's son is of age, and qualified to take the benefice: but if it had been for a lease of the glebe, or tithes, or a sum of money, that had been within the statutes. 2 *Black.* 680.

SIMPLE CONTRACT:

DEBTS by *simple contract*, (in opposition to debts by speciality, or *special contract*,) are such where the contract upon which the obligation arises, is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, or by notes unsealed, which are only better than a verbal promise, by being more capable of proof: whereas debts by speciality are such whereby the contract is ascertained by deed or instrument under seal. 2 *Black.* 462.

SINE-CURE, is where there is both rector and vicar in the same

same church; in which case, the duty commonly rests in the vicar, and the rectory is what is called a *fine-cure*. But no church where there is but one incumbent is properly a *fine-cure*. A church may be down, or the parish become destitute of parishioners, but still this is not a *fine-cure*, for the incumbent is under an obligation of performing divine service, if the church shall be rebuilt, or the parish become inhabited.

SINKING FUND, is so denominated from its having been originally destined to *sink* and lower the national debt. It is a provision made by parliament, consisting of surpluses of other funds, appropriated for payment of the public debts of the nation. Many acts of parliament have been made for applying the growing produce thereof; and money is often borrowed thereupon, towards raising the present supplies for the current service.

SLANDER, is the defaming of a man in his reputation, profession, or livelihood: as if a man, maliciously and falsely, utter any slander or false tale of another, which may either endanger him in law, by impeaching him of some heinous crime, as to say that a man hath poisoned another, or is perjured; or which may exclude him from society, as to charge him with having an infectious disease; or which may impair or hurt his trade or livelihood, as to call a tradesman a bankrupt. Words spoken in derogation of a peer, a judge, or other great officer of the realm, which are called *scandalum magnatum*, are held to be still more heinous; and though they be such as would not be actionable in the case of a common person, yet, when spoken in disgrace of the great men of the realm, they amount to an atrocious injury, which is redressed by action on the case, founded on many ancient statutes, as well on behalf of the crown to inflict the punishment of imprisonment on the slanderer, as on behalf of the party to recover damages for the injury sustained. Words also tending to scandalize a magistrate or person in a public trust, are reputed more highly injurious than when spoken of a private man. 3 *Black.* 124.

For scandalous words of any of the kinds above-mentioned, an action on the case may be had, without proving any particular damage; but with regard to words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened; which is called laying his action with a *per quod*; as if I say, that such a clergyman is a bastard, he cannot for this bring an action against me, unless he can shew some special loss by it; in which case, he may bring his action against me for saying he was a bastard, *per quod* he lost the presentation to such a living. In like manner, to slander another man's title, by spreading such injurious reports, as, if true, would deprive him of his estate, (as to call the issue in tail, or one who hath land by

by descent, a bastard,) is actionable, provided any special damage accrues to the proprietor thereby; as if he loses an opportunity of selling the land. *Id.*

But mere scurrility, or opprobrious words, which neither in themselves import, nor are in fact attended with any injurious effects, will not support an action. So scandals, which concern matters merely spiritual, as to call a man heretic or adulterer, are cognizable only in the ecclesiastical court, unless any temporal damage ensues, which may be a foundation for a *per quod*. So words of heat and passion, as to call a man rogue and rascal, if productive of no ill consequence, and not of any of the dangerous species before mentioned, are not actionable; neither are any reflecting words made use of in legal proceedings, and pertinent to the cause in hand, a sufficient cause of action for slander. Also if the defendant be able to justify, and prove the words to be true, no action will lie, even though special damage hath ensued; as if I can prove the tradesman a bankrupt, this will destroy his action; for though there may be damage sufficient accruing from it, yet, if the fact be true, it is damage without an injury; and where there is no injury, the law gives no remedy. *Id.*

Finally, by the 21 *Ja. c. 16.* actions upon the case for slander, shall be brought within two years after the words spoken, and not after: and if the jury find the damages under 40s., the plaintiff shall have no more costs than damages.

SLAVERY. A *slave*, or a negro, the moment he lands in *England*, falls under the protection of the laws, and so far becomes a freeman. Yet with regard to any right which the master may have lawfully acquired to his perpetual service, that will remain exactly in the same state as before: for this is no more than the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term. 1 *Black. 127. 424.*

Hence it follows, that the infamous and unchristian practice of withholding baptism from negro servants, lest they should thereby gain their liberty, is totally without foundation, as well as without excuse. The law of *England* acts upon general and extensive principles: it gives liberty, rightly understood, that is, protection, to a Jew, a Turk, or a Heathen, as well as to Christians; and it will not dissolve a civil obligation between master and servant, on account of the alteration of faith in either of the parties: but the slave is intitled to the same protection in *England* before as after baptism; and whatever service the heathen negro owed of right to his *American* master, by general, not by local law, the same (whatever it be) is he bound to render when brought to *England*, and made a Christian. *Id. 425.*

SLUICE, is a frame to keep or let out water. By 1 *G. 2. c.*

19. to

19. to destroy any lock or sluice on any navigable river is made felony, and the offender may be transported for seven years.

SMUGGLERS, are those persons that conceal prohibited goods, and defraud the king of his customs on the sea coast, by running of goods and merchandize.

If any goods be shipped or landed without warrant and presence of an officer, the vessel shall be forfeited, and the wharfinger shall forfeit 100*l.*, and the master or mariner of any ship inward bound, shall forfeit the value of the goods : and any carman, porter, or other assisting, shall be committed to gaol, till he find surety of the good behaviour, or until he shall be discharged by the court of exchequer. 13 & 14 C. 2. c. 11.

If goods be relanded after drawback, the vessel and goods shall be forfeited ; and every person concerned therein shall forfeit double value of the drawbacks. 8 An. c. 13.

Goods taken in at sea shall be forfeited, and also the vessel into which they are taken ; and every person concerned therein shall forfeit treble value. 9 G. 2. c. 35.

Vessel hovering near the coast shall be forfeited, if under fifty tons burthen ; and the goods shall also be forfeited, or the value thereof. 5 G. 3. c. 43.

Persons receiving or buying run goods shall forfeit 20*l.* 8 G. c. 18.

Concealer of run goods shall forfeit treble value. 8 G. c. 18.

Offering run goods to sale, the same shall be forfeited, and the person to whom they are offered may seize them ; and the person offering them to sale shall forfeit treble value. 11 G. c. 30.

Porter or other carrying run goods shall forfeit treble value. 9 G. 2. c. 35.

Persons armed or disguised carrying run goods, shall be guilty of felony, and transported for seven years. 8 G. c. 18. 9 G. 2. c. 35. And if they be three or more in company, they shall be guilty of felony without benefit of clergy. 19 G. 2. c. 34.

An officer of the customs is liable to an action for a wrong seizure, notwithstanding that there may be a probable cause. *Sir.* 820.

SNUFF. See **TOBACCO.**

SOAP. By the 27 G. 3. c. 13. certain duties are imposed on all soap made in *Great Britain*, and also on all soap imported, and drawbacks allowed on the exportation thereof ; as set forth in schedules annexed to the said act : which duties, on home made soap, are to be under the management of officers appointed by the commissioners of the treasury.

And by the 24 G. 3. c. 41. every soap-maker shall take out a licence annually from the officers of excise.

SOC,

SOC, *sok*, Sax. power or liberty to minister justice, and execute laws; also a circuit or territory wherein such power is exercised. Whence the word *soca* is used for feignory or lordship infranchised by the king, with the liberty of holding a court of sokmen.

SOCAGE:

TENURE in *socage*, according to *Littleton*, is where the tenant holds his tenement of the lord by any certain service, in lieu of all other services, so that the service be not knight's service. *Litt. test.* 17.

The service therefore must be certain, in order to denominate it *socage*; as to hold by fealty and certain rent; or by homage, fealty, and certain rent; or by homage and fealty without rent; or by fealty and certain corporal service; as ploughing the lord's land for a determinate number of days; or by fealty only, without any other service. 2 *Black.* 79.

Services originally were of various kinds; as by payment of a rose, a pair of gilt spurs, a certain number of capons or hens, or certain bushels of corn: and of some tenements, the service was to be hangman, or executioner of persons condemned in the lord's court: for in ancient time, such officers were not volunteers, nor for lucre to be hired, unless they were bound thereto by tenure. 1 *Inst.* 86. And from hence, perhaps the denomination of the *common* hangman; being an officer known and distinguished by the nature of his tenure.

The common lawyers generally derive this word from *soca*, which they say is an old Latin word denoting a plough; but as service of the plough was only one amongst several other species of *socage*, Mr. *Sommer's* etymology seems more apposite, who derives it from the *Saxon* appellation *soc*, which signifies liberty or privilege, denoting thereby a free or privileged tenure. 2 *Black.* 80.

By the statute of 12 C. 2. c. 24. all the ancient tenures by knight's service are turned into free and common *socage*.

SOLDIERS:

1. THE regulations concerning the soldiery (exclusive of the militia) depend chiefly on the annual acts against mutiny and desertion. In the case of *inlissing*, when any man shall be inlisted, he shall in four days time, but not sooner than twenty-four hours, be carried before the next justice of the peace, and before him shall be at liberty to declare his dissent to such inlissing; and in such case, on returning the inlissing money, and 20s. for the charges expended on him, he shall in presence of such justice be discharged; otherwise, he shall take the oath of inlissing before such justice, and by him be certified to be duly inlisted: but if, after having received the inlissing money, he shall abscond, or refuse to go before

fore such justice, he shall be deemed to be intitled, and may be proceeded against as if he had taken the said oath.

2. No soldier shall be *arrested* and taken out of the service for any debt less than 10*l.*

3. Soldiers shall not be billeted except only in public houses, and not in the house of any private person without his consent.

4. During the time of *election* of members of parliament, they shall, by order of the secretary at war, be removed from the place of election.

5. If any officer or soldier shall kill *game*, without leave of the lord of the manor, such officer shall forfeit 5*l.*, and for every such soldier killing game, the commanding officer shall forfeit 20*s.*: and such officer, not paying, shall forfeit his commission.

6. Every officer or soldier who shall excite or join in any *mutiny* or sedition, or shall not use his utmost endeavours to suppress the same, or shall not give immediate notice thereof to his commanding officer, or shall desert, or lift in any other regiment, or be found sleeping on his post, or leave it before relieved, or shall hold correspondence with the enemy, or strike, or use any violence against his superior officer, or disobey his lawful commands, shall suffer death, or such other punishment as a court martial shall inflict.

7. The constable may take up any person reasonably suspected to be a *deserter*, and carry him before a justice; and if it shall appear that he is a deserter, the constable shall have a reward of 20*s.* to be paid to him by the collector of the land tax of that parish or township.

8. After their discharge, soldiers may set up and use any *trade* in any place, (except the two universities,) notwithstanding any by-law of such place, and notwithstanding their not having served a regular apprenticeship to such trade: and neither they, nor their wives or children, during the times they should exercise such trades, shall be removeable to their place of settlement, until they shall become actually chargeable.

SOLICITOR, is a person employed to follow and take care of suits depending in the courts of equity. But by statute 23 G. 2. c. 26. a solicitor may be sworn and admitted an attorney in the court of king's bench or common pleas; as by 2 G. 2. c. 23. an attorney may be sworn and admitted a solicitor in any of the courts of equity.

SON ASSAULT, is a justification in an action of assault and battery; because the plaintiff made the first assault, and what the defendant did, was in his own defence.

SORCERY, *fortilegium*, is witchcraft or divination by lots. By the 9 G. 2. c. 5. all prosecutions for sorcery, enchantment,

or

or conjuration, are abolished; and any person pretending to the same shall be imprisoned for a year, set on the pillory four times in that year, and further bound to the good behaviour as the court shall award.

SOULSCOT, *symbolum animæ*, in the laws of king *Canute*, is used for a mortuary; a payment originally voluntary given to the priest, supposed for the benefit of the soul of the deceased. 2 *Black.* 425.

SPECIAL JURY, was originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him. He is in such cases, upon motion in court, and a rule granted thereupon, to attend the prothonotary, or other proper officer, with the freeholder's book; and the officer is to take indifferently forty-eight of the principal freeholders in the presence of the attornies on both sides; who are each of them to strike out twelve, and the remaining twenty-four are returned upon the pannel. 3 *Black.* 357.

Either party is intitled upon motion to have a special jury struck as well at the assizes as at bar, he paying the extraordinary expence; unless the judge shall in open court certify upon the back of the record, that the cause was proper to be tried by a special jury. *Id.* 358.

A person serving on a special jury, shall not be allowed more than the sum which the judge shall think reasonable, not exceeding one guinea; except in causes wherein a view is directed. 24 *G. 2. c.* 18.

SPECIAL OCCUPANT. SEE PUR AUTER VIE.

SPECIAL PLEADING, is where the defendant doth not traverse or deny the whole declaration, (which is called the *general issue*;) but sets forth some special matter whereby to evade it. Special pleas, in bar of the plaintiff's demand, are various, according to the circumstances of the defendant's case; as in real actions, a general release or a fine, either of which may destroy and bar the plaintiff's title. Or in personal actions an accord, arbitration, condition performed, non-age of the defendant, or some other fact which precludes the plaintiff from his action. A justification is likewise a special plea in bar; as in actions of assault and battery, that the plaintiff struck first; in trespass, that the defendant did the thing complained of in right of some office which warranted him so to do; or in an action of slander, that the plaintiff is as bad as the defendant represented him. Formerly, the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him; but when he meant to excuse or palliate the charge, it was usual to set forth the particular facts in a special plea. But

the science of special pleading having been often perverted to the purposes of delay, the courts, in some instances, and the legislature in many more, have permitted the general issue to be pleaded, and the special matter to be given in evidence. 3 *Black.* 305.

SPECIALTY :

DEBTS by *specialty*, or *special contract*, are such whereby a sum of money becomes due by deed, or instrument under seal: whereas, on the contrary, debts by *simple contract* are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, or by notes unsealed, which are only better than a verbal promise, by being capable of a more easy proof. 2 *Black.* 465.

SPECIFIC LEGACY, is the bequest of a certain particular thing; as of a horse, or a piece of plate, or the like; which, in a case of a deficiency of assets, shall not abate as the other legacies, unless there shall not be sufficient without it. 2 *Black.* 512.

SPECIFIC RELIEF IN EQUITY, is where the courts of law cannot give a remedy in kind, but only a recompence in damages; in which case, a court of equity will compel the thing itself specifically to be performed: as in the case of executory agreements, a court of equity, instead of giving damages for their non-performance, will compel them to be carried into strict execution. 3 *Black.* 438.

SPIRITING away of men, women, or children, is a very heinous crime; and punishable by fine, imprisonment, and pillory. 4 *Black.* 219.

SPIRITUAL CORPORATIONS, are where the members thereof are intirely spiritual persons; as bishops, archdeacons, parsons, and vicars, which are *sole* corporations; so deans and chapters, as formerly abbot and convent, are bodies *aggregate*. 1 *Black.* 470.

SPIRITUAL COURT. See ECCLESIASTICAL COURT.

SPIRITUALTIES, guardian of, is the archbishop during the vacancy of a bishopric; and when the archbishopric is vacant, the dean and chapter of his diocese are guardians of the spiritualties, who exercise all ecclesiastical jurisdiction during the vacancy. *Ayliff's Parerg.* 125.

SPIRITUOUS LIQUORS. By the 27 G. 3. c. 13. a duty is imposed on all spirits made in *Great Britain*, and also on all spirits imported; and drawbacks are allowed on the exportation thereof, as set forth in schedules annexed to the act.

And by several statutes, regulations are made for the distilling and rectifying of spirits, which is to be under the management of the officers of excise.

And

And by the 24 G. 3. c. 41. every distiller and rectifier of spirits shall take out a licence annually, for which he shall pay according to the contents of his still, on the penalty of 30*l.*

And every dealer in spirits, not being a retailer, rectifier, or stiller, shall take out a licence annually, for which he shall pay 5*l.* on the penalty of 100*l.*

And by the 30 G. 3. c. 38. every retailer of spirits, shall take out a licence annually, for which he shall pay a sum in proportion as his house shall be rated, under the 19 G. 3. for imposing a duty on inhabited houses, on the penalty of 20*l.*

SPOLIATION, is a writ obtained by one of the parties in suit, suggesting that his adversary (*spoliavit*) had wasted the fruits and profits, or received the same, to the prejudice of him who sueth out the writ. It is brought in the spiritual court, by one incumbent against another, where they both claim by one patron, and the right of patronage doth not come in question; as if a parson be created a bishop, and hath a dispensation to hold his benefice, and afterwards the patron presents another incumbent, who is instituted and inducted, in this case the former may have a spoliation in the spiritual court against the latter, because they both claim by one patron, and the right of patronage doth not come in debate; and because the intruder came into possession of the benefice, by the course of the spiritual law; that is, by institution and induction: for otherwise, if he be not instituted and inducted, a spoliation lies not against him, but a writ of trespass, or an affize of *novel disseisin*. *F. N. B.*

SQUIBS. See FIREWORKS.

STABBING, is a species of manlaughter, which is punished as murder, the benefit of clergy being taken away from it by statute 1 Ja. c. 8. which enacts, that where one thrusts or stabs another, not then having a weapon drawn, or who hath not then first stricken the party stabbing, so that he dies thereof within six months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought.

STABLE STAND, *stabilis statio*, is where a man is found at his *standing* in the forest, with a cross or long bow bent, ready to shoot at any deer; or standing close by a tree, with greyhounds in a leash, ready to slip. It was an evidence or presumption of a man's intending to steal the king's deer in the forest.

STAFF-HERDING, is a right to drive cattle on a common, gently, without hounding or other violence.

STALLAGE, *stallagium*, (from the Saxon *stal*, *stabulum*, *statio*,) is a payment for the liberty of setting up a stall in a fair or market.

Of common right, every man hath liberty of coming into any public market or fair, to buy and sell, without paying any toll,

unless it be due by custom or prescription ; but if he requires any particular easement or convenience, as a stall in the market or fair, he must agree with the owner of the soil, if there be no particular sum fixed by the custom for stallage ; if there is a fixed sum, he must pay the same accordingly. 1 *Wilson*, 114.

STANNERIES, (from *stannum*, tin,) are the mines and works in *Devonshire* and *Cornwall*, where tin metal is got and purified. The privileges of the tanners are confirmed by a charter 33 *Ed. 1.* and expounded by a private statute 50 *Ed. 3.* and further by a public act 16 *C. 1. c. 15.* by which all labourers in and about the stanneries shall have the privilege of the stannary court while they work there, and may not be impleaded in any other court, for any cause arising within the stannaries ; except for pleas of land, life, or member. Their courts are holden before the lord warden, or his substitutes, and no writ of error lies from thence to any court at *Westminster*. But an appeal lies from the steward of the court to the under-warden, from him to the lord warden, thence to the privy council of the prince of *Wales*, as duke of *Cornwall*, and from thence to the king. 3 *Black.* 80.

STAR, (*starrum*,) said to be from an Hebrew word *shetar*, a deed or contract, which were anciently called *stars*, and writ for the most part in Hebrew alone, or in Hebrew and Latin underneath it. And some are of opinion, that the court called the *star-chamber* had its name from thence ; because in that place, the said stars or contracts were anciently kept. 4 *Black.* 266.

STAR, or *bent*, planted on the sea coasts in the north-west parts of *England*, being of great use to preserve the sand from being blown away, and cast upon the adjacent lands ; a penalty of 20s. is inflicted on any person pulling up or destroying the same, by the statute 15 *G. 2. c. 33.*

STARCH. By the 24 *G. 3. c. 41.* every starch-maker shall take out a licence annually, from the officers of excise.

And by several statutes, regulations are made for the making of starch, and duties are imposed thereon, which are also to be under the management of the officers of excise.

STAR CHAMBER, *camera stellata*, is said to have been so called from the roof of the chamber where the court was holden having been anciently garnished with gilded stars. It was a court of very ancient original, but new modelled afterwards by divers statutes. It consisted of several of the lords spiritual and temporal, being privy counsellors, together with two judges of the courts of common law, without the intervention of any jury. Their legal jurisdiction extended over riots, perjury, misbehaviour of public officers, and other notorious misdemeanors. But afterwards, they stretched their power beyond the utmost bounds of legality, vindicating all the incroachments of the crown, in granting monopolies, in issuing proclamations which should have the

the force of laws, in punishing small offences, or no offences at all, but of their own creating, by exorbitant fines, imprisonment, and corporal severities; until at last this court became so odious, that it was finally abolished by the statute 16 C. c. 10.

4 *Black.* 264.

STATUTE has divers significations. First, it signifies an act of parliament made by the king, lords, and commons in parliament. Secondly, it is a short writing called a statute merchant, or statute staple, which are in the nature of bonds, and are called *statutes*, as being made according to the form provided in certain statutes or acts of parliament.

STATUTE MERCHANT, is a bond, or obligation of record, acknowledged before sufficient persons for that purpose appointed, sealed with the seal of the debtor and of the king; on condition, that if the obligor pay not the debt at the day, execution may be awarded upon his body, lands, and goods; and that the obligee may hold the lands to him, his heirs and assigns, till the debt is satisfied and paid. And during the time of being in possession of the lands, the obligee hath an estate by *statute merchant*, or is *tenant by statute merchant*; the bond or recognizance being so called, because it is entered into pursuant to the *statute* 13 *Ed.* 1. *de mercatoribus*.

Statutes merchant were contrived for the security of merchants only, to provide a speedy remedy to recover their debts; but afterwards they were used by others, and became one of the common assurances of the kingdom. But now statutes merchant are mostly out of use. *Wood.* b. 2. c. 3.

STATUTE STAPLE. *Staple* signifies a mart or market, and is that market town where the merchants are commanded to bring their goods. And a *statute staple* is a bond of record, acknowledged before the mayor of the staple or town, in the presence of one or more constables of the same staple; by virtue of which statute staple, the creditor may forthwith have execution of the body, lands, and goods of the debtor, on non-payment. And then he hath an estate in the lands of *statute staple*, or is *tenant in statute staple*, till the debt is paid. It is denominated a *statute*, because it is founded on the statute 27 *Ed.* 3. c. 9. which sets forth the manner of entering into it, and of its execution. *Wood.* b. 2. c. 1.

There is also a *statute staple*, improperly so called, being a *recognizance in the nature of a statute staple*, which extends the benefit of this mercantile transaction to all the king's subjects in general, by virtue of the statute 23 *H.* 8. c. 6.

But now *statute staple*, as well as *statute merchant*, are in a great measure become obsolete.

STERLING, was the epithet for silver money current within this kingdom, and took name from this; that there was a pure coin

coin stamped first in *England*, by the *Easterlings*, or merchants of *East Germany*, by the command of king *John*; and *Hoveders* writes it *esterling*. Instead of the pound sterling, we now say, so many pounds of lawful *Englisb* money; but the word is not wholly disused, for though we ordinarily say lawful money of *England*, yet in the mint they call it sterling money. And when it was found convenient in the fabrication of money to have a certain quantity of baser metal to be mixed with the pure gold and silver, the word *sterling* was then introduced; and it has ever since been used to denote the certain proportion or degree of fineness, which ought to be retained in the respective coins. *Lewnd's Essay on Coins*, 14.

STEWES, (from the French *estuves*, a *stove*, or bath,) are those places which were permitted in *England* to women of professed lewdness, and who for hire would prostitute their bodies to all comers; so called, because dissolute persons are wont to prepare themselves for acts of incontinence by bathing. These had long continued on the bank side in *Southwark*, but were finally suppressed by king *Henry* the eighth, by proclamation, in the 37th of his reign. 3 *Inst.* 205.

STINT, is the proportionable part of a man's cattle, which he may keep upon the common. The general rule is, that the commoner shall not turn more cattle upon the common, than are sufficient to manure and stock the land, to which his right of common is annexed. There may be such a thing as common without stint or number; but this hath been very seldom granted; and the grantee, at this day, cannot grant it over. 3 *Black.* 239. *L. Raym.* 407.

STIRPES, a stock, is chiefly used in estimating the different interests of the several kindred, in the distribution of an intestate's effects; of which kindred, some take *per capita*, by the heads, and some *per stirpes*, by the stocks, from which they have respectively descended: as if the next of kin to the intestate be his three brothers, *A.*, *B.* and *C.*: here his estate is divided into three equal portions, and distributed *per capita*, to every one an equal share; but if one of these brothers, *A.* had been dead, leaving three children, and another, *B.* leaving two, then the distribution must have been *per stirpes*; to wit, one third to *A.*'s three children, another third to *B.*'s two children, and the remaining third to *C.* the surviving brother: yet if *C.* had also been dead without issue, then *A.*'s and *B.*'s five children, being all in equal degree to the intestate, would take in their own rights *per capita*; to wit, each of them one fifth part. 2 *Black.* 517.

But in case of real estates, they do not descend *per capita*, but shall go to the lineal descendants *in infinitum*. As in the case of the three brothers abovementioned, the estate shall descend to the eldest

eldest singly, and his heirs, in exclusion of the other two brothers and their descendants. 2 *Black.* 216.

STOC and *stovel*, a forfeiture where one is taken carrying *sticks* and *pabulum* out of the woods; *stoc* signifying *stick*, and *stovel*, *pabulum*, (fodder for cattle.)

STOC, a stump of a tree; hence *stoke*, a woody ground: which is often added to the name of a place, as *Greystock*, *Basingstoke*, *Woodstock*. Hence also a *pair of stocks*; an engine made of two pieces of timber, for putting the legs of offenders in, for the securing of disorderly persons, and by way of punishment of divers offenders by several acts of parliament. Every vill is, by the common law, bound to provide a pair of stocks. 2 *Harw.* 73.

STOCK JOBBING. By the 7 *G.* 2. *c.* 8. all contracts upon which any premium shall be given for liberty to put upon, or to deliver, accept, or refuse any public stock or security, or any share or interest therein, and all wagers, and contracts in the nature of wagers, relating to the price of stock, shall be void, and the money paid thereon shall be restored, or may be recovered by action with double costs; and persons making such contracts shall forfeit 50*l.*

And no money shall be given or received for compounding differences relating to stock not actually delivered, on pain of 100*l.*

Stock sold, and not paid for at the time agreed on, may be sold again, and the first buyer shall make good the damage.

And if stock be bought and not transferred, the buyer may purchase other stock, and recover like damage.

And all contracts for stock, whereof the seller is not in actual possession at the time, shall be void; and every of the parties shall forfeit 50*l.* and the broker 100*l.*

STOLEN GOODS. By 3 *W. c.* 9. if any person shall buy or receive any stolen goods, knowing them to be stolen, he shall be deemed an accessory after the fact, and suffer accordingly.

By 4 *G. c.* 11 if any person shall take money or other reward, under pretence of helping any person to stolen goods, he shall, unless he prosecutes the felon, be guilty of felony, in the same manner as if he had stolen the said goods.

And by the same statute, advertising a reward for the return of things stolen, with no questions asked or words to the like purport, subjects both the advertiser and printer to a forfeiture of 50*l.*

By the 30 *G.* 2. *c.* 24. if any person who shall offer any goods by way of pawn, exchange, or sale, shall not give a satisfactory account how he came by the same, or if there be any other reason to suspect them to be stolen, the person to whom they are offered may detain him, and deliver him to a constable, who shall carry him before a justice; and if the justice shall find cause to suspect that the goods were stolen, he may commit him for six days for further examination; and if it shall appear to the satisfaction

faction of such justice, that the said goods were stolen, he shall commit the offender to be dealt with according to law.

STORES :

1. If any person having charge of the king's armour, ordnance, ammunition, shot, powder, or habiliments of war, or of any victuals provided for victualling the army, shall *imbezzle* the same, to the value of 20*s.*; or shall steal or imbezzle any of his majesty's sails, cordage, or other naval stores, to the like value of 20*s.*; he shall be guilty of felony without benefit of clergy: if under that value, he may be punished by fine, imprisonment, or process out of the exchequer. 31 *El. c. 4.* 22 *C. 2. c. 5.* 9 *G. 3. c. 30.*

2. No person shall *mark* any stores of war, or naval stores, with the king's mark; that is, cordage of three inches and upwards with a white thread laid the contrary way, or any smaller cordage with twine in lieu of white thread laid the contrary way, or any canvas with a blue streak in the middle, or any other stores with the broad arrow, on pain of forfeiting not exceeding 200*l.* 17 *G. 2. c. 40.*

And the person in whose custody such goods or stores so marked, or any timber, thick stuff, or plank, marked with the broad arrow, shall be found, shall incur the like forfeiture. 9 & 10 *W. c. 41.* 9 *G. c. 8.*

3. If any person shall either in this realm, or in any place thereto belonging, *set on fire*, burn, or destroy, any of his majesty's military, naval, or victualling stores, or other ammunition of war, or any place where the same shall be kept, he shall be guilty of felony without benefit of clergy. 12 *G. 3. c. 24.*

4. The king shall have power by proclamation, to prohibit the *exportation* of gunpowder and salt-petre, or any sort of arms or ammunition; and if any such shall be shipped after such proclamation, the same shall be forfeited; and the owner shall forfeit 100*l.* for every hundred weight of salt-petre and gunpowder; 100*l.* for every twenty-five arms; and 100*l.* for every two hundred weight of other ammunition; and every person assisting in shipping the same, shall forfeit 100*l.* and treble value, and the master also shall forfeit 100*l.* 12 *C. 2. c. 4.* 29 *G. 2. c. 16.*

SUBINFEUDATION, was where the inferior lords, in imitation of their superiors, began to carve out and grant to others minuter estates than their own, to be held of themselves, and were so proceeding downwards *in infinitum*, till the superior lords observed, that by this method of subinfeudation they lost all their feudal profits of worships, marriages, and escheats, which fell into the hands of those mesnie or middle lords, who were the immediate superiors of the terretenant, or him who occupied the land. This occasioned the statute of *quia emptores terrarum*, 18 *Ed. 1.* to be made, which directs, that upon all sales or feoff-

ments

ments of lands, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it. And from hence it is holden, that all manors existing at this day, must have existed by immemorial prescription, or at least ever since the statute of *quia emptores* was made. 2 *Black.* 91.

SUBORNATION of perjury. See **PERJURY**.

SUBPOENA, *ad testificandum*, is a process to cause witnesses to appear and give testimony, commanding them, laying aside all pretences and excuses, to appear, under the penalty (*sub pœna*) of 100*l.*, to be forfeited to the king; to which the statute 5 *El. c. 9.* hath added a penalty of 10*l.* to the party grieved, and damages equivalent to the loss sustained for want of his evidence. A subpoena *duces tecum*, is to compel the witness to bring with him some writing or other evidence necessary to be produced in the cause. A subpoena in *chancery*, is a writ commanding the defendant to appear and answer the plaintiff's bill; so there is a subpoena to make *better answer*, subpoena to *reply*, subpoena to *rejoin*, subpoena to *hear judgment*, subpoena for *costs*, and divers others.

SUBSIDY. Anciently the necessities of government were supplied by *fifteenths* and *subsidies*. A *fifteenth*, was a grant by the commons of the fifteenth part of all their moveable goods, for personal estate was very inconsiderable in those days, an intire fifteenth throughout the kingdom being only about 29,000*l.*; and therefore unto this was superadded the *subsidy*, which was an aid to be levied of every subject of his lands or goods, after the rate of 4*s.* in the pound for lands, and 2*s. 8d.* for goods. This subsidy was estimated at a medium at about 70,000*l.*, whilst a subsidy of the clergy (including the monasteries) was about 20,000*l.* But this way of taxation by fifteenths and subsidies being attended with many inconveniences, they were succeeded by the modern land tax.

SUCCESSOR. A sole corporation regularly cannot take in succession goods and chattels, either in action, as bonds and recognizances; or in possession, as leases for years; for the executors or administrators shall have them. And although a lease be made to a man and his heirs, yet it shall not go to his heirs, but to his executors. 1 *Inst.* 46.

SUFFERANCE, (estate at,) is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all; as if a man takes a lease for a year, and after the year is expired, continues to hold the premises without any fresh leave from the owner of the estate. Or if a man grants a lease at will, and dies, the estate at will is thereby determined; but if the tenant continue in possession, he is tenant at sufferance: and in this case, having come in by lawful title, the landlord cannot

not recover possession, but by actual entry and legal process of ejection. But by the 4 G. 2. c. 28. tenants holding over, after determination of their term, and after demand made in writing, to deliver possession, are rendered liable to pay double the yearly *value*. And by the 11 G. 2. c. 19. tenants giving notice of their intention to quit, and not accordingly delivering up the possession at the time in such notice contained, are rendered liable to pay double the *rent* they should otherwise have paid. And it hath been held, that under this act, the notice need not be in writing, and that the landlord may levy this double *rent* by *distress*. *Burr. Mansfield*, 1603.

SUGGESTION, is a surmise of a thing; and by *magna carta*, no person shall be put to his law, on the suggestion of another, but by lawful witnesses. 9 H. 3. c. 28.

Suggestions are grounds to move for prohibitions to suits in the spiritual courts where they meddle with matters out of their jurisdiction. Though matters of record ought not to be stayed on the bare suggestion of the party, there ought to be an affidavit made of the matter suggested, to induce the court to grant a rule for staying the proceedings. 2 Lill. Abr. 536.

In which case, the party aggrieved in the court below applies to the superior court, setting forth in a suggestion upon record, the nature and cause of the complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom; upon which, if the matter alleged appear to the court to be sufficient, the writ of prohibition immediately issues; but if the point be doubtful, the court will not determine upon that motion, but will require the party to declare in prohibition; that is, to prosecute an action: and if upon argument, the court shall be of opinion that the suggestion is sufficient, they will thereupon grant the prohibition. 3 Black. 113.

SUICIDE. See FELO DE SE.

SUIT, *secta*, (*a sequendo*,) anciently signified the witnesses or followers of the plaintiff; and to this day, the concluding words of the declaration are, "and thereupon he bringeth *suit*." For in former times, the law would not put the defendant to the trouble of answering the charge, till the plaintiff had made out at least a probable case. But the actually producing the *suit*, *secta*, or followers, is now antiquated; though the form thereof still continues. 3 Black. 295.

SUMAGE, toll for carriage on horseback.

SUMMARY proceedings, are such as are directed by particular acts of parliament, for the conviction of offenders, and the inflicting of certain penalties created by those acts. In which there is no intervention of a jury, but the party accused is acquitted, or condemned, by the suffrage of such person only as the statute hath appointed for his judge. Of this kind are most
of

of the proceedings before justices of the peace, intended for the ease of the subject, by doing him speedy justice, and not harassing the freeholders with frequent and troublesome attendance to try every minute offence; but hereby, withal, the subject is deprived of the benefit of that famous clause in the great charter, that a man shall be tried by his equals. 4 *Black.* 280.

SUMMONS, is a notice given upon all writs in real actions; and also upon personal writs for injuries not being against the peace, for the defendant to appear in court at the return of the original writ; and this notice is given to the defendant by two of the sheriff's officers called *summoners*, either in person, or left at his house or land; in like manner as in the civil law, the first process is by personal citation. This warning on the land, is given in real actions, by erecting a white stick or wand on the defendant's grounds; and by the statute of 31 *El. c. 3.* it must also be proclaimed on some *Sunday* before the door of the parish church. 3 *Black.* 279.

Also in summary convictions before justices of the peace, it is necessary that the party accused be summoned before he be condemned. 4 *Black.* 279.

But the want of a summons in such case may be supplied, if the party appears and answers to the charge against him. *Bur. Munsf.* 1786.

SUNDAY. See **LORD'S DAY.**

SUPERSEDEAS, is a writ that lies in a great many cases, and signifies in general, a command to stay proceedings at law, on good cause shewn, which ought otherwise to proceed. *F. N. B.*

When a certiorari is delivered, it is a supersedeas to inferior courts below; and being allowed, all their proceedings afterwards are erroneous.

If a sheriff holds plea of 40s. debt in his county court, the defendant may sue for a supersedeas that he do not proceed; or after judgment, he may have a supersedeas directed to the sheriff, requiring him not to award execution upon such judgment.

SUPPLETORY OATH, in ecclesiastical proceedings, is an oath given by the judge to the plaintiff or defendant, upon half proof already made: this being joined to the half proof, *supplies* and gives sufficient power to the judge to condemn or absolve. This oath is discretionary in the judge, and is only used where there is but what the civilians esteem a *semiplena probatio*; for if there be full proof, it is never required; and if the evidence doth not amount to a half proof, it is never granted, because this oath is not evidence strictly speaking, but only confirmation of evidence; and if that evidence doth not amount to a half proof, a confirmation of it by the party's own oath will not alter the case. *Strange*, 80.

SUP.

SUPPLICAVIT, is a writ issuing out of the king's bench or chancery, for taking surety of the peace, and is commonly issued to the justices of the peace, when they are averse from acting in the affair in their judicial capacity; and the justice who takes the recognizance, must make a return to the writ, under his hand and seal, specifying his compliance. But this writ is seldom used; for when application is made to the superior courts, they usually take the recognizance there. And indeed a peer or peers cannot be bound in any other place than the court of king's bench or chancery. 4 *Black.* 253.

SUPPOSITIOUS BIRTH. See **VENTRE INSPICIENDO.**

SUPREMACY. The papal incroachments upon the king's sovereignty in this realm having anciently obtained great strength and long continuance, it at length became necessary to assert and vindicate the king's supreme authority, by several acts of parliament; declaring, that the supremacy of the crown of *England* in matters ecclesiastical is a most indubitable right of the crown; that this kingdom is an absolute empire and monarchy, consisting of one head which is the king, and of a body consisting of several members, which the law divides into two parts, the clergy and laity, both of them next and immediately under God, subject and obedient to the head. And finally, it hath been thought proper to substitute by authority of parliament a recognition by oath of the king's supremacy, specifying that no foreign prince, prelate, state, or potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm. 1 *Black.* 368.

SURCHARGE, an overcharge; as where a man puts more cattle upon the common than he hath a right to do, he is said to surcharge the common. In which case, he that surcharges doth an injury to the rest of the owners, by depriving them of their respective portions, or at least contracting them into a smaller compass. The usual remedies for surcharging are either by distraining so many of the beasts as are above the number allowed, or else by an action of trespass; both which may be had by the lord; or by a special action on the case for damages; in which any commoner may be plaintiff. 3 *Black.* 237.

SURETY, is the bail or pledge for any person, that he shall do or perform such a thing; as surety for the *peace* is the acknowledging a recognizance or bond to the king, taken by a competent judge of record, for keeping the king's peace. And this surety of the peace, every justice of the peace may take and command by a twofold authority: first, as a minister, commanded thereto by an higher authority: as when a writ of *supplicavit*, directed out of the chancery or king's bench, is delivered to him: secondly, as a judge, and by virtue of his office derived from the commission of the peace. *Dalt. c.* 116.

SUR-

SURREBUTTER, is the replication or answer of the plaintiff to the defendant's *rebutter*.

SURREJOINER, is the plaintiff's answer to the defendant's *rejoinder*. First, the plaintiff *declares* his cause of action; to this the defendant puts in his *plea*, unto which the plaintiff may offer a *replication*, then the defendant brings his *rejoinder*, unto which the plaintiff replies by a *surrejoinder*; and sometimes the cause goes on to a *rebutter* and *surrebutter*.

SURRENDER, is properly a yielding up of an estate for life or years, to him that hath an immediate estate in reversion or remainder; wherein the estate for life or years may merge or drown, by mutual agreement between them. 1 *Inst.* 337.

There is also a surrender of customary estates holden by copy of court roll; in which case the word *surrender* is so necessary, that it cannot be supplied by any other word of conveyance. These surrenders are of several sorts, according to the several customs of manors. In some manors, where a copyholder surrenders his tenement, he holds a little rod in his hand, which he delivers to the steward or bailiff, according to the custom of the manor, to deliver it over to the party to whose use the surrender was made, in the name of seisin, and from thence they are called tenants by the *virge*. In some manors, instead of a wand, a straw is used, and in other manors a glove; and always the custom of the place is to be observed. *Coke's Copyb.* 103, 4.

SURVIVORSHIP, is where two persons or more are seised of a joint estate of inheritance, for their own lives, or for the life of another person, or are jointly possessed of any chattel interest; in which case the intire tenancy, upon the decease of any of them, remains to the survivors, and at length to the last survivor. And the same law is as to things personal. They cannot indeed be vested in coparcenary, because they do not descend from the ancestor to the heir, which is necessary to constitute coparceners. But if a horse, or other personal chattel, be given to two or more, they are jointenants thereof; and unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements. But for the encouragement of husbandry and trade, it is held, that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall be considered as common, and not as joint property; and there shall be no such survivorship therein. 2 *Black.* 183. 399.

SUSPENSION, is an ecclesiastical censure, and is of two sorts; one relating solely to the clergy, the other extending also to the laity. That which relates solely to the clergy, is suspension from office and benefice jointly, or from office or benefice singly, and may be called a temporary gradation, or deprivation,

or

or both. The other sort of suspension which extends also to the laity, is suspension *ab ingressu ecclesie*, or from the hearing of divine service, and receiving the holy sacrament; which may therefore be called a temporary excommunication. *Gibf.* 1047.

SUS' PER COLL'. When a criminal is attainted upon his trial, it is usual for the judge to sign the calendar or list of the prisoner's names, with their separate judgments, in the margin. As, for a capital felony, it is written opposite the prisoner's name, "let him be hanged by the neck;" which, when the proceedings were in Latin, was "*suspendatur per collum*;" or in the more abbreviated form "*sus' per coll'.*" 4 *Black.* 403.

SUSPICION. It hath been held by some, that a justice of the peace cannot apprehend a felon on bare suspicion but; it seems to be the better opinion, that a justice may issue a warrant to apprehend a person suspected of felony, though the original suspicion be not in himself, but in the party that prays the warrant, because he is a competent judge of the probability offered to him of such suspicion. But it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there is a felony or other crime actually committed, without which no warrant should be granted; as also to prove the cause and probability of suspecting the party, against whom the warrant is prayed. 4 *Black.* 290.

The causes of suspicion which are generally agreed to justify the arrest of an innocent person for felony, are, (1.) being found in such circumstances as induce a strong presumption of guilt; as being found in possession of any part of goods stolen, without giving a probable account of coming honestly by them; (2.) absconding; (3.) being found in company of known offenders, or of persons of scandalous reputation; (4.) living an idle, vagrant, and disorderly life, without having any visible means to support it; (5.) being pursued by hue and cry; for if a felony is done, and one is pursued upon hue and cry, who is not of ill fame, nor suspicious, yet he may be attached and imprisoned by the law of the land. But generally, no such cause of suspicion, as the abovementioned, will justify an arrest, when in truth no such crime hath been committed, unless it be in the case of hue and cry. 2 *Haw.* 76.

SWAINMOTE court, in forests, is holden before the verderers as judges, by the steward of the swainmote, thrice in every year; the freeholders within the forest composing the jury. Unto this court all the freeholders in the forest owe suit and service. And all the officers of the forest are to appear at every swainmote; also out of every town and village in the forest, four men and a reeve. The jurisdiction of this court is, to inquire into the oppressions and grievances committed by the officers

officers of the forest ; and to receive and try presentments certified from the court of attachments against the offenders in vert and venison.

SWANS. It is felony to take any swans that are lawfully marked, though they be at large. *Dalt. c. 156.*

And if they be unmarked, yet if they be domestical or tame, that is, kept in a moat, or in a pond near to the dwelling house, to steal such is also felony. *Id.*

But if swans that are unmarked shall be abroad, and shall attain to their natural liberty, then the property of them is lost ; and so long, felony cannot be committed by taking them. *Id.*

And yet such unmarked and wild swans the king's officers may seize for the king's use, by his prerogative. Also the king may grant them, and consequently another may prescribe to have them, within a certain place or precinct. *Id.*

Swans may be estray, which no other fowl can be. *Kitcb. 86.*

Taking swans eggs out of the nest is punishable by imprisonment for a year, and fine at the discretion of the court. *11 H.*

7. c. 17.

SWEARING. By the *19 G. 2. c. 21.* (which act is to be read by the minister in every church and chapel, four times in the year, on the *Sundays* next after *Lady-day, Midsummer, Michaelmas* and *Christmas*) every labourer, soldier, or sailor, profanely cursing or swearing, shall forfeit *1s.* ; every other person, under the degree of a gentleman, *2s.* ; and every gentleman or person of superior rank, *5s.* ; to the poor of the parish : on a second conviction, double ; and for every subsequent offence, treble ; with all charges of conviction : and, in default of payment, shall be committed to the house of correction for ten days unless he be a soldier or sailor, who shall instead thereof, be set in the stocks for the first offence one hour ; and for any number of offences whereof he shall be convicted at one and the same time two hours. And any justice of the peace may convict him on his own hearing, or the testimony of one witness ; and any constable, or peace officer, on his own hearing, may apprehend and carry him before a justice.

SWEETS. By the *24 G. 3. c. 41.* every maker of sweets for sale, shall take out a licence annually, from the officers of excise. And by the *30 G. 3. c. 38.* every retailer of sweets or British-made wines shall also take out a licence annually in like manner.

And by the *27 G. 3. c. 13.* a duty is imposed on all made wines or sweets, made in *Great Britain* for sale, which is to be paid by the maker thereof.

SYLVA CÆDUA ; wood under twenty years growth ; coppice wood.

SYNGRAPH, (from *συν*, together, and *γραφω*, to write,) was
a deed,

a deed, bond, or writing, under the hand and seal of both parties. Formerly, when deeds were more concise than at present it was usual to write both parts on the same piece of parchment with the word *syngraphus* in large letters written between them; through which the parchment being cut, one part thereof was delivered to each party; and these being matched and tallied together, proved their authenticity.

SYNOD, a meeting or assembly of ecclesiastical persons concerning religion; of which there are four kinds: 1. A general or universal synod or council, where bishops of all nations meet. 2. A national synod, of the clergy of one nation only. 3. A provincial synod, where ecclesiastical persons of a province only assemble. 4. A diocesan synod, of those of one diocese.

SYNODALES TESTES, were anciently persons summoned out of every parish to appear at the episcopal *synods*, and there attest or make presentment of the disorders of the clergy and people. They were in after-times a kind of impanelled jury, consisting of two, three, or more persons in every parish, who were upon oath to present all heretics and other irregular persons. And these in process of time became standing officers in several places, especially in great cities, and from hence were called *synodsmen*, and by corruption *sideismen*: they are also sometimes called *questmen*, from the nature of their office, in making inquiry concerning offences. But for the most part, this whole office is now devolved upon the churchwardens. *Ken. Par. Ant.* 649.

T A I

TAIL:

1. *Origin of estates tail.*
2. *What may or may not be intailed.*
3. *Of the several kinds of intail.*
4. *Incidents of intail.*
5. *Intail, how barred or destroyed.*
6. *Tenant in tail after possibility of issue extinct.*

1. *Origin of estates tail:*

By the common law all inheritances were *fee simple*, which were divided into two sorts; *fee simple absolute*, and *fee simple conditional*. *Litt. f. 13.*

A conditional fee at the common law was, a fee restrained to some particular heirs, exclusive of others; as to the *heirs of a man's*

man's body, by which only his lineal descendants were admitted, in exclusion of collateral heirs; or, to the heirs *male* of his body, in exclusion both of collateral and lineal females also. It was called a *conditional fee*, by reason of the condition expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever, that on failure of the heirs specified in the grant, the grant should be at an end, and the land return to its ancient proprietor. 2 *Black. b. 2. c. 7.*

Now with regard to the *condition* annexed to these fees by the common law, it was held, that such a gift (to a man and the heirs of his body) was a gift upon condition, that it should revert to the donor, if the donee had no heirs of his body; but, if he had, it should then remain to the donee. It was therefore called a fee simple, on condition that he had issue. Now, it is to be observed, that when any condition is performed, it is thenceforth intirely gone; and the thing to which it was before annexed, becomes absolute, and wholly unconditional: so that, as soon as the grantee hath any issue born, his estate was supposed to become absolute, by the performance of the condition; at least for these three purposes: First, to enable the tenant to aliene the land, and thereby to bar not only his own issue, but also the donor, of his interest in the reversion. Secondly, to subject him to forfeit it for treason, which he could not do till issue born, longer than for his own life. Thirdly, to empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind his issue. *Id.*

However, if the tenant did not in fact aliene the land, the course of descent was not altered by this performance of the condition; for if the issue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation; the lands by the terms of the donation, could descend to none but the heirs of his body, and therefore, in default of them, must have reverted to the donor. *Id.*

For which reason, in order to subject the lands to the ordinary course of descent, the donees of these conditional fees simple, took care to aliene as soon as they had performed the condition by having issue; and afterwards repurchased the lands, which gave them a fee simple absolute, that would descend to the heirs general, according to the course of the common law. And the judges gave way to this kind of finesse, by reason of the inconveniences which attended these limited inheritances, in order thereby to shorten their duration. *Id.*

But on the other hand, the nobility, who were willing to perpetuate their possessions in their own families, in order to put a stop to this practice, procured the statute of *Westminster* the second, 13 *Ed. 1 ff. 1. c.* (commonly called the statute *de donis*

conditionalibus) to be made; which pays a greater regard to the private will and intention of the donor, than to the propriety of such intention, or any public consideration whatsoever. By which it is enacted as follows:

“ Concerning tenements that many times are given *upon condition*, that is to wit, where any giveth his land to any man and his wife, and to the heirs begotten of the bodies of the same man and his wife, with such condition expressed, that if the same man and his wife die without heirs of their bodies between them begotten, the land so given shall revert to the giver or his heir; also in case where one giveth land to another, and the heirs of his body issuing, it seemeth hard to the givers and their heirs, that their will being expressed in the gift is not observed; in which cases, after issue begotten and born between them, (to whom the lands were given under such condition,) heretofore such feoffees had power to aliene the land so given, and to disinherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift; and further, when the issue of such feoffee is failing, the land so given ought to return to the giver or his heir, by form of the gift expressed in the deed, though the issue (if any were) had died, yet by the deed and feoffment of them to whom the land was so given upon condition, the donors have been barred of their reversion, which was directly repugnant to the form of the gift: it is ordained, that the will of the giver, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed; so that they to whom the land was given under such condition, shall have no power to aliene the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert to the giver or his heirs, on failure of such issue.”

Upon the construction of this act, the judges determined that the donee had no longer a *conditional fee simple*, which became absolute, and at his own disposal, the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee tail*, (from the French word *tailleur*, to cut, forasmuch as the heirs general are thereby cut off,) and vesting in the donor the ultimate fee simple of the land, expectant on the failure of issue; which expectant estate is what we now call a *reversion*. 2 *Black. Ibid.*

2. *What may or may not be intailed.*

TENEMENTS is the only word used in the statute, which comprehends not only all corporeal inheritances that are or may be holden, but also all incorporeal inheritances issuing out of any of those inheritances, or concerning, or annexed to, or which may be exercised with the same, though they be not in tenure; therefore all these without question may be intailed; as rents, estovers, com-

commons, or other profits whatsoever, granted out of land; or uses, offices, dignities, which concern lands or certain places, may be intailed within the said statute, because all these favour of the realty. 1 *Inst.* 19, 20.

But if the grant be of an inheritance merely personal, or to be exercised about chattels, and is not issuing out of land, nor concerning any land, or some certain place; such inheritances cannot be intailed, because they favour nothing of the realty: in these the grantee hath a fee conditional, as they were before the statute; and by his grant or release, he may bar his heir, as he might have done at the common law; for that, in these cases, he is not restrained by the said statute. *Id.*

So a grant of an annuity to a man and the heirs of his body is void; so also a lease for years, for the chattels cannot be turned to an inheritance. But it is commonly assigned in trust, that the trustees shall permit the issue in tail to receive the profits, which is an intail in effect. 4 *Inst.* 87.

A copyhold cannot be intailed by virtue of the statute; but by special custom of the manor, it may be limited to the heirs of the body. 2 *Black. Ibid.*

3. Of the several kinds of intail.

ESTATES tail are either *general* or *special*. Tail *general* is, where lands are given to one and *the heirs of his body begotten*; which is called *tail general*, because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order capable of inheriting the estate tail by force of the gift, because that every such issue is of his body begotten. *Litt. sect.* 14.

In the same manner it is where lands are given to a woman, and to the heirs of her body, although she hath divers husbands, yet the issue which she may have by every husband may inherit as issue in tail by force of this gift; and therefore such gifts are called *general tails*. *Litt. sect.* 15.

Tenant in *tail special* is, where lands are given to a man and to his wife, and to *the heirs of their two bodies begotten*; in this case, none shall inherit by force of this gift, but those that be procreated between them two. And it is called *special tail*, because if the wife die, and he taketh another wife, and they have issue, the issue of the second wife shall not inherit by force of this gift; nor also the issue of the second husband, if the first husband die. *Litt. sect.* 16.

Estates, either in *general* or *special* tail, may be further divided into *tail male*, or *tail female*; as if lands be given to a man and *his heirs male of his body begotten*, this is an estate in *tail male general*; but if to a man and *the heirs female of his body on his present wife begotten*, this is an estate in *tail female special*. And in case of an intail *male*, the heirs *female* shall never inherit, nor any derived

from them; nor, on the other hand, the heirs *male* in case of a gift in tail *female*. Thus if the donee in tail male hath a daughter who dies leaving a son, such grandson, in this case, cannot inherit the estate tail; for he cannot derive his descent wholly by heirs male. And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. And therefore, if a man hath two estates tail, the one in tail male, the other in tail female, and he hath issue a daughter, which daughter hath issue a son; this grandson can succeed to neither of the estates, for he cannot convey his descent wholly either in the male or female line. 2 *Black. Ibid.*

In gifts in tail, the word *heirs* is as necessary as in a fee simple; and the word *body*, (or other words that amount to it,) makes the tail, and may be restrained to males or females of the body. But a gift to heirs male or heirs female, is a fee simple, because it is not limited to what body. 1 *Inst.* 20. 26, 27.

But in a will, the word *body* is not absolutely necessary, in order to make an intail; but it may be sufficient, if it be to one and the issue, or the children of his body, or the like: for in making his will, a man hath not always opportunity to consult with able counsel. 1 *Inst.* 27.

If lands are given to a man and his wife, and to the heirs of the body of the man, the husband hath an estate in general tail, and the wife an estate for life; because the word *heirs* relates generally to the body of the husband. And if the estate is made to the husband and wife, and to the heirs of the body of the wife by the husband begotten, there the wife hath an estate in special tail, and the husband for term of life; because the word *heirs* relates to the body of the wife to be begotten by that particular husband. But if lands are given to husband and wife, and to the heirs of their two bodies, both of them have an estate in special tail; because the word *heirs*, or the inheritance, is not limited to one more than to the other. Therefore by observing to whom the word *heirs* relates, whether to both or one of them, it may be seen where the inheritance is lodged. *Litt. sect.* 26. 28.

4. Incidents of intail.

THE incidents to a tenancy in tail under the statute aforesaid, are chiefly these: 1. That a tenant in tail may commit *waste* on the estate tail, by felling timber, pulling down houses, or the like, without being impeached, or called to account for the same. 2. That the wife of tenant in tail shall have her *dower* or thirds of the estate tail. 3. That the husband of a female tenant in tail may be tenant by the *curtesy* of the estate tail. 2 *Black. ibid.*

5. Intail how barred or destroyed.

THE inconveniencies arising from the said statute *de donis*, by degrees became intolerable. Children grew disobedient, when they

they knew they could not be set aside; *farmers* were ousted of their leases by tenant in tail; for if such leases had been valid, then under colour of long leases, the issue might in effect have been disinherited; *creditors* were defrauded of their debts, for if tenant in tail could have charged his estate with their payment, he might have defeated his issue by mortgaging it for as much as it was worth; *treasurers* were encouraged, as estates tail were not liable to be forfeited longer than for the tenant's life; and innumerable *latent intoils* were produced, to deprive purchasers of the lands they had fairly bought. But as the nobility were always fond of this family law, (as it may very properly be styled,) there was little hope of procuring the repeal of it by the legislature. And therefore the application of fictitious *recoveries* was given way to by the judges, and at last in the 12 *Ed.* 4. solemnly declared to be a sufficient bar of an estate tail. By the 4 *Hen.* 7. c. 24. and 32 *Hen.* 8. c. 36. a *fine* was declared to be sufficient to bar an estate tail. By the 26 *Hen.* 8. c. 13. estates tail are made subject to be forfeited for *treason*. By the 32 *Hen.* 8. c. 28. *leases* made by tenant in tail for twenty-one years, or three lives, (under certain restrictions,) are allowed to bind the issue. By the 33 *Hen.* 8. c. 39. estates tail are rendered liable to be charged for payment of *debts due to the crown*, by record or specialty. And by the 21 *J.* c. 19. they are subjected to be sold for the debts contracted by a *bankrupt*.

Estates tail being thus by degrees unfettered, are now reduced again to almost the same state, even before issue born, as conditional fees were in at the common law, after the condition was performed by the birth of issue. *Id.*

6. *Tenant in tail after possibility of issue extinct.*

TENANT in tail after possibility of issue extinct, is where one is tenant in special tail, and a person, from whose body the issue was to spring, dies without issue; or having left issue, that issue becomes extinct: in either of these cases, the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct. 2 *Black. ubi supra.*

TALES, (*Lat.*) is used in the law for a supply of men impanelled on a jury and not appearing, or on their appearance challenged and disallowed; when the judge upon motion orders a supply to be made by the sheriff of one or more *such* persons present in court, to make up a full jury.

Tales are of two sorts: *tales de circumstantibus*, and a *decem tales*. *Tales de circumstantibus*, is where a full jury doth not appear at *nisi prius*, or so many are challenged that there is not a full jury; then on the prayer of the plaintiff's or defendant's counsel, the judge will grant this *tales*, which the sheriff returns immediately in court. A *decem tales*, is when a full jury doth not

appear on a trial at bar, and is a writ to the sheriff to return ten such as the other : on a trial at bar, the court cannot grant a *tales de circumstantibus*, but will grant a *decem tales*, returnable in some convenient time, the same term, to try the cause. 2 *Lill. Abr.* 552.

A *tales* is not to be granted where the whole jury is challenged ; but the whole panel, if the challenge be made good, is to be quashed, and a new jury returned ; for a *tales* consists but of some persons to supply the places of such of the jurors as were wanting of the number of twelve, and is not to make a new jury. *Id.*

TALLAGE, cometh of the French word *tailler*, to share or cut out a part ; and figuratively is understood, when the king or any other hath a share or part of the annual revenue of his lands, or puts any charge or burden upon another ; so as *tallage* is a general word, and includes all subsidies, taxes, tenths, fifteenths, impositions, or other burdens or charge put or set upon any man. 2 *Inst.* 532.

TANNER. By the 24 *G. 3. c. 41.* every tanner shall take out a licence annually from the officers of excise.

TARE and TRET. *Tare* is an allowance in merchandize, made to the buyer, for the weight of the box, bag, or casks, wherein the goods are packed ; and *tret* is a consideration in the weight, for waste in emptying and re-selling the goods, by dust, dirt, breaking, or the like.

TAWER. By 24 *G. 3. c. 41.* every tawer shall take out a licence annually from the officers of excise.

TEA. By the 27 *G. 3. c. 13.* a duty is imposed on all tea imported, according to the price at which the same shall be sold at the public sales of the *East India* company. And by several statutes, regulations are made respecting the importing, storing, exporting, and true manufacturing of tea, which is to be under the management of the officers of the customs and excise. And by the 20 *G. 3. c. 53.* every person who shall trade in or sell any tea, shall take out a licence annually from the officers of excise.

TEMPLARS, were an order of knights, so called from having their first residence in some apartments adjoining to the *Temple* at *Jerusalem*. They were instituted in the year 1118. Their business was to guard the roads for the security of pilgrims in the Holy Land. They came into *England* in the reign of king *Stephen* ; and in a little time obtained great possessions, so that at length their wealth and power were thought too great : they were accused of horrid crimes, and every where imprisoned ; their estates were seized, and their order finally suppressed by pope *Clement* the fifth, in the year 1312.

TEMPORALTIES, of a bishop, are all such things as the bishops

bishops have by livery from the king, as castles, manors, lands, tenements, and such other certainties, of which the king is answered during the vacation. *Watf. c. 40.*

And upon the filling of a void bishopric, not the new bishop, but the king, by his prerogative, has the temporalities thereof, from the time that the same became void, to the time that the new bishop should receive them from the king. *Id.*

This revenue of the king was anciently very considerable; but now, by a customary indulgence, it is almost reduced to nothing: for at present, as soon as the new bishop is consecrated and confirmed, he usually receives from the king the restitution of his temporalities intire and untouched; and then, and not sooner, he has a fee simple in his bishopric, and may maintain an action for the profits. 1 *Black. 283.*

TENANT HOLDING OVER. See SUFFERANCE.

TENANT TO THE PRÆCIPE, is he against whom the writ of *præcipe* is brought, in suing out a common recovery, and must be the tenant, or seized of the freehold.

TENANT AT WILL. See WILL, TENANT AT.

TENDER:

A MAN may *tender* money in purses or bags, without shewing or telling the same; for he doth that which he ought; namely, to bring the money in purses or bags, which is the usual manner to carry money in; and then it is the part of him who is to receive it, to put it out and tell it. 1 *Inst. 208.*

He that pleads a tender at the time and place, and no one there to receive, must shew at what time of the day he was there, and how long he staid; for he ought to shew that he has done all that could be done on his part to accomplish what by his agreement he was bound to do: and if the payment is mentioned to be on such a day, he ought to shew that he continued ready to pay at the last instant of that day so long as a man can see to count money. 2 *Salk. 624.*

After tender and refusal of a debt, if the creditor will harass the debtor with an action, it is requisite for the defendant to acknowledge the debt, and plead the tender; adding, that he has always been ready, and still is ready, to discharge it; for a tender by the debtor, and refusal by the creditor, will in all cases discharge the costs, but not the debt itself; though in some particular cases the creditor will totally lose his money. 3 *Black. 303.*

If an obligation of 100*l.* be made, with condition for the payment of 50*l.* at a day, and at the day the obligor tender the money, and the obligee refuses the same, yet in an action of debt upon the obligation, if the defendant plead tender and refusal, and that he is yet ready to pay the money, and tender the same in court; if the plaintiff will not then receive it, but take issue upon

upon the tender, and the same be found against him, he hath lost the money for ever. 1 *Inff.* 207.

But if a man be bound in two hundred quarters of wheat, for delivery of one hundred quarters, he shall not plead that he is still ready to deliver them; for they are perishable goods, and it is a charge for the obligor to keep them. *Id.*

So if a man make an obligation of 100*l.*, with condition for delivery of corn, timber, or the like, or for the performance of an award, or doing of any act, this is collateral to the obligation; that is to say, is not parcel of it, and therefore a tender and refusal is a perpetual bar. *Id.*

And in such cases the obligor is not bound to carry the corn, timber, or the like, about, to seek the obligee; but the obligor, before the day, must go to the obligee, and know where he will appoint to receive it, and there it must be delivered. 1 *Inff.* 210.

Payment of money into court is a kind of tender; which is done by paying into the hands of the proper officer of the court, as much as the defendant acknowledges to be due, together with the costs already incurred, in order to prevent the expence of any further proceedings. And if, after the money is paid in, the plaintiff proceeds in his suit, it is at his own peril; for if he doth not prove more due than is so paid into court, he shall be nonsuited, and pay the defendant's costs: but he shall still have the money so paid in, for that the defendant hath acknowledged to be his due. 3 *Black.* 304.

And where money is paid into court, so much is ordered by the court to be struck out of the declaration. *Bur. Mansf.* 1773.

TENEMENT, in its vulgar acceptation, is applied only to houses and other buildings; but in its original, proper, and legal sense, it signifies every thing that may be holden, provided it be of a permanent nature, whether it be of a substantial, or of an unsubstantial and ideal kind. Thus *frank-tenement*, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like; and, as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements. 2 *Black.* 17.

TENENDUM (to hold) in deeds, was formerly used to signify the tenure by which the estate granted was to be holden; as to hold by knight's service, in burgage, in free socage, and the like. But all these being now reduced to free and common socage, the tenure is not usually specified. Before the statute of *quia emptores*, 18 *Ed.* 1. it was also sometimes used to denote the lord of whom the land should be holden; but the statute directing

recting all future purchases to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* hath been also antiquated, though for a long time after we find it mentioned in ancient charters, that the tenements shall be holden of the chief lords of the fee; but as this expressed nothing more than the statute had already provided for, it gradually grew out of use. 2 *Black.* 298. But in several customary manors, it is usual to set forth of whom the land is to be holden, and by what services.

TENOR, in case of a libel, imports a transcript or copy of the part in dispute; and to say *according to the purport*, is not sufficient in case of a prosecution.

TENTHS, were anciently a temporary aid granted by parliament, and was the real tenth of all the moveables belonging to the subject; such moveables, or personal estate, being much less considerable then, than what they are at present. The clergy also, in their convocations, granted the tenth of all their ecclesiastical livings.

TENURE, is the manner whereby lands or tenements are holden, or the service that the tenant owes to his lord. And there can be no tenure without some service, for the service makes the tenure. 1 *Inst.* 1. 93.

TERM, *terminus*, is a limitation of time; as an estate for term of life; a term day for payment of rent: but more particularly it is used to signify the time wherein the courts of law at *Westminster* are open for all that complain of wrongs or injuries, and seek their right by course of law. Of these terms there are four in every year, denominated from some festival or saint's day immediately preceding; namely, the terms of St. *Hilary*, of *Easter*, of the *Holy Trinity*, and of St. *Michael*.

There are in each of these terms stated days, called *days in bank*; that is, days of appearance in the court of common pleas, called usually *bancum*, or *commune bancum*, to distinguish it from *bancum regis*, or the court of king's bench. 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. 3 *Black.* 277.

The first return in every term is, properly speaking, the first day in that term; and thereon the court sits to take *essoigns*, or excuses, for such as do not appear according to the summons of the writ; wherefore this is usually called the *essoign day* of the term. But the person summoned hath three days of grace, beyond the return of the writ, in which to make his appearance; and if he appears on the fourth day inclusive, *quarto die post*, it is sufficient. Therefore, at the beginning of each term, the court doth not sit for dispatch of business till the fourth day, and in
Trinity

Trinity term, by statute 32 *H. 8. c. 21.* not till the sixth day. *Id.* 278.

All the term, in construction of law, is accounted but as one day to many purposes; for a plea that is put in the last day of a term, is a plea of the first day of the term; and a judgment on the last day of the term is as effectual as on the first day: and for this reason, the judges may alter their judgments at any time during the same term.

TERRETENANT, is he who has the legal property and possession of the land in trust for him to whose use the land was granted.

TEST ACT, is an act of parliament, 25 *C. 2. c. 2.* for preventing papists from being appointed to offices in the state; whereby it is enacted, that every person who shall be admitted to any office, civil or military, shall, within three months after his admission, receive the sacrament of the Lord's Supper, according to the usage of the church of *England*, in some public church on the Lord's-day immediately after divine service and sermon. And in the court where, in pursuance of such promotion, he takes the oaths of allegiance, supremacy, and abjuration, he shall, at the same time, deliver a certificate of such his having received the sacrament, under the hands of the minister and church-wardens, and make proof of the truth thereof by two witnesses: and he shall also at the same time make and subscribe the declaration against transubstantiation (which is emphatically called the *test*).

TESTAMENT, is a voluntary disposition of what one would have to be done, concerning his goods and chattels, real and personal, after his decease; with the appointment of an executor. For which, see **WILLS**.

TESTATUM CAPIAS, is a writ in personal actions, where the defendant cannot be arrested upon a *capias* in the county where the action is laid, but is returned *non inventus* by the sheriff; then this writ shall be sent out into any other county where such person is thought to be, or to have wherewith to satisfy; and this is termed a *testatum*, by reason the sheriff hath testified that the defendant was not to be found in his bailiwick. But it is now usual, for saving trouble, time, and expence, to make out a *testatum capias* at the first, supposing a former *capias* to have been granted, which in fact never was. And this fiction being beneficial to all parties, is readily acquiesced in, and is become the settled practice. 3 *Black.* 283.

TESTE, is a word generally used in the last part of all writs wherein the date is contained, which runs *teste meipso*, if it is an original writ; or *teste* the lord chief justice, if a judicial one.

THEFTBOTE, (from the Saxon words *theft*, and *bote*, boot, or amends,) is where one not only knows of a felony, but takes his

his goods again, or other amends, not to prosecute. 1 *Haw.* 125.

This is frequently called compounding of felony; and formerly was held to make a man an accessory; but is now punished only by fine and imprisonment. *Id.*

But the bare taking of one's own goods again, which have been stolen, is no offence, unless some favour be shewed to the thief. *Id.*

THIRDBOROUGH. When the kingdom was first divided into hundreds and tithings, an officer was set at the head of each tithing in the nature of constable, called the *headborough*: but whereas, in some places, only one headborough was set over three tithings, he was therefore called the *thirdborough*.

THOROUGH TOLL, is when a town prescribes to have toll for such a number of beasts, or for every beast that goeth through their town, or over a bridge or ferry, maintained at their cost. *Terms of the Law.*

And this requires a consideration to be shewn to support the demand of it, because it is against common right; for there is a difference between prescriptions for private rights, and prescriptions that affect the public: in the former case, a consideration may be implied; but in the latter, a sufficient consideration must be proved. *Bur. Mansf.* 1402.

THORP, Sax. a village.

THREATNING LETTER. If any person shall send any letter threatening to accuse any other person of a crime punishable with death, transportation, pillory, or other infamous punishment, with a view to extort money from him, he shall be punished at the discretion of the court, with fine, imprisonment, pillory, whipping, or transportation. 30 *G. 2. c. 24.*

And if any person shall send any letter threatening to kill any of the king's subjects, or to fire their houses, outhouses, barns, stacks of corn or grain, hay or straw, he shall be guilty of felony without benefit of clergy. 9 *G. c. 22.* 27 *G. 2. c. 15.*

TILES. By the 27 *G. 3. c. 13.* several duties are imposed on tiles made in *Great Britain*: and by several statutes regulations are made for the true making of tiles, and the surveying thereof by the officers of excise.

TIMBER TREES, are properly oak, ash, and elm. In some particular countries, by local custom, other trees, being commonly there made use of for building, are considered as timber. 2 *Black.* 28. Of these, being part of the freehold, larceny cannot be committed; but if they be severed at one time, and carried away at another, then the stealing of them is larceny. And by several late statutes, the stealing of them, in the first instance, is made felony, or otherwise subject to a pecuniary forfeiture. 4 *Black.* 233. 247.

TIME. If one binds himself to another to pay a sum of money,

ney, and doth not say at what time, the obligation is good, and the money is to be paid presently; that is, in convenient time. And yet in case of a condition of a bond or obligation, there is a diversity between a condition of an obligation which concerns the doing of a *transitory act* without limitation of any time, as payment of money, delivery of writings, or the like, for there the condition is to be performed presently, that is, in convenient time; and when by the condition of the obligation, the act that is to be done to the obligee is of its own nature *local*, for there the obligor (no time being limited) hath time during his life to perform it, as to make a feoffment, or the like, if the obligee doth not hasten the same by request. *1 Inst.* 268.

When the obligor, feoffor, or feoffee, is to do a sole act or labour, as for instance, to go to *Rome*, in such case he hath time during his life, and cannot be hastened by request. And so it is if a stranger to the obligation or feoffment were to do such an act, he hath time to do it at any time during his life. *Id.*

TIPSTAFF, an officer appointed by the marshal of the court of king's bench to attend upon the judges, with a kind of rod or *staff tipped* with silver, to take prisoners into custody.

TITHES :

1. TITHES are the tenth part of the increase yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants. And hence they are usually divided into three kinds; *prædial*, *mixt*, and *personal*. *Prædial* tithes are such as arise merely and immediately from the ground; as grain of all sorts, hay, wood, fruits, herbs; for a piece of land or ground being called in Latin, *prædium*, (whether it be arable, meadow, or pasture,) the fruit or produce thereof is called *prædial*, and consequently the tithe payable for such annual produce is called a *prædial* tithe. *Mixt* tithes are those which arise not immediately from the ground, but from things immediately nourished by the ground; as by means of goods depastured thereupon, or otherwise nourished with the fruits thereof; as colts, calves, lambs, chickens, milk, cheese, eggs. *Personal* tithes, are such as do arise by the honest labour and industry of man, employing himself in some personal work, artifice, or negotiation; being the tenth part of the clear gain, after charges deducted. *Watf. c.* 59.

2. Tithes, with regard to value, are divided into *great* and *small*: *great* tithes; as corn, hay, wood: *small* tithes; as the *prædial* tithes; of other kinds, together with those that are *mixt* and *personal*.

3. Tithes of common right belong to that church within the precincts of whose parish they arise. But one parson may prescribe to have tithes within the parish of another; and this is what is called a *portion* of tithes. *Gibf.* 663.

The reason whereof may be, the lord of a manor's having his estate

estate extending into what is now apportioned into distinct parishes; for there were tithes before the present distribution of parishes took place.

Tithes in extraparochial places, that is within the compass of no certain parish, belonging to the king; and he may grant them to whomsoever he pleases.

4. Of things that are *fera natura*, no tithe shall be paid; therefore no tithe is due for fish taken out of the sea, or out of a river, unless by custom; so neither for the same reason is any tithe due of deer, conies, or the like. But if the tithe thereof be due by custom, it must be paid. 2 *Inst.* 651.

Of *barren land*, converted into tillage, no tithe shall be paid for the first seven years; but if it be not barren in its own nature, as if it be woodland grubbed and made fit for tillage, tithes shall be paid presently; for woodland is fertile and not barren. *Id.* 655.

Glebe lands, in the hands of the parson, shall not pay tithe to the vicar; nor being in the hands of the vicar, shall they pay tithe to the parson; because the church shall not pay tithe to the church. But if the parson lets his rectory, reserving the glebe lands, he shall pay the tithes thereof to his lessee. *Gibf.* 661.

5. Exemptions from tithes are of two kinds; either to be exempted from paying any tithes at all, or from paying tithes in kind. The former is called *de non decimando*: the latter *de modo decimandi*.

6. Prescription *de non decimando* is, to be free from the payment of tithes, without any recompence for the same. Concerning which, the general rule is, that no layman can prescribe in *non decimando*; that is, to be discharged absolutely of the payment of tithes, and to pay nothing in lieu thereof; unless he begin his prescription in a religious or ecclesiastical person. But all spiritual persons, as bishops, deans, prebendaries, parsons, and vicars, may prescribe generally in *non decimando*. 1 *Roll's Abr.* 653.

7. A *modus decimandi*, commonly called by the single name of *modus* only, is, where there is by custom a particular *manner* of tithing different from the general law of taking tithes in kind. This is sometimes a pecuniary compensation, as so much an acre for the tithe of land: sometimes it is a compensation in work and labour; as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him: sometimes in lieu of a large quantity, when arrived to greater maturity; as a couple of fowls in lieu of tithe eggs, and the like. Any means, in short, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing. 2 *Black.* 29.

8. To

8. To make a *modus* or prescription good, several qualifications are requisite. As first, it must be supposed to have had a *reasonable commencement*, as that at the time of the composition the *modus* was the real value of the tithes, though by the decrease in the value of money, it is now become much less.

It must be something for the *parson's benefit*: therefore the finding straw for the body of the church, the finding a rope for a bell, the paying 5*s.* to the parish clerk, have been adjudged not to be good. But it is a good *modus* to be discharged, that he hath been used time out of mind to employ the profits for the repair of the chancel, for the parson hath a benefit by that.

It must not be *one tithe paid in lieu of another*; as it must not be to pay tithes of other kinds, to be discharged of the tithes of dry cattle, and must not be so much for every cow and calf, for the tithe of herbage.

It must be something in its kind *different from the thing that is due*; and therefore a load of hay in lieu of tithe hay, or certain sheaves of corn for all tithes of corn, is not a good prescription.

A *modus* must be *certain*: so a prescription to pay a penny, or thereabouts, for every acre of land, is void for the uncertainty. And heretofore it was held, that if a precise day of payment is not alleged, the *modus* shall be ill; but now it is holden, that where an annual *modus* hath been paid, and no certain day for the payment thereof is limited, the same shall be due and payable on the last day of the year.

A *modus* must be *ancient*: and therefore if it is any thing near the value of the tithe, it will be supposed to be of late commencement, and for that reason will be ~~set~~ *set aside*.

It must be *durable*, for the tithe in kind being ~~an~~ *an inheritance* certain, it is reasonable that the recompence for it should be as durable; for which reason, a certain sum to be paid by the inhabitants of such an house hath been set aside, because the house may go down, or none may inhabit it.

It must be *constant* and without interruption; for if there have been frequent interruptions, no custom or prescription can be obtained. But after it hath been once duly obtained, a disturbance for ten or twenty years shall not destroy it.

9. When a common is divided and inclosed, a *modus* shall only extend to such tithes as the common yielded before inclosure; such as the tithes of wool, lambs, or agistment; but not to the tithes of hay and corn, which the common, whilst it was common, did never produce. *Burr. Mansf.* 1375.

10. The person cannot come himself and set out his tithes, without the consent of the owner; but he may attend and see it set out; yet the owner is not obliged to give him notice when he intends to set it out, unless it be by special custom. *Id.* 1891.

11. After

11. After it is set out, the care thereof, as to waisting or spoiling, rests upon the parson, and not upon the owner of the land; but the parson may spread, dry, and prepare his corn, hay, or the like, in any convenient place upon the ground, till it be sufficiently weathered and fit to be carried into the barn.

12. And he may carry his tithes from the ground, either by the common way, or such way as the owner of the land uses to carry away his nine parts.

If the parson suffers his tithe to stay too long upon the land, the owner may distrain the same as doing damage; or he may have an action upon the case: but he cannot put in his cattle and destroy the corn or other tithe, for that would be to make himself judge what shall be deemed a convenient time for taking it away. *L. Raym.* 189.

13. In the ecclesiastical court, the parson may sue for and recover the tithes themselves, or an equivalent for the same, and also double value. In the courts of common law, he cannot recover the tithes themselves, but may sue for and recover treble value, which is tantamount to the tithes, and double value in the ecclesiastical court.

But it rarely happens, that tithes are sued for at all in the ecclesiastical court; for if the defendant pleads any custom, modus, composition, or other matter, whereby the right of the tithe comes in question, this takes it out of the jurisdiction of the ecclesiastical judges; for the law will not suffer the existence of such a right to be decided without the verdict of a jury.

But where the tithes are any thing considerable, they are frequently sued for in the courts of equity.

Small tithes, not exceeding the value of 40s. and Quakers tithes, great or small, not exceeding the value of 10*l.* may be recovered before the justices of the peace.

TITHING. Anciently, for the better conservation of the peace, and more easy administration of justice, every hundred was divided into ten districts or tithings, consisting of ten men with their families: and at the head of each tithing was appointed an officer, called the *tithingman*, being much of the nature of what is now called the *constable*.

TITHINGMAN, was anciently at the head of the tithing or decenary, which consisted of ten men with their families, and is now in the nature of constable. But, in some places, there is both a tithingman and constable, where the tithingman is as it were a deputy to execute the office in the constable's absence: but there are some things which a constable hath power to do, that tithingmen cannot intermeddle with; for the constable may do whatever the tithingman may do; but not on the contrary, the tithingman not having an equal power with the constable. But
in

in places where there is no constable, the office and authority of tithingman seems to be all one under a different name.

TITLE, BUYING OF. It is an high offence at common law to buy or sell any doubtful title to disputable lands, to the intent that the buyer may carry on the suit, which the seller doth not think it worth his while to do; all which practices ought by all means to be discountenanced, as manifestly tending to oppression. 1 *Haw.* 261.

And by the statute 32 *H. 8. c. 9.* no person shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for a year before such grant, or hath been in actual possession of the land, or of the reversion or remainder; on pain that both purchaser and vendor shall each forfeit the value of such lands to the king and the prosecutor.

When a person will recover any thing from another, he must make out and prove a better title than the other hath; otherwise it will not be enough to destroy his title. For it is not allowed for the party to forsake his own title, and fly upon the other's; for he must recover by his own strength, and not by the other's weakness. *Hob.* 103.

TOBACCO AND SNUFF. No person shall plant any tobacco, on forfeiture thereof; and also 12*l.* for every rod or pole. 12 *C. 2. c. 34.* 15 *C. 2. c. 7.*

And by the 29 *G. 3. c. 68.* every manufacturer of, or dealer in tobacco or snuff, shall take out a licence annually from the officers of excise.

And by several statutes, regulations are made respecting the manufacturing of tobacco and snuff, which are also put under the management of the officers of excise.

TOFT, a messuage, or rather a place or piece of ground where a house formerly stood, but is decayed or casually burned, and not rebuilt.

TOLERATION, act of. See **DISSENTERS.**

TOLL, *tolnetum,* signifies generally a payment in markets and fairs, for goods sold therein.

But there are also divers other kinds of tolls: as,

Turn toll, where toll is paid for beasts that are driven to be sold at market, and return unfold.

Toll travers, where one claimeth to have toll for every beast that *traverseth,* or is driven over his ground.

Thorough toll, where a town prescribes to have toll for every beast that goeth *through* the town, or over a ferry, or bridge, maintained at their cost.

There is also *in-toll* and *out-toll,* mentioned in ancient charters.

Toll must have a reasonable cause of commencement, as in consideration

consideration of repairs or the like; otherwise the franchise is illegal and void. 2 *Black.* 38.

To TOLL AN ENTRY, is to defeat or *take away* the right of entry into lands and tenements.

TOLT, is a precept from the sheriff for removing a writ of right from the court baron into the county court; and is so called, because it takes (*tollet*) the cause out of the court of the lord of the manor. And from the county court it may be removed into the king's courts, by writ of *pone* or *recordari facias*, at the suggestion of either party that there is a defect of justice.

TOMBSTONES. See MONUMENTS.

TONNAGE, *tunnage*, a duty on goods imported or exported, at the rate of so much a ton.

TOR, Sax. a mount or hill.

TORRALE, (from *torreo*, to roast or dry,) a kiln or malt-house. So *secta ad torrale*, was suit to the lord's kiln with a prohibition to the tenants to dry their corn or malt elsewhere.

TORT, from the Latin, *tortus*, is a French word for injury or wrong; as *de son tort*, of his own wrong. It is properly called *tort*, because it is *wrested* or crooked. So *tortfeasor*, is a wrong doer or trespasser.

TOURN. The sheriff's tourn is the king's court of record, holden before the sheriff, for the redressing of common grievances within the county. 2 *Harv.* 55.

And because the sheriff did go in circuit twice every year, throughout every hundred within the county, it was called the *tourn*, which signifies a circuit or perambulation. 2 *Inst.* 70.

The times for performing this perambulation are to be within a month after *Easter*, and a month after *Michaelmas*. At which courts, all persons, (except peers, clergymen, tenants in ancient demesne, and those who have hundreds or lects of their own,) being above the age of twelve years, are bound to attend, in order to make inquiry of all common grievances, and to take the oath of allegiance to the king.

The estate to qualify a jurymen in the tourn, is 20s. a year freehold, or 26s. 8d. customary or copyhold.

It seems to be settled, that a distress is incident of common right to every fine and americiament in the tourn, and that the offender's goods may be distrained in any lands within the precinct of the court, or in the highway; and that the goods distrained may be sold; or the fine may be recovered by action of debt. 2 *Harv.* 60, 1.

But the sheriff by several statutes is restrained from trying indictments found in the tourn; but he must deliver them to the next session of the peace. Since which restrictions, the business of the tourn hath declined, and is now almost wholly devolved upon the quarter sessions.

TOUT TEMPS PRIST, is a plea to an action, whereby, after tender and refusal of a debt, the defendant acknowledges the debt, and pleads the tender; adding, that he has always been ready, *tout temps prist*, and still is ready, *uncore prist*, to discharge it. For a tender by the debtor, and refusal by the creditor, will discharge the costs, though not the debt itself. 3 *Black.* 303.

TOWN, villa, or *vicus*, was a precinct anciently of ten families, upon which account they are sometimes called *tithings*. There ought to be in every town a petty constable, or tithingman, or both. If a town is decayed, so that it hath no house left, yet it is a town in law. *Wood. Introduction.*

TRANSITORY ACTION, is an action that is not confined to the proper county; as for debt, detinue, slander, or the like, which are injuries that might happen any where; whereas a *local* action is restricted to that particular county where the injury was actually done; as for waste, trespass, or the like. See **LOCAL ACTION**.

TRANSPORTATION of offenders, is the banishing or sending them away into another country. By the 4 *G. c. 11.* 6 *G. c. 23.* and 8 *G. 3. c. 15.* persons convicted of felony within the benefit of clergy, may, instead of burning in the hand or whipping, be ordered to be transported into some of his majesty's plantations in *America*, [and by the 19 *G. 3. c. 74.* and 24 *G. 3. c. 56.* to any place beyond the seas,] for seven years. And persons convicted of offences excluded from the benefit of clergy, to whom the king shall be pleased to extend mercy on condition of transportation, may be transported for fourteen years, or such other term as shall be made part of the condition.

And by the 19 *G. 3. c. 74.* instead of transportation, penitentiary houses may be erected in *Middlesex, Essex, Kent, or Surry*, for confining and employing in hard labour, six hundred male, and three hundred female convicts. And also ships may be provided for the more effectual punishment of atrocious offenders, to be employed in hard labour in raising sand, soil, or gravel, from and cleansing the river *Thames*, or any other navigable river, or any port or haven, or in any other public work upon the banks thereof; and such offenders are to be fed during the time with bread, and any coarse or inferior food, and water, or small beer; with power to the king, on their good behaviour, to shorten the term of their confinement.

TRAVERSE, took its name from the French *de traverse*, which is no other than *de transverso* in Latin, signifying *on the other side*; because as the indictment on the one side charges the party, so he on the other side cometh in to discharge himself. To traverse an indictment therefore, is to take issue upon the chief matter thereof; which is the same as if one shall say, *to make contradiction, or to deny the point of the indictment*; as in a presentment

sentment against a person for a highway overflowed with water, for default of scouring a ditch which he and they whose estate he hath in certain lands there have used to scour or cleanse; such person may traverse either the matter; namely, that there is no highway there, or that the ditch is sufficiently scoured; or otherwise he may traverse the cause; namely, that he hath not that land, or that he and they whose estate he hath, have not used to scour the ditch. *Lamb. 540.*

A plea will be ill which neither traverseth nor confesseth the plaintiff's title. And every matter of fact, alleged by the plaintiff, may be traversed by the defendant, but not matter of law, or where it is part matter of law, and part matter of fact: nor may a record be traversed which is not to be tried by a jury. *Cra. Eliz. 755.*

A traverse must be always made to the substantial part of the title. Where an act may indifferently be intended to be at one day or another, there the day is not traversable. In an action of trespass, generally the day is not material; though if a matter be to be done upon a particular day, there it is material and traversable. *2 Roll's Rep. 37.*

TREASON, is a word borrowed from the French, and imports a *betraying, treachery, or breach of faith and allegiance.* *4 Black. 75.*

Treason, generally speaking, is intended not of petit treason, but of high treason only. *1 Hale's Hist. 316.*

By the statute 25 *Ed. 3. st. 5. c. 2.* all treasons, which had been uncertain before, were settled. Which statute by 1 *Mar. st. 1. c. 1.* is reinforced, and again made the only standard of treason; and all statutes between the said statutes of 25 *Ed. 3.* and 1 *Mary,* which made any offences high or petit treason, or misprision of treason, are abrogated; so that no offence is at this day to be esteemed high treason, unless it be either declared to be such by the said statute of 25 *Ed. 3.* or made such by some statute since the 1 *Mary.*

The statute of 25 *Ed. 3.* is to the following effect:—Where divers opinions have been before this time, in what case treason shall be laid, and in what not; the king, at the request of the lords and commons, hath made a declaration in the manner hereafter followeth; that is to say, 1. When a man doth compass or imagine the death of our lord the king, or of our lady his queen, or of their eldest son and heir. 2. If a man do violate the king's companion, (that is, his wife, 3 *Inst. 9.*) or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir. 3. If a man do levy war against our lord the king in his realm. 4. If a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere. 5. If a man counterfeit the king's great or privy seal. 6. If a ma-

counterfeit the king's money; or bring false money into the realm counterfeit to the money of *England*. 7. If a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices. And if any other case, supposed to be treason, which is not above specified, doth happen before any judge, he shall tarry, without going to judgment, till the cause be declared before the king and parliament, whether it ought to be treason or other felony.

New treasons, created since the statute 1 *Mary*, may be comprehended under three heads: 1. Such as relate to the *coin*, by way of enforcement of the statute of the 25 *Ed.* 3. 2. Such as relate to *papists*. 3. Such as relate to the security of the *protestant succession* in the house of *Hanover*.

In high treason there are no accessaries, but all are principals; and therefore whatsoever act or consent will make a man accessory to a felony before the act done, the same will make him a principal in high treason. 3 *Inst.* 9. 21.

A person indicted for high treason whereby corruption of blood shall be made, or for misprision of such treason, (except for counterfeiting the coin, the great seal, privy seal, privy signet, or sign manual,) shall have a copy of the indictment, a list of the jurors, and also of the witnesses, delivered to him ten days before the trial. 7 *An. c.* 21.

The treason ought to be manifested by an overt act, or open deed. How far words shall amount to such overt act hath formerly been doubted; but now it seems to be agreed, that words spoken amount only to a high misdemeanor, and no treason. 4 *Black.* 80.

In order to convict an offender, there must be two witnesses, either to the same overt act, or one to one overt act, and the other to another overt act of the same treason. 7 *W. c.* 3.

The judgment for high treason, (not relating to the coin,) is, that he be carried back to the place from whence he came, and from thence be drawn (that is, not to be carried, or walk, though usually a sledge or hurdle is allowed, to preserve the offender from the torment of being dragged on the ground or pavement,) to the place of execution, and be there hanged by the neck, and cut down alive, and that his entrails be taken out, and burned before his face, and his head cut off, and his body divided into four quarters, and his head and quarters disposed of at the king's pleasure. The judgment of a woman for high treason, is to be drawn and burned. 3 *Inst.* 211. 2 *Haw.* 443.

In which judgment is implied forfeiture of lands and goods to the king, loss of dower, and corruption of blood. But by the statute 17 *G.* 2. c. 39. after the death of the pretender, and
of

of his eldest and every other son, no attainder for treason shall disinherit or prejudice any heir or other person, other than the offender during his life.

Petit treason.

By the same statute 25 *Ed.* 3. there is another manner of treason; when a servant slayeth his master, or a wife her husband, or a man, secular or religious, slayeth his prelate: the judgment in which case is, that the offender shall be drawn to the place of execution, and there hanged by the neck till he be dead. The judgment against a woman is, that she shall be drawn to the place of execution, and there burned. The consequence of this attainder is, forfeiture of lands (to the lord of the fee) and of goods; loss of dower; and corruption of blood. Although there can be no accessaries in high treason, yet in petit treason there may be accessaries both before and after. And accessaries before the fact are ousted of clergy by several statutes; but accessaries after the fact, have their clergy in all cases of petit treason, for no statute takes it from them. 2 *Haw.* 444. 2 *Hale's Hist.* 342.

Misprison of treason.

MISPRISON of treason, is when one knows of any treason, though so party nor consenting to it, yet conceals it, and doth not reveal it in convenient time. The judgment in which case, is imprisonment for life, forfeiture of goods for ever, and the profits of lands during life. But misprison of petit treason is punishable only by fine and imprisonment. 3 *Inst.* 36. 1 *Hale's Hist.* 375.

TREASURER. By statute 12 *G.* 2. c. 29. the justices of the peace in sessions may appoint treasurers from time to time of the county rates, and allow them salaries not exceeding 20%. a year; which treasurers shall keep books of entries of all receipts and disbursements by them made, and account for the same to the said justices in sessions.

TREASURE TROVE, (from the French *trover*, to find,) is where any money or coin, gold, silver, plate, or bullion, is found hidden in the earth, or other private place, the owner thereof being unknown; in which case, the treasure belongs to the king: but if he that hid it be known, or afterwards found out, the owner and not the king is intitled to it. 1 *Black.* 295.

Also if it be found in the sea, or upon the earth, it doth not belong to the king, but to the finder, if no owner appears. *Id.*

So that it seems it is the *finding*, not the *abandoning* of it, that gives the king a property. And the difference arises from the

different intentions which the law implies in the owner. A man that hides his treasure in a secret place, doth not mean to relinquish his property, but reserves a right of claiming it again when he sees occasion ; and if he dies, and the secret also dies with him, the law gives it to the king. But a man that scatters his treasure into the sea, or upon the public surface of the earth, is construed to have absolutely abandoned his property, and returned it into the common stock, without any intention of reclaiming it : and therefore it belongs, as in a state of nature, to the first occupant or finder ; unless the owner appears and asserts his right, which then proves that the loss was by accident, and not with an intent to renounce his property. *Id.*

Larceny cannot be committed of such things whereof no man hath any determinate property ; though the things themselves are capable of property ; as of treasure trove, or wreck till seized ; though he that has them in point of franchise, may have a special action against him that takes them. *1 Hale's Hist.* 510.

And on a criminal prosecution, the punishment for concealment of treasure trove is by fine and imprisonment. *3 Inst.* 133.

Therefore when a man has found any treasure, he ought to make it known to the coroner ; who has jurisdiction given to inquire thereof by the statute of 14 *Ed.* 1. called the statute *de officio coronatoris.*

TREBUCKET, (a bucket at the end of a tree or piece of timber,) signifieth a stool that falleth down into a pit of water, for the punishment of the party placed therein, being the same as the *cucking stool.*

TRESAYLE, Fr. the grandfather's father : it is a writ that lies, where the grandfather's grandfather was seized on the day on which he died, of lands or tenements in fee simple ; and after his death a stranger entereth the same day upon him and keeps out the heir.

TRESPASS, in its largest sense, signifies any transgression or offence against a man's person or property ; but in its usual and more restrained sense, it signifies properly, an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. *3 Black.* 208.

One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass ; or at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land. *Id.* 210.

A man is answerable for not only his own trespass, but that of his cattle also ; for, if by his negligent keeping, they stray upon the land of another, (and much more if he permits, or drives them on,) and they there tread down his neighbour's herbage,

Wage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages. *Id.* 211.

And the law gives the party injured a double remedy in this case; by permitting him to distrain the cattle thus doing damage, till the owner shall make him satisfaction; or else by leaving him to the common remedy by action. *Id.*

And the action that lies in either of these cases, of trespass committed upon another's land, either by a man himself, or his cattle, is the action of *trespass with force and arms*; for the law always couples the idea of force with that of intrusion upon the property of another. And herein, if any unwarrantable act of the defendant or his beasts in coming upon the land be proved, it is an act of trespass, for which the plaintiff must recover some damages; such, however, as the jury shall think proper to assess. *Id.*

In some cases, trespass is justifiable; or rather, entry on another's land or house, shall not in those cases be accounted trespass; as if a man comes there to demand or pay money there payable, or to execute, in a legal manner, the process of the law. Also, a man may justify entering into an inn or alehouse without the leave of the owner first specially asked; because, when a man professes the keeping of such inn or alehouse, he thereby gives a general licence to any person to enter his doors. So a landlord may justify entering to distrain for rent; a commoner to tend his cattle commoning on another's land; and a reversioner, to see if any waste be committed on the estate; from the apparent necessity of the thing. In like manner, the common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another's land; because the destroying them is profitable to the public; but not to break the soil in order to dig them out. *Id.* 212.

Also a man may justify a trespass, where it was merely accidental and involuntary; as where sheep were trespassing in the defendant's ground, he chased them out with his dog; the dog pursued them into his next neighbour's adjoining ground, though as soon as they were out of his own ground, he called back his dog and chid him. The owner of the sheep brought an action of trespass, for chasing his sheep. But the court were of opinion, that an action did not lie in this case, as it appeared to be an involuntary trespass; whereas a trespass that may not be justified ought to be done voluntarily. *Bur. Mansf.* 2094.

A man may also justify in an action of trespass, on account of the freehold and *right* of entry being in himself; and this defence brings the title of the estate in question. This is therefore one of the ways devised, since the disuse of real actions, to try the property of estates; though it is not so usual as that by *ejectment*; because

because *ejectment* being now a mixed action, not only gives damages for the ejection, but also possession of the land; whereas in *trespass*, which is merely a personal suit, the right can be only ascertained, but no possession delivered; nothing being recovered but damages for the wrong committed. *Id.* 214.

If a man has a way over my lands for his beasts to pass: if the beasts snatch the grass by morsels in passing, it is justifiable; it being against his will, as must be intended. *2 Roll's Abr.* 567.

If a servant, without his master's knowledge, puts beasts in another man's land, the servant is the trespasser, and not the master; because the servant doing it without the master's assent, gains as it were a special property for the time; and so to this purpose they are his beasts. *2 Roll's Abr.* 553.

But it seems, if a man's wife put beasts into another's land, the husband is the trespasser; because the wife cannot gain a property distinct from her husband. *2 Roll's Abr.* 55.

If several come, and one does the trespass, and the others do nothing but come in aid, they are all principal trespassers; for in trespass there is no accessory. *Br. Tresp.*

If in cutting my thorns, some of them fall into another man's land, when I did all I could to prevent it, I may enter upon that land to take them. *Id.*

So if trees are blown down by the wind, it is no trespass to enter the land into which they are blown down, to take them. *Latch.* 13.

So if trees grow in my hedge, hanging over another man's land, and the fruit of them falls into the other's land, I may justify my entry to gather up the fruit, if I make no longer stay there than is convenient, nor break his hedge. *Id.* 120.

If a man seised in fee of lands, hath certain loads of timber upon the land, and dies, his executor may justify the entry into the land to take the timber. *2 Roll's Abr.* 564.

So if the executor sell it to another, the vendee may justify the entry into the land to take it. *Id.*

If the sheriff upon an execution sells corn growing, the vendee, when the corn is ripe, may enter and reap, and carry it away. *1 Vent.* 222.

In order to prevent trifling and vexatious actions of trespass, it is enacted by the 43 *Eliz. c. 6.* and 8 & 9 *W. c. 11.* that where the jury who try an action of trespass give less damages than 40s., the plaintiff shall be allowed no more costs than damages, unless the judge shall certify on the back of the record that the freehold or title of the land came chiefly in question. But if it shall appear, that the trespass was wilful and malicious, the plaintiff shall have his full costs. Note, every trespass is *wilful*, where the defendant hath notice, and is especially forewarned
not

not to come on the land ; and every trespass is *malicious*, where the intent of the defendant plainly appears to be to harass and distress the plaintiff. 3 *Black.* 214.

TRIAL, is the examination of the matter of fact in issue ; of which there are many different species, according to the difference of the subject or thing to be tried. 3 *Black.* 330.

TRINODA NECESSITAS, signifies a threefold necessary tax, to which all lands in the Saxon times were liable ; that is, for repairing of bridges, the maintaining of castles or garrisons, and for expeditions to repel invasions. And in the king's grants of privileges and immunities, these three things were commonly excepted.

TRITHING. When the kingdom was first divided into hundreds and tithings, an officer was set at the head of each tithing, commonly called the *tithingman*, or sometimes the *headborough* ; except that in some places, one officer only presided over three tithings ; and these joined together constituted the *trithinga* ; and the said officer was denominated the *thirdborough*, or *trithingman*.

TRONAGE, *tronagium*, is a customary duty or toll for weighing of wool. *Trone* is a beam to weigh with ; and *tronage* was used for the weighing wool in a staple or public mart, by a common trone or beam ; which, for the tronage of wool in *London*, was fixed at *Leaden-hall*. The mayor and commonalty of *London* are ordained keepers of the beams and weights for weighing merchants commodities, with power to assign clerks and other officers of the great beam and balance ; and no stranger shall buy any goods in *London*, before they are weighed at the king's beam, on pain of forfeiture. *Chart. Hen.* 8.

TROVER, is a French word, and signifies to *find*. Action of *trover and conversion* was in its original an action of trespass upon the case, for recovering of damages against such person as had *found* another's goods, and refused to deliver them on demand, but *converted* them to his own use ; from which finding and converting it is called an action of *trover and conversion*. 3 *Black.* 151.

By a fiction of law, actions of trover are now permitted to be brought against any person who hath got into his possession by any means whatsoever the goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded. *Id.* 152.

The injury lies in the conversion ; for any man may take the goods of another into possession, if he finds them ; but no finder is allowed to acquire a property therein, unless the owner is unknown. And therefore he must not convert them to his own use, which the law presumes him to do, if he refuses to restore them

them to the owner ; for which reason, such refusal alone is, *prima facie*, sufficient evidence of the conversion. *Id.*

The fact of finding or trover, is therefore now totally immaterial, for the plaintiff needs only to suggest, as words of form, that he lost such goods, and that the defendant found them ; and if he proves that the goods are his (the plaintiff's) property, and that the defendant had them in his possession, it is sufficient. But a *conversion* must be fully proved ; and then in this action the plaintiff shall recover damages, equal to the value of the thing converted, but not the thing itself ; which nothing will recover but an action of detinue or replevin. *Id.*

In this action, the plaintiff must first prove a right or property in the goods, or at least a lawful possession or special property for some time, as in the case of a carrier. Secondly, he must prove a possession in the defendant. And thirdly, he must prove a demand, and refusal to deliver them, which refusal is allowed to be good evidence to the jury that he converted the same, unless the contrary be made appear. *Wood. b. 4. c. 4.*

In trover for a bond, the plaintiff need not shew the date ; for the bond being lost or converted, he may not know the date ; and if he should set out the date, and mistake it, he would fail in his action. *Cro. Car. 262.*

Trover for a bank bill will lie against a person who found it, because the finding gave him no title, though payment to him would have indemnified the bank ; but if the finder hath assigned it over to another for a valuable consideration, trover will not lie against the assignee, by reason of the course of trade. *1 Salk. 126.*

Trover lies for a wager against him who holds the stakes. *1 Com. Dig. 237.*

A man put out cattle to pasture at so much a week, and then sold them to the plaintiff, who demanded the cattle, but the defendant refused to deliver them to the plaintiff, unless he would pay for the pasturage of them. On trover brought for the cattle, it was adjudged, that this denial upon demand was a conversion, and that the defendant might not detain the cattle against him who bought them, until the pasturage was paid, but can only bring his action against him who put them to pasturage ; and that it is not like to the case of an innkeeper or taylor ; they may retain the horse or garment delivered to them until they be satisfied ; but not, where one receives cattle to pasturage, unless there be such an agreement between the parties. *Cro. Car. 271.*

TROY WEIGHT, is a weight of twelve ounces to the pound ; having its name from *Troyes*, a city in *Champain* ; from whence it first came to be used here.

TRUSTS

TRUSTS :

1. TRUSTS are of the same nature that uses were at the common law. It is only a new name given to an use. And conveyances by way of trust were invented to evade the statute of uses. 21 *Vin.* 493. 2 *Black.* 336.

2. If a person, in whom a trust is reposed, breaks or doth not perform the same, the remedy is by bill in equity, the common law generally taking no notice of trusts. 2 *Atk.* 612.

And, now, trusts are governed by very nearly the same rules in a court of equity, as would govern the same in a court of law, if no trustee were interposed; and by a regular positive system established in the courts of equity, the doctrine of trusts is now reduced to as great certainty as that of legal estates in the courts of common law. 3 *Black.* 439.

3. By the statute of frauds and perjuries, 29 C. 2. c. 3. All " declarations of trusts of lands shall be in writing, except where " the trust shall arise by construction of law, or be transferred " or extinguished by operation of law. And the sheriff may have " execution of the trust estate, in like manner as if the *cestuy que trust* (that is, he for whose use the trust is created) had himself been seised "

And so far as the statute doth not extend to trusts by construction or operation of law, therefore if a man buys land in another person's name, and pays the money for the land, this will be a trust for him that paid the money, though there be no deed declaring the trust, for the trust in this case arises from construction of law. 2 *Ventr.* 361. 2 *Vern.* 294.

4. In a devise to trustees, it is not necessary the word *heirs* should be inserted to carry the fee at law; for if the purposes of the trust cannot be satisfied without having a fee, the court will so construe it. 1 *Vez.* 491.

5. Where executors are made trustees, they can take nothing for their own benefit, unless it be particularly given to them; for there is a difference between a trustee and an executor. A trustee hath a mere legal right only, but an executor has more; for if there is a surplus, he may have a beneficial interest. 2 *Atk.* 643. 3 *Atk.* 96.

But if there be a direction in the will, that the trustees shall be paid for their *trouble*, this shall be considered as a legacy to the trustees: and herein there can be no inconvenience; because it can carry it no farther than the particular words of the will do direct. 1 *Vez.* 115.

Though there are no negative words in a deed, that the trustees shall not be liable for the acts of one another, yet the court will not make them liable for more than each hath received. 3 *Atk.* 584.

And

And although they all join in a receipt for money, yet the court will make that trustee liable only who received it; for they are all obliged to join in the receipt: but otherwise it is as to executors, for there is no necessity for their joining, but they may act severally if they will. 3 *Atk.* 584.

But if the trustees will bind themselves to be liable for the acts of each other, the court will not relieve them. *Id.*

6. If a trustee compounds a debt with consent of *cestuy que trust*, this is no breach of trust. 21 *Vin.* 525. *Cha. Ca. Finch.* 58.

Therefore where a trustee errs in the management of the trust, yet if he goes out of the trust with the approbation of the *cestuy que trust*, it must be first made good out of the estate of the person who consented to it. 3 *Atk.* 444.

7. In equity, trusts are so regarded that no act of a trustee will prejudice the *cestuy que trust*; for though a purchaser for valuable consideration, without notice, shall not have his title any way impeached, yet the trustee must make good the trust: but if he purchases with notice, then he is the trustee himself, and shall be accountable. *Abr. Caf. Eq.* 384.

A trustee having broken his trust, by delivering up a bond, and taking security to save him harmless, was decreed to pay the money and interest ever since the bond was due. *Cha. Ca. Finch.* 241.

If one deviseth lands to trustees until his debts be paid, with remainder over, and the trustees misapply the profits, they shall hold the land only till they might have paid the debts, if the rents had been duly applied; and after that, the land shall be discharged, and the trustees only are answerable. 1 *P. W.* 519.

In the case of *Whelpdale and Cookson, E.* 1747. on a devise of lands in trust for payment of debts, the trustee himself purchased part. Lord *Hardwicke* said he would not allow it to stand good, although another person, being the best bidder, bought it for him at a public sale; for he knew the dangerous consequence. Nor is it enough for the trustee to say, you cannot prove any fraud, as it is in his own power to conceal it. But if the majority of creditors agreed to allow it, his lordship said, he should not hesitate to make it a precedent. 1 *Vez.* 9.

The trustees of an infant, having saved money out of the estate, purchased lands with it, which lay near to the infant's estate, with the consent of his grandmother, declaring the trust for the benefit of the infant, if he, when of age, should agree to it. The infant died within age. It was decreed that the trustees should account to the executors of the infant for the money, but the profits of the land should be set against the interest. 1 *Vern.* 435.

8. If a trustee lets out money to supposed able men, though they fail, he shall not be charged for more than he received. 12 *Mach.* 509.

9. A breach of trust is considered but a simple contract debt, and can only fall upon the personal estate of the trustee; and the particular circumstances of a case ought not to vary the rule. 2 *Atk.* 119.

10. A *fine* with proclamation and non-claim will bar a trust. 1 *Cba. Ca.* 268.

11. There shall be a tenant by *curtesy* of a trust estate; but of such an estate a widow shall not have *dower*. 1 *P. W.* 109. *Caf. Talb.* 139.

12. A trust is not within the *statute of limitations*. 2 *Atk.* 612.

TUMBREL, is an engine of punishment for correction, chiefly of scolding women. Lord Coke says, it properly signifies a dung cart. *Bracton* writes it *tymborella*. In Domesday, it is called *cathedra stercoris*. It was in use in the Saxon times by whom it was described to be *cathedra in qua rixosa mulieres sedentes aquis demergebantur*; and seems to be no other than what is now called the *ducking stool*. Perhaps it might receive the appellation of *tymborella*, and by corruption *tumbrel*, as also the name of *trebucket*, (as it was sometimes called,) from the stool or bucket being fixed at the end of a *tree* or piece of *timber*, whereby to let down the seat into the water.

It was anciently also a punishment inflicted upon brewers, bakers, and others transgressing the laws; who were thereupon in such a stool immersed in *stercore*, that is in stinking water. By the 51 *Hen. 3. st. 6.* intitled, the Statute of the Pillory and Tumbrel, a baker or brewer, grievously offending against the assize of bread or ale, shall suffer bodily punishment; that is, to wit, a baker to the pillory, and a brewer to the tumbrel, or other castigation (*pislor patiatur collistrigium, braciatrix trebucketum vel castigationem*).

Every lord of a leet or market ought to have a pillory and tumbrel. 3 *Inst.* 219.

TURN. See **TOURN.**

TURNPIKES, in aid of the statute duty, have of late years been introduced in most places; and for the security thereof, it is enacted by the 13 *G. 3. c. 84.* that if any person shall pull down, or otherwise destroy, any turnpike gate, post, chain, bar, or other fence, or any house erected for the use of such gate, he shall be guilty of felony, and transported for seven years.

VACATION,

V A C

VACATION, in the courts of law, is all the time between the end of one term, and the beginning of another. So there is the vacation of an office, the vacation of a benefice, and the like.

VACCARY, a place to keep cows in.

VADIARE DUELLUM, to wage combat, is, where two contending parties, on a challenge, do give and take a mutual pledge of fighting. *Cowel.*

VADIUM, (*vas, vadis,*) a pledge or surety. So *vadium ponere* is to give security, bail, or pledges, for the appearance of a defendant in a court of justice.

VADIUM MORTUUM, a mortgage or dead pledge; which is, where a man borrows money of another, and grants him an estate in fee, on condition that if the money is not repaid, the estate so put in pledge shall continue to the lender as dead and gone from the mortgagor. *2 Black. 157.*

VADIUM VIVUM, a living pledge, is, where a man borrows of another a sum of money, and grants him an estate, to hold until the rents and profits shall repay the sum borrowed. *2 Black. 157.*

VAGRANTS, by *17 G. 2. c. 5.* are described to be of three kinds:

1. *Idle and disorderly persons*: being (1.) such as threaten to run away and leave their wives and children to the parish. Or, (2.) who having been removed by order of two justices, return without a certificate. Or, (3.) who not having wherewith to maintain themselves, refuse to work for the usual and common wages. Or, (4.) who go about from door to door, and beg in the parish where they dwell. All these may be punished by one month's imprisonment in the house of correction.

2. *Rogues and vagabonds*; who are, (1.) persons going about begging, under pretence of loss by fire or other casualty. (2.) Persons going about as collectors for prisoners, goals, or hospitals. (3.) Fencers. (4.) Bearwards. (5.) Common players of interludes, not being licensed thereto. (6.) Minstrels. (7.) Jugglers. (8.) Gypsies, or persons wandering in the habit or form of Egyptians. (9.) Persons pretending to tell fortunes. Or, (10.) using any subtil craft to impose on his majesty's subjects. Or, (11.) playing or betting at any unlawful games. (12.) Persons running away and leaving their wives or children to the parish. (13.) Petty chapmen and pedlars unlicensed. (14.) Per-

(14.) Persons wandering abroad, and lodging in alehouses, barns, outhouses, or in the open air, and not giving a good account of themselves. (15.) Persons wandering and begging, pretending to be soldiers or mariners. (16.) Pretending to go to work in harvest, without a certificate from the minister and churchwardens from whence they came. (17.) All other persons wandering abroad and begging. These may be punished by whipping, and imprisonment in the house of correction not exceeding six months.

3. *Incorrigible rogues*; who are, (1.) persons going about and collecting ends of yarn, thrums, or other refuse of cloth, in prejudice of the woollen manufacture. (2.) Persons apprehended as rogues and vagabonds, and escaping, or refusing to be examined, or knowingly giving a false account of themselves. (3.) Rogues or vagabonds escaping out of the house of correction. (4.) All persons who having been punished as rogues and vagabonds, and discharged, shall again commit any of the said offences. All these may be punished with whipping and imprisonment in the house of correction, not exceeding two years; and if they shall escape or offend again in like manner, they shall be guilty of felony, and transported for seven years.

And if any person shall suffer any rogue, vagabond, or incorrigible rogue, to lodge in his house, outhouse, or other building, and shall not apprehend him and carry him before a justice, or give notice to the constable so to do, he shall forfeit not exceeding 40s. nor less than 10s.; and if any charge shall be brought on the parish by means of such offence, the same shall be answered to the parish by such offender.

VALET, *vadelet*, was anciently a name specially denoting young gentlemen in the service of a person of quality, but afterwards attributed to those of lower rank.

VALUABLE CONSIDERATION, is an equivalent given for a thing purchased. There is a difference between a *good* and a *valuable* consideration. A *good* consideration, is such as that of blood or of natural love and affection, when a man grants an estate to a near relation; but deeds or grants, upon good consideration only are considered in law as merely voluntary, and are frequently set aside in favour of creditors and *bona fide* purchasers. 2 *Black.* 297.

VARIANCE, signifies any alteration of a thing formerly laid in a plea, or where the declaration in a cause differs from the writ, or from the deed upon which it is grounded. If there is a variance between the declaration and the writ, it is error; and the writ shall abate. And if there appear to be a material variance between the matter pleaded, and the manner of pleading it, this is not a good plea; for the manner and matter of pleading ought to agree in substance, otherwise there will be

no

no certainty in it. 2 *Lill. Abr.* 620. But when the pleading is good in substance, a small variation shall not hurt. 3 *Mod.* 227.

VASSAL, originally signified a tenant or holder of the lands generally; but in after-times, it was brought to signify a slave or bondsman: so *vassalage* (*vassaloria*) signifies the state of a vassal, or servitude and dependency on a superior lord. 2 *Black.* 53.

VAVASOR, *valvasor*, was a title next in dignity to a baron; but vavasors are now quite out of use, insomuch, that antiquarians are not agreed even upon their original and ancient office.

VELLUM AND PARCHMENT. By the 24 G. 3. c. 41. every maker of vellum or parchment, shall take out a licence annually from the officers of excise.

VENIRE, (so called from those words in the writ, *venire facias*,) is the common process on an indictment or presentment for any misdemeanor under the degree of treason, felony, or maim; being in the nature of a *summons* to cause the party to appear. And if by the return to such *venire* it appears that the party hath lands in the county, whereby he may be distrained, then a *distrain* infinite, shall be issued from time to time till he appears. But if the sheriff returns that he hath no lands in his bailiwick, then (upon his nonappearance) a writ of *capias* shall issue to take his body. 4 *Black.* 313.

Also when a cause is brought to issue, a writ of *venire* is directed to the sheriff, to summon a jury to appear, at the time and place appointed, to try the cause.

VENTRE INSPICIENDO, is a writ to search a woman that saith she is with child, and thereby withholds lands from the next heir. As if a man, having lands in fee simple, dies, and his widow soon after marries again, and says, she is with child by her former husband; in this case, this writ *de ventre inspiciendo* lies for the heir against her. By which writ the sheriff is commanded, that, in presence of twelve men, and as many women, he cause examination to be made, whether the woman is with child or not; and if with child, then about what time it will be born; and that he certify the same to the justices of assize, or at *Westminster*, under his seal, and under the seals of two of the men present. *Cro. Eliz.* 506.

VENUE, (*visne, vicinetum*,) the *neighbourhood*, from whence juries are to be summoned for trial of causes. In *local* actions, as of trespass and ejectment, the venue is to be from the neighbourhood of the place where the lands in question lie; and in all real actions, the venue must be laid in the county where the thing is for which the action is brought. But in *transitory* actions, for injuries that may have happened any where, as debt, detinue, slander, or the like, the plaintiff may declare in what county

county he pleases; and then the trial must be in that county in which the declaration is laid. Though if the defendant will make affidavit, that the cause of action, if any, arose not in that but in another county, the court will direct a *change of the venue*, and oblige the plaintiff to declare in the proper county. And the court will sometimes remove the venue from the proper jurisdiction, (especially of the narrower and limited kind,) upon a suggestion, duly supported, that a fair and impartial trial cannot be had therein. 3 *Black.* 294.

VERDERER, *viridarius*, is an officer in the king's forest, whose office is properly to look after the *vert*, for food and shelter of the deer. He is also sworn to keep the assizes of the forest, and receive and inroll the attachments and presentments of trespasses within the forest, and certify them to the swainmote or justice-seat.

VERDICT. See **JURORS**.

VERT, Fr. *verd*, *viridis*, in the forest laws, signifies every thing that beareth a green leaf within the forest, that may be covert for the deer. Vert also sometimes is taken for that power which a man hath by the king's grant to cut green wood in the forest.

VESTED legacy. If a legacy be given to one, *to be paid* at a future day, this is a vested legacy, an interest which commences *in presenti*, although it be *solvendum in futuro*: and if the legatee dies before the day of payment, his representatives shall receive it at the same time that it would have become payable in case the legatee had lived. But if the legacy be given to one *when he attains*, or *if he attains* such an age, and he dies before that time, in such case the legacy is lapsed. 2 *Black.* 513.

A *vested remainder*, is where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. As if one be tenant for twenty years, remainder to another in fee; here the remainder is fixed, which nothing can defeat or set aside. But where an estate in remainder is limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event, this is a *contingent* remainder, so as the particular estate may chance to be determined, and the remainder never take effect. 2 *Black.* 168.

VESTRY; is an assembly of the whole parish met together in some convenient place, for the dispatch of the affairs and business of the parish; and this meeting being commonly held in the vestry adjoining to, or belonging to the church, it thence takes the name of vestry, as the place itself doth, from the priest's vestments, which are usually deposited and kept there.

On the *Sunday* before a vestry is to meet, public notice ought to be given, either in the church, or after divine service is ended, or else at the church door as the parishioners come out; both of

the calling of the said meeting, and also the time and place of the assembling of it: and it is reasonable then also to declare for what business the said meeting is to be held, that none may be surprized, but that all may have full time before to consider of what is to be proposed at the said meeting. *Watf. c. 39.*

In every such meeting the minister usually presides, for regulating and directing the business.

Out-dwellers, occupying land in the parish, have a vote in the vestry as well as the inhabitants. *Johns. 19.*

When they are met, the major part present will bind the whole parish. *Watf. c. 39.*

The right of adjourning is not in the minister or any other person as chairman, nor in the churchwardens, but in the whole assembly, who are all upon an equal footing; and the same must be decided, as other matters there, by a majority of votes. *Str. 1045.*

It is convenient that every vestry act be entered in the parish book of accounts; and that every man's hand consenting to it, be set thereto.

The *vestry clerk* is chosen by the vestry; whose business it is, to attend at all parish meetings, and to draw up and copy all orders and other acts of the vestry, and to give out copies thereof when necessary; and therefore he has the custody of all books and papers relating thereto.

By custom there may be a *select vestry*, or a certain number of persons chosen to have the government of the parish, to make rates, and take the churchwardens accounts, and the like. In the city of *London* in particular, there are select vestries in most of the parishes.

VETITUM NAMIUM, (*vetitum*, forbidden, and *namium*, from *naam*, a distress,) signifies properly when the bailiff of the lord distraineth beasts or goods, and the lord *forbiddeth* his bailiff to deliver them when the sheriff comes to replevy them, and to that end to drive them to places unknown, or to take such a course as they should not be replevied: but it is also called *vetitum namium*, a forbidden distress, when without any words they are elaigned, or so handled by a forbidden course, as they cannot be replevied, for then they are forbidden in law to be replevied. 2 *Inst. 140.*

VICAR, *vicarius*, is one that supplies the place of another. On the appropriation of a church to any of the religious houses, the monks generally supplied the cure by one of their own fraternity, and received the revenues of the church to their own use. Afterwards it became established in most of the appropriated churches, that they should be supplied by a secular clerk, and not by a member of their own house; from whence he received the name of *vicarius*, as it were *vicem gerens*, supplying the place

place of the religious society. And for the maintenance of this vicar, was set apart a certain portion of the tithes, commonly about a third part of the whole, which are now what are called the vicarial tithes; the rest being reserved to the use of those houses, which for the like reason are denominated the rectorial tithes. And after these houses were dissolved, and the king was become possessed of that share which had belonged to the religious houses, those possessions were granted by the crown to divers persons, chiefly among the laity, who are therefore now styled *lay impropiators*, the whole rectory belonging to them; that is the whole tithes and other revenues of the church, except what the vicar can claim by endowment or prescription.

VICAR GENERAL, is an officer under the bishop, having cognizance of spiritual matters, as correction of manners, and the like; as the *official principal* hath jurisdiction of temporal matters, as of wills and administrations; and both of these are commonly united under the general name of *chancellor*.

VICINAGE, *common of*: this is, where the inhabitants of two townships, which lie contiguous, have usually intercommoned with one another, the beasts of the one straying mutually into the other's fields without any molestation from either. This is indeed only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits; and therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally into the other's common; but if they escape and stray there of themselves, the law winks at the trespass. 2 *Black.* 34.

VICONTIEL, belonging to the sheriff; as *vicontiel writs* are such as are triable in the county or sheriff's court. So *vicontiel rents* are such as were received by the sheriff, and for which he accounted in the exchequer.

VIDAME, *vice-dominus*, was an ancient officer, in degree next unto a baron.

VIEW, *jury of*. In any action brought in the courts at *Westminster*, where it shall appear to the court, that it is necessary for the jurors to have a view of the place in question, they may order special writs of *disfringos*, or *habeas corpora*, to issue; by which the sheriff shall be commanded to have six or more of the jurors in the panel, who shall be consented to by the parties, or if they cannot agree, by the proper officer or judges of the court, at the place in question, some convenient time before the trial; who shall have the matters in question shewn to them by two persons in the said writs named. And upon the trial, those who have had the view shall be first sworn, or such of them as shall appear, before any drawing, and others shall be drawn to make up the number. 4 *An. c. 16.* 3 *G. 2. c. 25.*

Upon the view, the thing in question shall only be shewn to the jury, but no evidence shall be given on either side. 2 *Lill. Abr.* 656.

VIEW OF FRANKPLEDGE. See FRANKPLEDGE.

VIGIL, *vigilia*, the eve or day next before any solemn feast; because then christians were wont to *watch*, fast, and pray in their churches. *Ken. Par. Ant.* 609.

VI LAICA REMOVENDA, is a writ that lies where a clerk intrudes into an ecclesiastical benefice, and holds the same with strong hand and great power of the laity. By this writ the sheriff is commanded to remove the force, and to arrest and imprison the persons that make resistance, so as to have their bodies before the king at a certain day, to answer the contempt. The writ is returnable into the king's bench, where the offenders shall be fined and punished for the force, and from thence restitution shall be awarded to the party intruded upon. *Watf. c.* 30.

VILI, *villa*, or *vicus*, was anciently a precinct consisting of ten families; upon which account they are sometimes called *tithings*.

VILLEINS, *villani*, were so called, because they lived in *villages*, and were employed in rustic work; whilst the free tenants, who held by knights service, attended their lord to the wars. 1 *Inst.* 116.

Villeins were either villeins *regardant*; that is, annexed to the manor or land; or else they were *in gross*, or at large; that is, annexed to the person of the lord, and transferrable by deed from one owner to another. They could not leave their lord without his permission; but if they ran away, or were purloined from him, might be claimed and recovered by action, like beasts or other chattels. They held indeed small portions of land, by way of sustaining themselves and families; but it was at the mere will of the lord, who might dispossess them whenever he pleased. 2 *Black.* 93.

A villein could acquire no property either in lands or goods; but if he purchased either, the lord might enter upon him, and seize them to his own use. *Id.*

The children of villeins were in the same state of bondage with their parents, whence they were called *nativi*, which gave rise to the female appellation of a villein, who was called a *neise*. In case of a marriage between a freeman and a neise, or a villein and a free woman, the issue followed the condition of the father, being free if he was free, and villein if he was villein. *Id.* 94.

The lord might not kill or maim his villein, but he might beat him with impunity. *Id.*

But partly by manumission or enfranchisement, and partly by the

the indulgence of the lords in permitting their villeins and their children to enjoy their possessions without interruption in a regular course of descent, the common law, of which custom is the life, gave them title to prescribe against their lords; for though, in general, they are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the custom of the manor; and from hence have sprung up many of the copyhold tenures at this day. *Id.* 95.

VILLENOUS JUDGMENT, is that which casts the reproach of villany upon him against whom it is given; and it was an ancient judgment given by the common law in attain, or in cases of conspiracy, whereby the offender lost his *liberam legem*, and became infamous, disabled to be a juror or witness, forfeited his goods and chattels, and his lands during life, and to have those lands wasted, his houses rased, his trees rooted up, and his body committed to prison. But this judgment seems to be now obsolete, there being no instance of it since the reign of *Edward* the third. *Burr. Mansf.* 996. 1027.

VINEGAR. By the 24 G. 3. c. 41. every maker of vinegar for sale, shall take out a licence annually.

And by the 27 G. 3. c. 13. a duty is imposed on all vinegar imported; and also on all vinegar made in *Great Britain*, which is to be under the management of the officers of excise.

VIRGA, a rod or white staff, such as sheriffs, bailiffs, and others, carry as a badge or ensign of their office. *Cowell.*

VIRGATE of land, is said to consist of twenty-four acres; four virgates make a hide, and five hides a knight's fee. *Ken. Gloss.*

VIRGE, tenant by. A species of copyholders, who are said to hold by the virge or rod.

VISCOUNT, *vice-comes*, is a title of nobility, above a baron, and next below an earl. He was originally the earl's deputy in the government of the shire. But in after-times, it became a mere title of honour, without any shadow of office belonging to it. The first instance whereof was, in the 18 *Hen.* 6. when *John Beaumont* was created a peer by the name of viscount *Beaumont*. *1 Black.* 398.

VISITOR, is an inspector of the government of corporations or bodies politic, ecclesiastical or civil. With respect to all ecclesiastical corporations, the ordinary is their visitor, so constituted by the canon law, and from thence derived to us. The pope formerly, and now the king, as supreme ordinary, is the visitor of the archbishop; the archbishop, of the bishops; and the bishops, in their several dioceses, are in ecclesiastical matters the visitors of all deans and chapters, parsons and vicars, and all other spiritual corporations. With respect to all lay corporations, the founder, his heirs or assigns, are the visitors,

whether the foundation be civil or eleemosynary. Eleemosynary corporations are chiefly hospitals, and colleges in the universities; which colleges are lay corporations, although the particular members thereof may be clergymen. 1 *Black.* 482.

VISNE, *vicinetum*, a neighbouring place. See VENU.

VIVARY, a place by land or water, where *living* creatures were kept; and, in law, is most commonly used for a park, warren, or fishery.

VIVUM VADIUM, a living pledge, (in opposition to *mortgage*, or dead pledge,) is when a man borrows a sum of money, and grants an estate to the lender, to hold till the rents and profits shall repay the sum borrowed. In which case, the land or pledge is said to be *living*, and survives to the borrower on discharge of the debt. 2 *Black.* 157.

UMPIRE, is one chosen to decide between the parties; which is usually when the parties in difference submit the matters in dispute to the arbitration of certain persons, and if they cannot agree, or are not ready to deliver their award before such a time, then to the judgment of another as umpire (*imperator*) between them. See ARBITRATION.

UNCORE PRIST, (Fr. *yet is ready*,) is where, after tender and refusal of a debt, and an action brought for the debt, the debtor acknowledges the debt, and pleads the tender; adding, that he has been always ready, *tout temps prist*, and still is ready, *uncore prist*, to discharge it: for a tender by the debtor, and refusal by the creditor, will in all cases discharge the costs, but not the debt itself; though in some particular cases the creditor will totally lose his money. 3 *Black.* 303.

UNCOUTH, Sax. unknown.

UNION of *England* and *Scotland*, was made by the parliaments of both kingdoms in the year 1707, comprized in a number of articles; the principal of which are, that the united kingdom shall be represented by one parliament; that the laws relating to trade, customs, and the excise, shall be the same in both kingdoms; that when *England* raises 2,000,000*l.* by a land tax, *Scotland* shall raise 48,000*l.*: that sixteen peers shall be chosen to represent the peerage of *Scotland* in parliament, and forty-five members to sit in the house of commons; that all peers of *Scotland* shall be peers of *Great Britain*, and rank next after those of the same degree at the time of the union, and shall have all privileges of peers, except sitting in the house of lords, and voting on the trial of a peer.

Union of two churches. By statute 37 *H. 8. c. 21.* an union or consolidation of two churches in one, or of a church and chapel in one, and one of them not being above 6*l.* a year in the king's books, and not distant from the other above one mile, may be made by the assent of the respective ordinaries, patrons, and incumbents,

cumbents. And further provisions are made concerning the same, by the subsequent statutes of 17 C. 2. c. 3. and 4 W. c. 12.

UNIVERSITY. See COLLEGES.

UNLAWFUL ASSEMBLY, is where three or more persons assemble together, with intent mutually to assist each other in the execution of some enterprize of a private nature, with force or violence. If they move forward towards the execution thereof, it is then a *rout*; and if they execute it in deed, it is a *riot*. 1 *Haw.* 155.

VOIR DIRE, *veritatem dicere*, is where the party is examined upon oath, to *make true answer* to such questions as the court shall demand of him: so where it is prayed upon a trial at law, that a witness may be sworn whether he shall get or lose by the matter in controversy, this is called a *voir dire*; and if it appears that the witness is disinterested, his testimony is allowed, otherwise not.

3 *Black.* 332.

VOLUNTARY, as applied to a deed, is where any conveyance is made without a consideration, either of money, marriage, or other valuable thing; which kind of conveyances, in favour of creditors, and *bona fide* purchasers, are frequently set aside. 2 *Black.* 297.

A *voluntary oath*, is where a man takes an oath in an extrajudicial matter, of which the law takes no notice; for no oath incurs the punishment of perjury, unless it is taken in some court of justice having power to administer an oath, or before some magistrate or proper officer invested with a like authority. 4 *Black.* 137.

VOUCHER, (*vocatio*,) is a word of art made of the Latin, *voco*; and is, when the tenant in a *real* action calleth another into the court that is bound to him in warranty; that is, either to defend the right against the demandant, or to yield him other land in value; and extendeth to lands or tenements of an estate of freehold of inheritance, and not to any chattel real, personal, or mixed: for in those cases, the party, if he hath a warranty, shall not vouch, but have his action of covenant, if he hath a deed: or if it be by parol, then an action upon his case, or an action of deceit, as the case shall require. 1 *Inst.* 101.

It is generally used in suffering recoveries called a *single* voucher, where there is but only one voucher; and a *double* voucher, when the vouchee voucheth over; and so a *treble* voucher, or further, as occasion may be. 1 *Inst.* 102.

He that voucheth, is called the *voucher*; and he that is vouch- ed, is called the *vouchee*.

USAGE, differs from *custom* and *prescription*: no man may claim a rent, common, or other inheritance, by usage, though he may by prescription. 6 *Co.* 65. See PRESCRIPTION.

USANCE,

USANCE, is a word among merchants in bills of exchange, and denotes a calendar month; as from *May 20*, to *June 20*: so double usance is two such months.

USE, is a trust and confidence reposed in another who is tenant of the land, that he shall dispose of the land according to the intention of *cestuy que use*, or him to whose use it was granted, and suffer him to take the profits; as if a feoffment was made to *A.* and his heirs, to the use of (or in trust for) *B.* and his heirs; here, at the common law, *A.* the tenant had the legal property and possession of the land; but *B.* (*the cestuy que use*,) was in conscience and equity to have the profits and disposal of it. 2 *Black.* 328.

This notion was first introduced by the ecclesiastics, to evade the statutes of mortmain; by obtaining grants of lands, not to their religious houses directly, but to the *use* of the religious houses. *Id.*

But, however fraudulently introduced, this idea afterwards continued to be often innocently, and sometimes laudably, applied to a number of civil purposes, as it enabled the owner of lands to make various designations of the profits thereof, as prudence, or justice, or family convenience, might require. 2 *Black.* 328, 9.

But this opening the way to frauds, statutes were made from time to time to remedy the several inconveniences; and finally, by the 27 *H. 8. c. 10*, which is commonly called the *statute of uses*, or the *statute for transferring uses into possession*, the *cestuy que use* is considered as the real owner of the estate; whereby it is enacted that, "when any person is seised of lands to the use of another, the person intitled to the use in fee simple, fee tail, for life, or years, or otherwise, shall stand and be seised or possessed of the land, in the like estate as he hath of the use, trust, or confidence;" and thereby the act makes *cestuy que use* complete owner both at law and in equity. 2 *Black.* 332.

And this introduced the present and most usual form of conveyance of a freehold by lease and release, in order to save the trouble of making livery of seisin upon the lands. The *lease* makes the lessor stand seised to the *use* of the lessee, and vests in the lessee the use of the term; and then the statute immediately annexes the possession. And being thus in possession, he is capable of receiving a *release* of the freehold and reversion. 2 *Black.* 339.

And forasmuch as the use now governs the possession, hence in conveyances, it is set down in the *habendum* to whose use the lands are conveyed; as, to the only proper use and behoof of him the said *A. B.* (the purchaser) his heirs and assigns forever.

But copyhold lands are not within this statute of uses; because

cause the transferring of the possession by the sole operation of the statute, without allowance of the lord and agreement of the tenant, would tend to the prejudice of both lord and tenant. *Coke's Copph. f. 54.*

USUFRUCTUARY, is one that has the use, and reaps the profits of a thing.

USURPATION, is the using that which is another's; an interruption or disturbing a man in his right and possession.

An usurpation of a *church benefice* is, when a stranger, that hath no right, presents a clerk, who is thereupon admitted and instituted. In which case, by the common law, the patron lost not only his turn of presenting for that time, but also the absolute and 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, upon a *writ of right of advowson*. But by the 13 *Ed. 1. c. 5.* the patron shall not be driven to the difficulties of a real action upon a *writ of right*, but he shall recover the presentation upon a *possessory* action by *durrein presentment* or *quare impedit*, provided he brings such action within six months after the avoidance: but if he neglected to bring his action within the six months, he was driven about to his writ of right as before. But now finally, by the 7 *An. c. 18.* no usurpation shall displace the estate or interest of the patron, or turn it to a mere right; but the true patron may present upon the next avoidance, as if no such usurpation had happened. 3 *Black. 243.*

There is also an usurpation of *franchises* and *liberties*; which is, when a subject unjustly uses any royal franchises or liberties, which is said to be an usurpation upon the king; who shall have a writ of *quo warranto* against the usurper.

USURY, properly consists in extorting an unreasonable rate for money, beyond what is allowed by statute.

By the 12 *An. c. 26.* no person shall upon any contract, take, directly or indirectly, for loan of any money, wares, merchandize, or other commodities whatsoever, above the value of 5*l.* for the forbearance of 100*l.* for a year; and so in proportion: and all contracts to the contrary shall be void. And persons taking more, shall forfeit treble value of the money, or other things lent. And any scrivener, broker, or solicitor, who shall take for brokage, soliciting, or procuring the loan, above 5*s.* for the loan, or above 12*d.* (above stamp duties) for making or renewing the bond or bill, shall forfeit 20*l.* with costs, and be imprisoned half a year. Which said forfeiture shall be half to the king, and half to the prosecutor.

But if a contract, which carries interest, be made in a foreign country, our courts will direct the payment of interest according
to

to the law of that country in which the contract was made. Thus, *Irisb, American, Turkish, and Indian* interest, have been allowed in our courts, to the amount of even twelve *per cent.* For the moderation or exorbitance of interest depends upon local circumstances; and the refusal to enforce such contracts would put a stop to all foreign trade. 2 *Black.* 463.

UTLAGATUS, a person outlawed. See OUTLAW.

W A G

WAGER OF LAW, *vadiare legem*, is where an action of debt is brought against a man upon a simple contract between the parties, without deed or record; and the defendant swears in court, that he owes the plaintiff nothing in manner and form as he hath declared; and his compurgators swear that they believe what he swears is true. And the reason of waging law is, because the defendant may pay the plaintiff his debt in private, or before witnesses which may be dead, and therefore the law allows him to wage his law in his discharge; and his oath shall be rather accepted to discharge himself, than the law will suffer him to be charged upon the bare allegation of the plaintiff. 2 *Inst.* 45.

It is called *wager* of law, because of ancient time he put in *gages*, pledges or sureties, to make his law at such a day. And it is called *making* of his law, because the law doth give such a special benefit to the defendant to bar the plaintiff for ever in that case. But he ought to bring with him eleven persons of his neighbours, that will avow upon their oath, that in their consciences he saith truth. 1 *Inst.* 295.

The manner of waging law is thus:—He that hath waged or given security to make his law, brings with him into court his eleven compurgators; and, standing towards the end of the bar, the secondary asks him, whether he will wage his law? If he answer that he will, the judges admonish him to be well advised, and tell him the danger of a false oath. If he still persists, the secondary says, and he that wagemeth his law repeats after him; *Hear this, ye justices, that I, A. B. do not owe to C. D. the sum of , nor any part thereof, in manner and form as the said C. D. hath declared against me; So help me God.* And thereupon his compurgators shall make their oaths in manner aforesaid. 3 *Black.* 343.

Wager

Wager of law lieth not where there is any specialty, as a bond or deed, to charge the defendant; but when the debt groweth by word only. A man outlawed, attainted for false verdict, or for conspiracy, or perjury, or otherwise become infamous, shall not be permitted to wage his law. So also where a contempt, trespass, deceit, or any injury with force is alledged against the defendant, he shall not be permitted; for it is impossible to presume he hath satisfied the plaintiff his demand in such cases, where the damages are uncertain, and left to be assessed by a jury. Likewise executors and administrators, when charged for the death of the deceased, shall not be admitted to wage their law; for no man can swear of another man's contract, either that he never made such contract, or that he privately discharged it. *Id.* 345.

At length it being considered that this waging of law offered too great a temptation to perjury, by degrees new remedies were devised, and new forms of action introduced, wherein no defendant is at liberty to wage his law. So that now, instead of an action of debt upon a simple contract, an action of *trespass upon the case* is brought for the *breach of a promise* or *assumpsit*, wherein, though the specific debt cannot be recovered, yet damages may, equivalent to the specific debt; and this being an action of trespass, no law can be waged therein. So instead of an action of *deinure* to recover the very thing detained, an action of *trespass upon the case in trover and conversion* is usually brought; wherein, though the specific thing cannot be had, yet the defendant shall pay damages for the conversion, equal to the value thereof; and for this trespass also no wager of law is allowed. In the place of actions of *account*, a bill in equity is usually filed; wherein, though the defendant answers upon his oath, yet such oath is not conclusive to the plaintiff; but he may prove every article by other evidence, in contradiction to what the defendant hath sworn. So that wager of law is now quite out of use, being avoided by the mode of bringing the action, but still it is not out of force. And therefore when a new statute inflicts a penalty, and gives an action of debt to recover it, it is usual to add, *in which no wager of law shall be allowed.* 3 *Black.* 347.

WAGGONS, WAINS, AND CARTS, are by the 23 G. 3. c. 66. subjected to annual duties; which, by the 25 G. 3. c. 47. are put under the management of the commissioners of the window duties.

WAIFS, are goods stolen and *waived* or thrown away by the thief in his flight, for fear of being apprehended. These are given to the king by the law, as a punishment upon the owner for not himself pursuing the felon, and taking away his goods from him. And therefore, if the party robbed do his diligence immediately to follow and apprehend the thief (which is called making

making fresh suit), or do convict him afterwards, or procure evidence to convict him, he shall have his goods again. 1 *Black.* 296.

Waived goods do also not belong to the king until seized by some person to his use; for if the owner seize them first, though at the distance of twenty years, the king shall never have them. *Id.* 297.

If the goods are hid by the thief, or left any where by him, so that he had them not with him when he fled, and therefore did not throw them away in his flight, they are not waived, but the owner may have them again when he pleases. *Id.*

Waifs have most commonly been granted by the king to the lords of manors respectively.

WAINAGE. The reasonableness of fines or amercements having been regulated by *magna charta*, that no person shall have a larger amercement imposed upon him than his circumstances of personal estate will bear, it is added, "saving to the freeholder his contentment or land; to the trader his merchandise; and to the countryman his *wainage* or team and instruments of husbandry." 4 *Black.* 379. See GAINAGE.

WAKE, is the ancient customary festival annually celebrated on the day of that saint to which the church was dedicated. It received the name of *vigil* or *wake*, from the people resorting to the church on the evening before, and their *waking* and performing their devotions. *Ken. Par. Ant.* 609.

WALES. By the 27 *Hen.* 8. c. 26. and other subsequent statutes, the dominion of *Wales* shall be incorporated with and part of the realm of *England*; and all persons born in *Wales* shall enjoy all liberties and privileges as the subjects in *England* do. And the lands in *Wales* shall be inheritable after the *English* tenure, and not after any *Welsh* laws or customs. And the proceedings in all the law courts shall be in the *English* tongue. A session is also to be held twice a year in every county, by judges appointed by the king, to be called the great sessions of the several counties in *Wales*; in which all pleas of real and personal actions shall be held, with the same form of process, and in as ample manner as in the court of common pleas at *Westminster*; and writs of error shall lie from judgments therein to the court of king's bench at *Westminster*. But the ordinary original writs, or process of the king's courts at *Westminster*, do not run into the principality of *Wales*; though process of execution does, as also do all prerogative writs; as writs of *certiorari*, *quo minus*, *mandamus*, and the like. 3 *Black.* 77.

Murders and felonies in any part of *Wales* may be tried in the next adjoining *English* county; the judges of assize having a concurrent jurisdiction throughout all *Wales* with the justices of the grand sessions. *Str.* 553.

And

And all local matters arising in *Wales* triable in the king's bench, are by the common law to be tried by a jury returned from the next adjoining county in *England*. *Bur. Mansf.* 859.

By the 11 & 12 *W. c.* 9. no sheriff or other officer within the principality of *Wales*, shall upon any process out of the courts at *Westminster*, hold any person to special bail, unless an affidavit be first made in writing, signifying that the cause of action is 20*l.* or upwards.

WAPENTAKE, (Sax. from *weapon*, and *tuc, taflus*,) is all one with what we call a hundred, specially so used in some of the northern counties. The word seems to have had its origin from hence: When first this kingdom, or part thereof, was divided into hundreds, he who was the chief of the hundred, whom we now call the high constable, as soon as he entered upon his office, appeared in the field on a certain day on horseback, with a pike in his hand, and all the chief men of the hundred met him there with their lances, and touched his pike; which was a sign that they were firmly united to each other, by touching of their weapons. *Hoveden. Fleta, b. 3.*

WAR, time of. When the courts of justice are open, so that the king's judges distribute justice to all, and protect men from wrong and violence, it is said by our law to be a time of peace: but when, by invasion, insurrection, rebellion, or the like, the peaceable course of justice is stopped, this is adjudged to be a time of *war*. And this shall be tried by the records and judges, whether justice at such a time had her equal course of proceeding or not. For time of war gives privilege to them that are in war, and all others within the kingdom. So if a man be disseised in time of peace, and a descent is cast in time of war, this shall not take away the entry of the disseisee. 1 *Inst.* 249.

WARDSHIP. When the tenant died, and his heir was under the age of twenty-one, being a male, or fourteen, being a female, the lord was intitled to the wardship of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and fourteen (which was afterwards advanced to sixteen) in females. For the law supposed the heir male unable to perform knight's service till twenty-one; but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service. 2 *Black. 67.*

WARDS AND LIVERIES, court of, was established by the statute 32 *H. 8. c.* 46. to inquire of wardships, liveries, and all the numerous incidents of knights service; from the burden

den whereof the subject was delivered by the statute. 12 C. 2 c. 24.

WARRANT, is a power and charge to a constable or other officer to apprehend a person accused of any crime. It may be issued in extraordinary cases by the privy council, or secretaries of state; but most commonly it is issued by justices of the peace. This they may do in any cases where they have a jurisdiction over the offence, in order to compel the person accused to appear before them; for it would be absurd to give them power to examine an offender, unless they had also a power to compel him to attend and submit to such examination. And this extends to all treasons, felonies, and breaches of the peace; and also to all such offences as they have power to punish by statute. 4 *Black.* 290.

Before the granting of the warrant, it is fitting to examine upon oath the party requiring it, as well to ascertain that there is a felony or other crime actually committed, without which no warrant should be granted; as also to prove the cause and probability of suspecting the party against whom the warrant is prayed. *Id.*

This warrant ought to be under the hand and seal of the justice; should set forth the time and place of making, and the cause for which it is made; and should be directed to the constable, or other peace officer, or it may be to any private person by name. 4 *Black.* 291.

A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion. Also a warrant to apprehend all persons guilty of such a crime, is no legal warrant; for the point upon which its authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be guilty or not guilty. *Id.*

When a warrant is received by the officer, he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. A warrant from any of the justices of the court of king's bench extends over all the kingdom, and is tested or dated *England*: but a warrant of a justice of the peace in one county, must be backed, that is, signed, by a justice of another county, before it can be executed there. And a warrant for apprehending an English or a Scotch offender, may be indorsed in the opposite kingdom, and the offender carried back to that part of the united kingdom in which the offence was committed. 4 *Black.* 291.

WARRANT TO CONFESS JUDGMENT. The course for one to acknowledge a judgment for debt, is for him that doth

doth acknowledge it, to give a general warrant of attorney to any attorney, or to some particular attorney of that court where the judgment is to be acknowledged, to appear for him at his suit, against the party who is to have the judgment acknowledged unto him, and thereupon to confess judgment for the sum demanded, together with costs of suit.

WARRANTY. By the civil law, every man is bound to warrant the thing that he selleth or conveyeth, although there be no express warranty; but the common law bindeth him not, unless there be a warranty either in deed or in law. 1 *Inst.* 102.

Warranty of *lands*, is whereby the grantor doth, by an express clause in the deed, for himself and his heirs, warrant and secure to the grantee the estate so granted: and this the heir is bound to perform, provided that he hath assets by descent. 2 *Black.* 300. 302.

With respect to *goods and chattels*, the purchaser may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose: but with regard to the *goodness* of the wares so purchased, the vendor is not bound to answer, unless he expressly warrants them to be sound and good; or unless he knew them to be otherwise, and hath used any art to disguise them; or unless they turn out to be different from what he represented to the buyer; for in such cases, this artifice shall be equivalent to an express warranty, and the vendor shall be answerable for their goodness. 2 *Black.* 452. 3 *Black.* 169.

In contracts for provisions, there is an *implied warranty*, that they are wholesome; and if they be not, an action on the case lies to recover damages for this deceit. 2 *Black.* 165.

And in all cases, where he that selleth any thing doth upon the sale warrant it to be good, the law annexes a tacit contract to this warranty, that if it be not so, he shall make compensation to the buyer. *Id.*

But such warranty must be upon the sale; for if it be made after, and not at the time of the sale, it is a void warranty; for then the buyer doth not take the goods upon the credit of the vendor. 3 *Black.* 165.

WARREN, is a franchise erected for preservation or *custody* (as the word *warren* properly signifies) of beasts and fowls of warren.

The beasts of warren, are hares, conies, and roes: the fowls of warren, are either field-fowl, as partridges, rails, and quails; or wood-fowl, as pheasants and woodcocks; or water-fowl, as mallards and herons. 1 *Inst.* 233.

These were looked upon as royal game, and the franchise of free warren was invented to protect them, by giving the grantee a sole and exclusive power of killing such game, so far as his

his warren extended, on condition of his preventing other persons. For by the common law, no man, not even a lord of a manor, could justify killing game on another man's soil, or even on his own, unless he had the liberty of free warren. 2 *Black.* 39.

But now this franchise is almost fallen into disrepute, since the modern statutes for preserving the game; the name being now chiefly preserved in grounds that are set apart for breeding hares and conies. *Id.*

A person may have a warren in another man's land; for one may aliene the land, and reserve the franchise: but none can make a warren, and appropriate those creatures that are *feræ naturæ*, without licence from the king, or where a warren is claimed by prescription. *Id.*

WASTE :

1. WASTE, *vastum*, is a spoil or destruction of houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee simple or fee tail. 2 *Black.* 281.

2. Waste is either *voluntary*, which is a crime of *commission*, as by pulling down an house; or *permissive*, which is a matter of *omission* only, as by suffering it to fall for want of necessary reparations. *Id.*

3. Waste may be done in *houses*, by pulling them down, or by suffering the same to be uncovered, whereby the spars, rafters, or other timber of the house, are rotted. 1 *Inst.* 53.

But if the house be uncovered when the tenant cometh in, it is no waste in the tenant to suffer the same to fall down. But though the house be ruinous at the tenant's coming in, yet if he pull it down, it is waste, unless he build it again. *Id.*

Also if glass windows, though glazed by the tenant himself, be broken down, or carried away, it is waste; for the glass is part of the house. And so it is of wainscot, benches, doors, windows, furnaces, and the like, annexed or fixed to the house, either by him in reversion, or by the tenant. *Id.*

4. If waste be done by the enemies of the king, the tenant shall not answer for the waste done by them. The same law it is, if the waste be done by tempest, lightning or the like, the tenant shall not answer for it. 2 *Inst.* 303.

And by the 6 *An. c.* 31. *f.* 6. no action shall be had against any person in whose house or chamber any fire shall accidentally begin; nor any recompence be made by such person for any damage sustained thereby.

But in such cases of accident, the tenant for his habitation may, if he will, build the premises again with such materials as remain, and with other timber which he may take growing on the ground; but he must not make the house larger than it was before. 1 *Inst.* 53.

So if a lessee throws down a wall or partition between one chamber and another, it is waste; for it is not intended for the benefit of the lessor, nor is it in the power of the lessee to transpose the house. 2 *Roll's Abr.* 815.

5. If the tenant of a dove house, warren, park, fishpond, or the like, do take so many of the animals therein, as such sufficient store be not left as he found when he came in, this is waste. 1 *Inst.* 53.

Burning the soil, in order to convert it to tillage, is waste; for thereby the soil is consumed. 22 *Vin.* 441.

6. Waste may be committ'd in timber trees; to wit, oak, ash, and elm, (and these are timber trees in all places,) either by cutting them down, or topping them, or doing any act whereby the timber may decay. Also in countries where timber is scarce, and beeches, or the like, are converted to building, they also are accounted timber. 1 *Inst.* 53.

7. If a house be ruinous at the time of the lease made, if the lessee suffer the house to fall down, he is not punishable for waste; for he is not bound by law to repair the house in that case; but yet if he cut down timber upon the ground so letten, and repair it, he may well justify it; and the reason is, for that the law doth favour the supplantation and maintenance of houses of habitation for mankind. 1 *Inst.* 54.

So if the lessor by his covenant undertakes to repair the house, yet the lessee (if the lessor doth it not) may with the timber growing upon the ground repair it, though he be not compellable thereto. *Id.*

But the tenant cannot sell trees, and with the money cover the house, for the sale is waste. 1 *Inst.* 53.

And if after cutting down the timber, the tenant suffer the young germins to be destroyed by the eating of beasts, it is waste; and although they grow again, yet it is waste: for after such eating, they never will be great trees, but shrubs. 2 *Roll's Abr.* 815.

8. The tenant, unless restrained (which is usual) by particular covenants or exceptions, may take sufficient housebote, hedgebote, firebote and ploughbote, and it is no waste. 1 *Inst.* 53.

But he may not cut off the top boughs, for that will cause the putrefaction of the whole tree. *Cro. Eliz.* 361.

9. Digging for gravel, lime, clay, brick, earth, stone or the like, or for mines of metal, coal, or the like, hidden in the earth, and which were not open when the tenant came in, is waste; but the tenant may dig for gravel or clay for the reparation of the house, as well as he may take convenient timber trees. 1 *Inst.* 53.

10. It is waste to suffer a wall of the sea to be in decay, so

as by the flowing and reflowing of the sea, the ground be surrounded, whereby it becomes unprofitable: but if it be surrounded suddenly by the rage and violence of the sea, occasioned by wind or tempest, without any default in the tenant, this is no waste punishable. So it is, if the tenant repair not the banks or walls against rivers or other waters. 1 *Inft.* 53.

11. All tenants for life, or for any less estate, are punishable or liable to be impeached for waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment of waste; that is, with a provision that no one shall impeach or sue him for waste committed. 2 *Black.* 283.

But tenant in tail after possibility of issue extinct, is not impeachable for waste, because the inheritance was once in him.

12. He who has the remainder for life only, is not intitled to sue for waste, because his interest may never perhaps come into possession, and then he hath suffered no injury. 3 *Black.* 225.

But a parson, vicar, archdeacon, prebendary, and the like, who are seised in right of their churches of any remainder or reversion, may have an action of waste; for they, in many cases, have, for the benefit of the church and of the successor, a fee simple qualified. *Id.*

13. By the statute of 13 *Ed.* 1. c. 22. where two or more hold wood, turf land, or fishing, or other such thing, *in common*, where none knoweth his several, and some of them do waste against the minds of the other, an action shall lie by a writ of waste. And this extends also to *jointenants*. 2 *Inft.* 403.

But it doth not extend to *coparceners*, because they were compellable to make partition by the common law. *Id.*

14. The redress for this injury of waste is of two kinds, *preventive* and *corrective*: the former whereof is by writ of *estrepement*, the latter by writ of *waste*. 3 *Black.* 225.

Estrepement is an old French word, signifying *extirpation*, which is the same as waste. And this writ lay at common law, after judgment obtained in any real action, and before possession was delivered by the sheriff, to stop the vanquished party from committing any waste in the mean time; and by the statute of *Gloucester*, 6 *Ed.* 1. c. 5. it may be had to prevent any waste pending the suit. *Id.*

And by virtue hereof, the sheriff may resist them that do or offer to do waste; and if otherwise he cannot prevent them, he may lawfully imprison the wasters, or make a warrant to others to imprison them: or if necessity require, he may take the power of the county to his assistance. *Id.*

But now the most usual way of preventing waste, is by *injunctio*

junction out of a court of equity, upon a bill exhibited, 3 *Black.* 227.

15. Where a *mortgagor* commits waste, the court will restrain him by injunction, because the whole estate is a security. 3 *Atk.* 210.

So if a *mortgagee* in fee in possession, commits waste by cutting down timber, and the money arising by the sale of the timber is not applied in sinking the interest and principal of his mortgage; the court, on a bill brought by the mortgagor to stay waste, will grant an injunction. 3 *Atk.* 723.

16. Though a person be tenant for life without impeachment of waste, yet the court will grant an injunction to restrain him from cutting down trees in lines, or avenues, or ridges in a park, which are for shelter or ornament: and it is the same thing whether they were planted for that purpose, or grow natural. 3 *Atk.* 215, 216.

17. Also tenant for life without impeachment of waste, shall be obliged to keep tenants houses in repair, unless the charge is excessive, and shall not suffer them to run to ruin. 2 *Atk.* 383.

18. Trustees to preserve contingent remainders, may bring a bill to stay waste in the tenant for life. 3 *Atk.* 95.

19. The court will grant an injunction to stay waste, in favour of an infant *in ventre sa mere*. 2 *Atk.* 117.

20. If a parson or vicar waste the trees of the parsonage or vicarage, the patron may have a prohibition. 2 *Roll's Abr.* 813.

And lord *Coke* says, waste by the incumbent in houses and buildings is a good cause of deprivation. 3 *Inst.* 204.

21. A writ of waste, to punish the offence after it has been committed, is an action partly founded upon the common law, and partly upon the statute of *Gloucester* aforesaid; and may be brought by him that has the immediate estate of inheritance in reversion or remainder, against the tenant for life, tenant in dower, tenant by the curtesy, or tenant for years. 3 *Black.* 227.

This action of waste is a mixed action; partly real, so far as it recovers land; and partly personal, so far as it recovers damages: for it is brought for both those purposes; and if the waste be proved, the plaintiff shall recover the thing or place wasted, and also treble damages by the said statute of *Gloucester*, 6 *Ed. 1. c. 5.*

The writ of waste calls upon the tenant to appear and shew cause why he hath committed waste and destruction in the place named, to the disherison of the plaintiff. And if the defendant makes default, or doth not appear at the day assigned him, then the sheriff is to take with him a jury of twelve men, and go in person to the place alledged to be wasted, and there inquire of the waste done, and the damages; and make a return or report

of the same to the court, upon which report the judgment is founded. 3 *Black.* 228.

But if the defendant appears to the writ, and afterwards suffers judgment to go against him by default, or not putting in an answer, this amounts to a confession of the waste; since, having once appeared, he cannot afterwards pretend ignorance of the charge. In this case, therefore, the sheriff shall not go to the place to inquire of the fact, whether any waste has or has not been committed, for this is already ascertained by the tacit confession of the defendant; but he shall only, as in defaults upon other actions, make inquiry of the *quantum* of damages. 3 *Black.* 228.

When the waste and damages are thus ascertained, either by confession, verdict, or inquiry of the sheriff, judgment is given, in pursuance of the said statute of *Gloucester*, that the plaintiff shall recover the place wasted, for which he shall have a writ of seisin, (provided the particular estate be still subsisting,) and also that the plaintiff shall recover treble the damages assessed by the jury; which he must obtain in the same manner as all other damages, in actions personal and mixed, are obtained, whether the particular estate be expired or still in being. *Id.* 229.

WASTEL BOWL, a large silver cup or bowl, wherein the Saxons at their entertainments drank *beal* (*health*) to one another. In the religious houses this bowl was set at the upper end of the table for the abbot, who began the health, or *paulum charitatis*. Hence fine white bread, or cakes, commonly used therewith, were called *wastel bread*.

WATCH AND WARD. One of the principal duties of both high and petty constables; arises from the statute of *Winchester*, which appoints them to keep watch and ward in their respective jurisdictions. Ward is chiefly intended of the daytime, in order to apprehend rioters and robbers on the highways. Watch is properly applicable to the night only, and begins at the time when ward ends, and ends when ward begins, to apprehend all rogues, vagabonds, and night walkers, and make them give account of themselves. 1 *Black.* 356.

The several hundreds into which the counties are divided, are sometimes called *wards*, as being the districts of the high constables for the aforesaid purposes.

WATER, in legal acceptance, is considered under the notion of land, in respect of the land that lies underneath it; and may be sued for under that name, as so many acres of land covered with water. 2 *Black.* 18.

WATER ORDEAL. The most ancient species of trial was by *ordeal*, which was of two sorts, *fire ordeal* and *water ordeal*. *Fire ordeal* was performed either by taking up in the hand, unhurt, a piece of red-hot iron; or else by walking barefoot and blind-

blindfold over nine red-hot plough-shares. *Water ordeal* was performed, either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt thereby; or by casting the person suspected into a river or pond of cold water, and if he floated, it was deemed an evidence of his guilt, but if he sunk he was acquitted. But this superstition hath been long since abolished by act of parliament. It is easy from hence to trace out the barbarity still remaining in some countries to discover witches, by casting them into a pool of water, and by their sinking to prove their innocence. 4 *Black.* 342.

WAY, considered as a species of incorporeal hereditaments, is the right of going over another man's ground, in which a particular person may have an interest and a right, though another be the owner of the soil. This may be grounded on a special permission; as when the owner of the land grants to another a liberty of passing over his grounds, to go to the church, or market, or the like; in which case, the gift or grant is particular, and confined to the grantee alone, and dies with the person. A way may be also by prescription; as if all the owners and occupiers of such a farm have immemorially used to cross another's ground; for this immemorial usage supposes an original grant. A right of way also may arise by act and operation of law; for if a man grants to another a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives him a way to come at it: for where the law gives any thing to any one, it gives impliedly whatever is necessary for enjoying the same. 2 *Black.* 35.

WEIGHTS AND MEASURES. The standard of *measures* was originally kept at *Winchester*; and we find in the laws of king *Edgar*, near a century before the conquest, an injunction that the one measure which was kept at *Winchester* should be observed throughout the realm. Most nations have regulated the standard of measures of *length* by comparison with the parts of the human body; as the thumb, the palm, the hand, the foot, the cubit, the ell, (*ulna*, or arm,) the pace, and the fathom: but as these are of different dimensions in men of different proportions, our ancient historians inform us, that a new standard of longitudinal measure was ascertained by king *Henry* the first, who commanded that the yard should be made of the exact length of his own arm. And one standard of measures of length being gained, all others are easily derived from thence; those of greater length by multiplying, those of less by subdividing, that original standard. Thus, by the statute called *compositio ulnarum et perticarum*, five yards and an half make a perch; and the yard is subdivided into three feet, and each foot into twelve inches; which inches will be each of length of three grains of barley. *Superficial* measures are derived by squaring those of

length; and measures of capacity by cubing them. 1 *Black.*
274.

The standard of *weights* was originally taken from corns of wheat, whence the lowest denomination of weights that we have is still called a *grain*; thirty-two of which are directed, by the statute called *compositio mensurarum*, to compose a penny-weight, whereof twenty make an ounce, and twelve ounces a pound. *Id.*
275.

And upon these principles the first standards were made, and by a variety of subsequent statutes were directed to be kept in the exchequer, and all weights and measures to be made conformable thereto. But, as Sir *Edward Coke* observes, though this hath so often by authority of parliament been enacted, yet it never could be effected; so forcible is custom with the multitude. For notwithstanding the many statutes which have been enacted, that there shall be but one weight and one measure throughout the realm, there always have been, and still are, two kinds of weights used in *England*, the one by law, and the other by custom; but they are for several sorts of wares or commodities; for there is *troy* weight and *avoirdupois*. *Troy* weight is by law; and thereby are weighed silk, gold, silver, pearl, and precious stones: and this hath to the pound twelve ounces. *Avoirdupois* is by custom, yet confirmed by statute; and thereby are weighed all kinds of grocery wares, drugs, butter, cheese, flesh, wax, pitch, tar, tallow, wool, hemp, flax, iron, steel, lead, and all other commodities which bear the name of *garble*, and whereof issueth a refuse or waste (and also bread, by 31 *G. 2. c. 29.*); and this hath to the pound sixteen ounces; and twelve pounds over are allowed to every hundred. *Dalt. c. 112.*

By statute 8 *Hen. 6. c. 5.* and 11 *Hen. 7. c. 4.* in every market town a common balance shall be kept, with common weights sealed, according to the standard of the exchequer; at which all the inhabitants may weigh without paying any thing; taking nevertheless of foreigners for every draught between 40*lb.* and 100*lb.* an halfpenny; between 100*lb.* and 1000*lb.* a farthing. And the clerk of the market or other proper officer shall seal all measures duly gaged brought unto him, by the standard in his possession; and may take for the same one penny for every bushel; an halfpenny for every half bushel or peck; and a farthing for every gallon, pottle, quart, pint, or half pint.

WEREGILD, was a pecuniary satisfaction paid to the party injured, or to his kindred, to expiate enormous offences. In the Saxon laws, particularly those of king *Athelstan*, we find the several weregilds in the case of homicide established in progressive order, from the death of the corl, or peasant, up to that of the king himself. The weregild of a corl was 266 thrymsas, that of the king 30,000; each thrymsa being equal to about a shilling
of

of our present money. The wergild of a subject was paid intirely to the kindred of the party slain; but that of the king was divided, one half being paid to the public, the other to the royal family. 4 *Black.* 313.

WESE-SAXON LAGE. West-Saxon law, was a code of laws compiled by king *Alfred* from the laws introduced by the Saxons into this kingdom; as the *Danelage* was that introduced by the Danes; and the *Mercenlage* was that which was used in the ancient kingdom of *Mercia*. And these seem partly to have composed what is now known by the name of the common law. 1 *Black.* 65. 4 *Black.* 412.

WHARFAGE, is money paid for landing goods at a wharf, or for shipping and taking goods into a boat or barge from thence.

WHITE RENTS, *redditus albi*, were so called, because they were paid in silver, to distinguish them from rent cummin, rent corn, rent cattle, and the like. 2 *Inst.* 19.

WIDOW'S CHAMBER, is the widow's apparel and furniture of a bed chamber, which, throughout the province of *York*, and in the city of *London*, the widow is intitled to, over and above her distributive share of the personal estate of her husband dying intestate.

WIFE. See **HUSBAND.**

WILL:

1. *Who may make a will.*
2. *Will of lands.*
3. *Will of goods.*
4. *Nuncupative will.*
5. *Revocation of a will.*
6. *Rules concerning the construction of wills.*

1. *Who may make a will.*

It is generally said, that an *infant* male at the age of fourteen years, and a female at the age of twelve years, may make a testament of goods and chattels. And this is by the rule of the civil law, which fixes the age of puberty and consent to marriage at those years. 2 *Black.* 497.

Madmen, idiots, or natural fools, persons grown childish by age or infirmity, and such as have their senses befotted with drunkenness; so persons born deaf and dumb; persons under fear or restraint; or circumvented by fraud; persons outlawed, excommunicate, attainted of treason or felony; are incapable to make a will, so long as such disability continues. So also a married woman, unless by the express consent of her husband.

2. *Will of lands.*

BEFORE the conquest, lands were deviseable by will: but upon the introduction of the military tenures, the restraint of devising lands

lands necessarily took place, as a branch of the feudal doctrine of non-alienation, without the consent of the lord. And therefore, by the common law since the conquest, no estate greater than for term of years, could be disposed of by will; except only in *Kent*, and in some ancient boroughs, and a few particular manors, where the Saxon immunities by special indulgence subsisted. And though the feudal restraint on alienation by deed vanished very early, yet this on wills continued for some centuries after. But when ecclesiastical ingenuity had invented the doctrine of uses, as a thing distinct from the land, uses began to be devised very frequently, and the devisee of the use could in chancery compel its execution. But when the statute of uses, 2 *Hen.* 8. c. 10. had annexed the possession to the use, these uses, being now the very land itself, became no longer deviseable; which might have occasioned a great revolution in the law of devises, had not the statute of wills been made about five years after, viz. 32 *Hen.* 8. c. 1. explained by 34 *Hen.* 8. c. 5. which enacted, that all persons being seized in fee simple (except *femes covert*, infants, idiots, and persons of nonsane memory) might by will in writing devise to any other person two thirds of their lands held in chivalry, and the whole of those held in socage; which now, by turning the tenure in chivalry into free and common socage by the statute 12 *C.* 2. c. 24. amounts to the whole of their landed property, except their copyhold, or other tenements in the nature of copyhold. And to prevent frauds in this private and less solemn way of passing lands, the statute 29 *C.* 2. c. 3. directs, that "all devises of lands shall be in writing and signed by the testator, or some other person in his presence, and by his direction; and attested by three or four credible subscribing witnesses." In the construction of which statute, it hath been adjudged, that the testator's name, written with his own hand, at the beginning of his will, as, "I, *John Stanley*, make this my last will and testament," is a sufficient signing, without any name at the bottom; though the other is the safer way. It has also been determined, that although the witnesses must all see the testator sign, or at least acknowledge the signing, yet they may do it at different times; but they must all subscribe their names as witnesses in his presence, lest by any possibility they should mistake the instrument. Also it hath been determined, that it is not necessary that the testator should declare the instrument he executes to be his will; nor that the witnesses should know the contents; nor that they should attest every page, folio, or sheet; nor that each page, folio, or sheet, should be particularly shewn to them; but it may be material if one of the sheets was not in the room, when the other was executed and attested. 2 *Black.* 373. *Burr. Mansf.* 1775.

By the 25 *G.* 2. c. 6. a *legatee* may be a witness; and in order

to

to take off the bias of interest, the statute makes void all legacies given to witnesses. And by the same statute, *creditors* are admitted to be witnesses, leaving their credit to be considered, on a view of all the circumstances, by the court and jury before whom such will shall be contested.

3. *Will of goods.*

A WRITTEN will of goods and chattels is not altered by the statute; and therefore it is not of necessity to have any subscribing witnesses to it; witnesses subscribing their names being first introduced by that statute. And if a testament of chattels is written in the testator's own hand, though it hath neither his name nor seal to it, nor witnesses present at its publication, it is good in law, provided sufficient proof can be had that it is his hand-writing. And though written in another man's hand, and never signed by the testator, yet if proved to be according to his instructions, and approved by him, it hath been held a good testament of the personal estate. Yet it is the safer and more prudent way, and leaves less in the breast of the ecclesiastical judge, if it be signed and sealed by the testator, and published in the presence of witnesses. 2 *Black.* 502.

4. *Nuncupative Will.*

No nuncupative will shall be good, where the estate bequeathed exceeds 30*l.*, unless proved by three witnesses present at the making thereof, and unless they or some of them were specially required to bear witness thereto by the testator himself; and unless it was made in his last sickness, in his own dwelling house, or where he had been resident ten days at the least, except he be surpris'd with sickness on a journey, or from home, and dies without returning. And it shall not be proved after six months from the making, unless it were put in writing in six days; nor until fourteen days after the death of the testator; nor till process hath issued to call in the widow, or next of kin, to contest it if they think proper. 29 *C. 2. c. 3.*

5. *Revocation of Wills.*

No will of lands shall be revocable, otherwise than by another will or writing declaring the same, signed in the presence of three witnesses; or by obliterating the same by the testator himself, or in his presence and by his direction. And no will of personal estate shall be revocable by any words or will by word of mouth only, except the same be in the life of the testator committed to writing and read to the testator and approved by him, and proved to be so done by three witnesses. 29 *C. 2. c. 3.*

6. *Rules*

6. *Rules concerning the construction of Wills.*

IN construing wills, the intention of the testator ought to prevail, if agreeable to the rules of law.

No particular form is necessary to convey the testator's meaning, but it must be collected from the will itself, by attending to the several parts of it, and comparing and considering them together. *Bur. Mansf.* 770.

Every clause in a will shall be construed so as to take effect according to the testator's intent, if it consists with the rules of law. *1 Atk.* 416.

A court of equity is as much bound by positive rules and general maxims concerning property, as a court of law is. If the intention of the testator be contrary to the rules of law, it can no more take place in a court of equity than in a court of law. *Burr. Mansf.* 1108.

On the other hand, if the intention be not contrary to law, a court of common law is as much bound to construe and effectuate the will according to that intention, as a court of equity can be. *Id.*

If the name of a devisee be mistaken in a will, yet if the person is clearly made out by averment to be the person intended, and there can be no other to whom it may be applied, the devise to him is good. *1 Atk.* 410.

Devise in restraint of marriage ought to be construed strictly against such restraint, and in favour of the person attempted to be restrained; for such conditions are odious, and contrary to found policy. *Burr. Mansf.* 2055.

An executory devise, to take place at a future time, ought not to exceed the compass of a life or lives in being, and twenty-one years after at the furthest. *Burr. Mansf.* 879.

By an ancient maxim of law, although the estate be limited to the ancestor expressly *for life*, and after his death to his heirs, (general or special,) the heir shall take by descent, and the fee shall vest in the ancestor. *Id.* 1106.

But where it is devised to one *for life only* or *for life and not otherwise*, it shews the intention of the testator clearly; and the construction shall be made so as to effectuate that intention. *Id.* 1107.

WILL.:

I. *TENANT at will* is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor; by force of which lease, the lessee is in possession, in this case, the lessee is called tenant at will, because he hath no certain or sure estate; for the lessor may put him out at what time it pleaseth him. *Litt. sect.* 68.

Yet if the lessee sows the land, and the lessor, after it is sown, and before the corn is ripe, put him out, the lessee shall have the corn; and shall have free entry, egress and regress, to cut and carry

carry away the corn; because he knew not at what time the lessor would enter upon him. *Ibid.*

For when the law giveth any thing, it giveth impliedly whatsoever is necessary for the taking and enjoying it. And the law in this case doth not drive him to an action for the corn, but giveth him a speedy remedy to enter into the land, and to take and carry the corn away; and doth not compel him to take it at one time, or to carry it before it be ready to be carried; and therefore the law giveth all that is convenient; to wit, free entry, egress and regress, as much as is necessary. 1 *Inst.* 56.

So if a house be let to one, to hold at will, by force whereof the lessee entereth into the house, and brings his household stuff into the same, and afterwards the lessor puts him out; yet he shall have free entry, egress and regress, into the said house, by reasonable time, to take away his goods and utensils. So if a man seised of an house in fee simple, fee tail, or for life, hath certain goods within the said house, and maketh his executors, and dies; whoever after his decease hath the house, his executors shall have free entry, egress and regress, to carry out of the same house the goods of the testator by reasonable time. *Litt. sect.* 69.

Also, if a man make a deed of feoffment to another, of certain lands, and delivereth to him the deed, but not livery of seisin; in this case, he to whom the deed is made, may enter into the land, and hold and occupy it at the will of him who made the deed; because it is proved by the words of the deed that it is his will that the other should have the land: but he who made the deed may put him out when he pleases. *Litt. sect.* 70.

2. The lessor may, by actual entry into the ground, determine his will in the absence of the lessee; but by words spoken from the ground, the will is not determined, until the lessee hath notice; no more than the discharge of a factor, attorney or such like, in their absence, is sufficient in law, until they have notice thereof. 1 *Inst.* 55.

And it is regularly true, that every lease at will must in law be at the will of both parties; and therefore when the lease is made to have and to hold at the will of the lessor, the law implies it to be at the will of the lessee also; and consequently, the lessee hath the same power to determine the lease at his will as the lessor hath. *Ibid.*

And it seems to be now settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber, taking a distress for rent and impounding it thereon, or making a feoffment, or lease for years, of the land, to commence immediately; or any act of desertion by the lessee, as assigning his estate to another, or committing waste; or the death,

or

or outlawry of either lessor or lessee; puts an end to, or determines, the estate at will. 2 *Black.* 146.

Finally, the courts at law have of late years leaned against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year, so long as both parties please, especially where an annual rent is reserved; in which case, they will not suffer either party to determine the tenancy, even at the end of the year, without reasonable notice to the other. 2 *Black.* 147.

And in *Timmins and Rowlinson, H. 5. G. 3.* it was said by Mr. Justice *Wilnot*, in the country, leases at will being found in the strict legal notion of a lease at will extremely inconvenient, exist only *notionally*; and were succeeded by another species of contract less inconvenient. At first it was indeed settled to be for a year certain, and then the landlord might turn out the tenant at the end of the year. It is now established, that if a tenant takes from year to year, either party must give a *reasonable* notice before the end of the year, though that *reasonable* notice varies according to the custom of different counties. *Burr. Mansf.* 1603.

3. Tenant at will, in like manner as tenant for years, hath incident to, and inseparable from his estate, unless by special agreement, reasonable estovers of housebote, firebote, ploughbote, and haybote. 1 *Inst.* 41.

WINCHESTER MEASURE, a standard of eight gallons originally kept at *Winchester*, according whereunto regulations ought to be made of all measures throughout the kingdom. But so prevalent is custom, that although it has been enacted by divers statutes, that there ought to be only one weight and one measure throughout the realm, yet this could never be effected; but the weights and measures continue different still in different places. 1 *Black.* 274.

WINDOW DUTY. By several statutes a duty is imposed on every dwelling-house inhabited; and also on windows and lights according to the number thereof; and on houses of 5*l.* a year and upwards, according to their value; which are to be under the management of the commissioners of the land tax. For which duties, see *Burn's Justice*, tit. HOUSE.

WINE. By the 26 G. 3. c. 59. every wholesale dealer in foreign wine shall take out a licence annually from the officers of excise.

And by the 30 G. 3. c. 38. every retailer of foreign wine shall also take out a licence annually in like manner.

WIRE. By the 24 G. 3. c. 41. every wire-drawer shall take out a licence annually from the officers of excise.

And by 27 G. 3. c. 13. several duties are imposed on wine imported;

imported; and also on all wire made in *Great Britain*, to be paid by the maker.

WITCHCRAFT. By the 9 G. 2. c. 5. no prosecution shall be commenced or carried on against any person for witchcraft, forcery, inchantment, or conjuration, or for charging another with any such offence. But if any person shall pretend to exercise or use any kind of witchcraft, forcery, inchantment, or conjuration; or undertake to tell fortunes; or pretend, from his skill or knowledge in any occult or crafty science, to discover where, or in what manner, any goods, supposed to have been stolen or lost, may be found; he shall be imprisoned for a year, and once in every quarter of that year stand openly on the pillory for an hour, and further shall be bound to the good behaviour as the court shall award.

WITE, Sax. a punishment or penalty. So *witefree* is an immunity from fines and amercements. *Witeless*, free from censure or blame.

WITHERNAM, (from the Saxon *weder*, which common speech hath turned to *oder*, *other*; and *naam*, a caption or taking, is where a distress is driven out of the County, and the sheriff upon a replevin cannot make deliverance to the party distrained; in this case, the writ of *withernam* is directed to the sheriff for the taking as many of his beasts or goods that did thus unlawfully distrain, into his keeping, till the party make deliverance of the first distress. 2 *Inft.* 140, 1.

WITNESS. See EVIDENCE.

WITNESSMAN, was a man dwelling out of the limits of the forest, summoned to attend the forest courts, as a witness, or to be sworn on an inquest; and it was par of the tenure of several of the mesne lords holding under the lord of the forest, that they should *find unto the foresters witnessman*; that is, compel such their tenants to appear there, and be sworn for the purposes aforesaid.

WITTENA-GEMOT, was a convention or assembly of wise men, to assist the king in their counsel in the nature of our present parliament.

WOOD. If any offender shall wilfully and maliciously, without the consent of the owner, cut down, destroy, break, bark, burn, deface, spoil, or carry away, any wood, or springs of wood, underwood or coppice wood, he shall be imprisoned three months in the house of correction, and be publicly whipped once a month. 6 G. c. 16.

And every person who shall wilfully cut or break down, bark, burn, pluck up, lop, top, crop, deface, damage, spoil, or destroy, or carry away, any timber tree without consent of the owner, shall forfeit not exceeding 20*l.*: and for a second offence, 30*l.* 6 G. 3. c. 48.

WOOD.

WOODGELD, a fine for cutting wood in the forest.

WOODMOTE, is the old name of that court of the forest which is now called the *court of attachments*; for looking after the wood or covert for the deer.

WOOL. By the 28 G. 3. c. 38. wool is prohibited to be exported, on forfeiture of 3*s.* a pound, or 50*l.* in the whole, at the option of the person who shall sue; and the offender shall also suffer solitary imprisonment, for three calendar months, and until the penalty be paid, not exceeding twelve calendar months; and the wool shall be forfeited, and the vessels, carriages, horses, or other beasts, used in conveying the same.

WRECK, of the sea, in legal understanding, is applied to such goods, as, after shipwreck at sea, are by the sea cast upon the land. 2 *Inst.* 167.

By the ancient common law, where any ship was lost at sea, and the goods or cargo were thrown upon the land, these goods, so wrecked, were adjudged to belong to the king; for it was held, that, by the loss of the ship, all property was gone out of the original owner; but the rigour of this hath been mitigated in after times. And by the 3 *Ed.* 1. c. 4. if a man, a dog, or a cat, escape alive, the vessel shall not be adjudged a wreck. Which animals are only put for examples; for it is now held, that not only if any live thing escape, but if proof can be made of the property of any of the goods or lading which come to shore, they shall not be forfeited as wreck. 1 *Black.* 290.

The statute further ordains, that the sheriff shall be bound to keep the goods a year and a day; that if any person can prove a property in them, either in his own right, or by right of representation, they shall be restored to him without delay; but if no such property be proved within that time, they then shall belong to the king, or to him unto whom the king hath granted the same. But if the goods are of a perishable nature, the sheriff may sell them; and the money shall be liable in their stead. *Id.* 292.

In order to constitute a legal wreck, the goods must come to land: if they continue at sea, the law distinguishes them by the appellations of *jetsam*, *flotsam*, and *ligan*. *Jetsam*, is where goods are cast into the sea, and there sink and remain under water: *flotsam*, is where they continue floating on the surface of the water: *ligan*, is where they are sunk in the sea, but tied to a cork or buoy, in order to be found again. These are also the king's, if no owner appears to claim them; but they are so far a distinct thing from the former, that they do not pass in a general grant of wreck. *Id.*

By the 27 *Ed.* 3. if any ship be lost on the shore, and the goods come to land, (which do not come under the denomination

tion of wreck,) they shall be presently delivered to the merchants, paying only a reasonable reward to those that saved and preserved them, which is intitled salvage.

By the 12 *An. st.* 2. c. 18. and 26 *G.* 2. c. 19. all head officers, and others of towns near the sea, shall, on application to them made, summon as many hands as are necessary, and send them to the relief of any ship in distress; and, in case of assistance given, salvage shall be paid by the owners, to be assessed by three neighbouring justices. And if any person shall plunder, steal, or destroy, any goods belonging to a ship in distress, (whether they be wrecked or not,) or any tackle, provision, or part of such ship; or shall beat or wound, or otherwise wilfully obstruct the escape of any person endeavouring to save his life from such ship, or the wreck thereof; or shall put out any false light with intent to bring any vessel into danger; or shall make any hole in any such ship in distress; or steal any pump belonging thereto; or wilfully do any thing tending to the immediate loss of such ship; he shall be guilty of felony without benefit of clergy. Provided, that when goods of small value shall be stranded or cast on shore, and stolen without circumstances of cruelty, outrage, or violence, the offenders may be prosecuted for petit larceny only.

WRIT:

A WRIT is the king's precept in writing under seal, issuing out of some court, to the sheriff or other person; and commanding something to be done, touching a suit or action, or giving commission to have it done. *T. L.*

Writs, in civil actions, are either *original* or *judicial*. *Original* writs are issued out of the court of chancery, for the summoning a defendant to appear, and are granted before the suit is begun, in order to begin the same; and *judicial* writs issue out of the court where the original is returned after the suit is begun.

WRIT OF ERROR:

A WRIT of error lies for some supposed mistake in the proceedings of a court of record; for, to amend errors in an inferior court, not of record, a writ of false judgment lies. 3 *Black.* 405.

The writ of error only lies upon matter of *law*, arising upon the face of the proceedings; so that no evidence is required to substantiate or support it: the method of reversing an error in the determination of *facts*, is commonly by a new trial, to correct the mistakes of the former verdict. *Id.*

He that brings the writ of error, must in most cases find substantial pledges of prosecution, to prevent delays by frivolous pretences, and for securing payment of costs and damages, if the determination shall go against him. *Id.* 410.

WRIT

WRIT OF INQUIRY :

A WRIT of inquiry of damages, is a judicial writ, that issues out to the sheriff, commanding him to summon a jury, to inquire what damages the plaintiff hath sustained ; and when this is returned with the inquisition, judgment is thereupon entered. 2 *Lill. Abr.* 721.

This writ lies on a judgment by default, in an action of the case, covenant, trespass, trover, or the like, or on a demurrer ; but not on a verdict ; for, in that case, the quantum shall be determined by the verdict. *Id.*

It is executed before the sheriff or his deputy (after due notice to the defendant) ; at the execution whereof, both parties have liberty to be heard before the sheriff, by their counsel or attorneys, and evidence may be given on both sides. *Id.*

If the plaintiff gives no evidence before the jury, yet they must find *some* damages, because the defendant hath confessed the action, and consequently hath admitted that there is damage. *Id.*

WRIT OF RIGHT OF ADVOWSON, was so called from the special words in the writ, requiring the party to *do right concerning the advowson*. By this, the inheritance of the advowson might have been recovered against an usurper ; but the incumbent could not be removed for that turn. But afterwards it was provided, that if the true patron brought a possessory action of *darrein presentment*, or *quare impedit* within six months after the avoidance, he should recover the intire presentation.

Y E A

YARDLAND, *virgata terra*, is a quantity of land consisting (according to some) of twenty four acres, whereof four yardlands make an hide, and five hides a knight's fee.

YEAR. By the statute 24 G. 2. c. 23. the year shall begin on the first day of *January*, and not as heretofore on the twenty-fifth of *March*.

And in legal proceedings, the year must be computed according to the calendar, and not according to twenty-eight days to the month. 2 *Inst.* 320.

So a legacy payable within so many months, shall be understood to signify calendar months. 3 *Atk.* 346.

YEAR AND DAY, is a time that determines a right, or works a prescription in many cases by law ; as in case of an estrey,

tray, if the owner challenge it not within that time, it belongs to the lord ; so in like manner a wreck ; so if a man be wounded or poisoned, and dieth thereof within a year and a day, it is murder. 1 *Inst.* 254.

YEAR, DAY, AND WASTE, is a part of the king's prerogative, whereby he hath the profits of lands and tenements for a year and a day, of those that are attainted of petit treason or felony, whosoever is lord of the manor whereto the lands or tenements do belong ; and the king may cause waste to be made on the tenements, by destroying the houses, ploughing up the pastures and meadows, and rooting up the woods, except the lord of the fee agree with him for the redemption of such waste, afterwards restoring it to the lord of the fee. *Stamf. Pr.* 44.

YEARS (estate for) :

1. **TENANT** for term of years, is where a man letteth lands or tenements to another, for a certain term of years agreed upon between the lessor and the lessee ; and when the lessee entereth by force of the lease, then is he tenant for term of years. *Litt. sect.* 58.

If tenements be let to a man for term of half a year, or for a quarter of a year, or any less time ; this lessee is respected as a tenant for years, and is styled so in some legal proceedings : a year being the shortest term which the law in this case takes notice of. *Litt. sect.* 67. 2 *Black.* 140.

2. Generally, every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years ; and therefore this estate is frequently called a *term* ; because its duration or continuance is bounded, limited and determined. 2 *Black.* 143.

For every such estate must have a certain beginning, and certain end. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery of the lease. A lease for so many years as such an one shall live, is void from the beginning ; for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease. *Ibid.*

And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of such a church, for this is still more uncertain. But a lease for twenty or more years, if the parson shall so long live, or if he shall so long continue parson, is good ; for there is a certain period fixed, beyond which it cannot last, though it may determine sooner, on the parson's death, or his ceasing to be parson there. 2 *Black.* 143.

3. An estate for years, though never so many, is inferior to an estate for life. For an estate for life, though it be only for the life of another person, is a freehold ; but an estate, though

it be for a thousand years, is only a chattel, and reckoned part of the personal estate. *Ibid.*

Hence it follows, that a lease for years may be made to commence *in futuro*, though a lease for life cannot. As if I grant lands to one from *Michaelmas* next for twenty years, this is good; but to hold from *Michaelmas* next for the term of his natural life, is void. *Ibid.*

For no estate of freehold can commence *in futuro*, because it cannot be created at common law without livery of seisin, or corporal possession of the land; and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter. And because no livery of seisin is necessary for a lease for years, such lessee is not said to be *seised*, or to have true legal seisin of the lands. Nor indeed doth the bare lease vest any estate in the lessee, but only gives him a right of entry on the tenement, which right is called his *interest in the term*: but when he hath actually entered, and thereby accepted the grant, the estate is then, and not before, vested in him; and he is *possessed*, not properly of the land, but of the term of years, the possession or seisin of the land remaining still in him who has the freehold. 2 *Black.* 144.

4. Tenant for term of years hath incident to, and inseparable from his estate, unless by special agreement, the same estovers that tenant for life is intitled to; namely, housebote, firebote, ploughbote, and haybote. 1 *Inst.* 41.

5. With regard to emblements, or profits of lands sowed by tenant for years, there is this difference between him and tenant for life; that where the term of tenant for years depends upon a certainty, as if he holds from *Midsummer* for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before *Midsummer*, which is the end of his term, the landlord shall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he never could reap the profits of. 2 *Black.* 144.

But where the lease for years depends upon an uncertainty; as upon the death of the lessor, being himself only tenant for life, or being a husband seised in right of his wife; or if the term of years be determinable upon a life or lives: in all these cases, the estate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant, or his executors, shall have the corn, in the same manner that a tenant for life or his executors shall be intitled thereto. 2 *Black.* 145.

But he shall not have the grass, or other fruits, if they are not severed, because they are parcel of the inheritance.

6. A lease for *life* is not saleable by the sheriff upon execution for debt; but he may extend the yearly profits to pay the debt. But he may sell a term for *years* for debt, by writ of execution

execution upon a judgment in the life-time of the owner, or when it is in the hands of executors or administrators.

YEOMAN, is a *Saxon* word, *geman*, (the *g* being turned into *y*, as in many like cases,) and signifies *land-man*; and is defined to be one that hath free land of 40*s.* a year; who was thereby heretofore qualified to serve on juries, and can yet vote for knights of the shire, and do any other act where the law requires one that is *probus et legalis homo*. Below yeomen are ranked tradesmen, artificers, and labourers. 2 *Inst.* 668.

YORK, YORKSHIRE :

1. IN the county of *York*, only one panel of forty-eight jurors shall be returned to serve on the grand jury at the assizes; and at the quarter sessions not above forty, either upon the grand jury or other service there, 7 & 8 *W. c.* 32. And no person, having 150*l.* a year, shall be summoned to the sessions, but only persons less able to be at the expence of attending at the assizes.

1 *An. st.* 2. c. 13.

2. In order to render it more easy to borrow money upon land security, within the several ridings in the said county, there are several acts of parliament directing memorials of all deeds and wills of lands to be registered within the said ridings respectively: viz. 2 & 3 *An. c.* 4. 5 *An. c.* 18. 6 *An. c.* 35. 8 *G.* 2. c. 6.

3. By the 4 *W. c.* 2. the inhabitants of the province of *York* have power to dispose of their whole personal estate by will; which before they had not, further than the testator's own proportionable part, called the *dead man's*, or *death's part*. For if the testator had a wife, and a child or children, the wife should have one third, the child or children another third, and the remaining third was all that the testator had to dispose of. If he had a wife and no child, then she should have one moiety, and the other moiety remained to him to dispose of by his testament: so if he left a child or children, and no wife. But if he had neither wife nor child, then he might dispose of the whole. In case of intestacy, the same proportions continue to the wife and children to this day; but the deadman's part shall be distributed according to the statute of distribution, 22 & 23 *C.* 2. c. 10.

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