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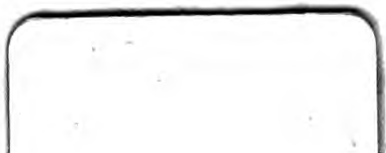


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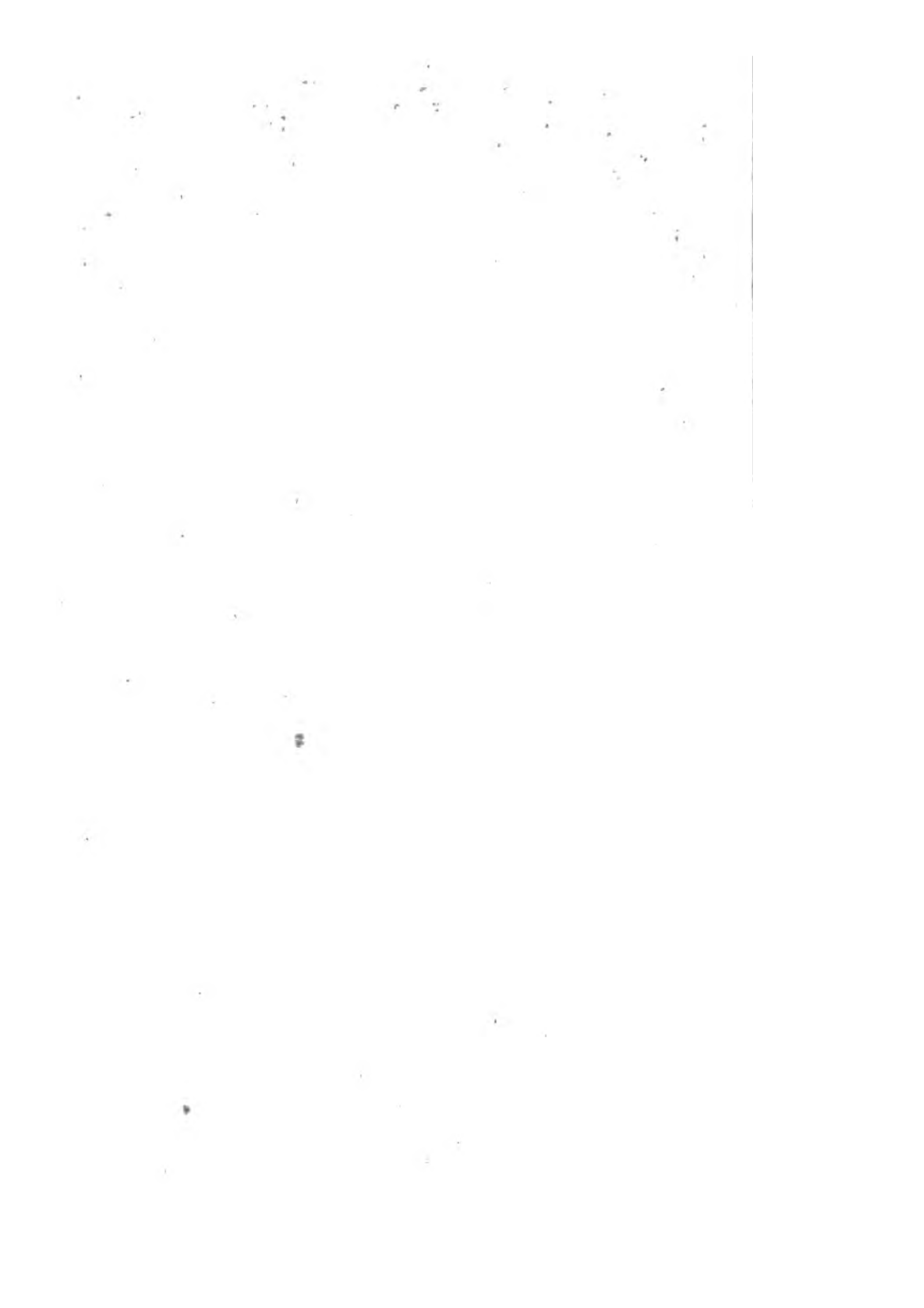
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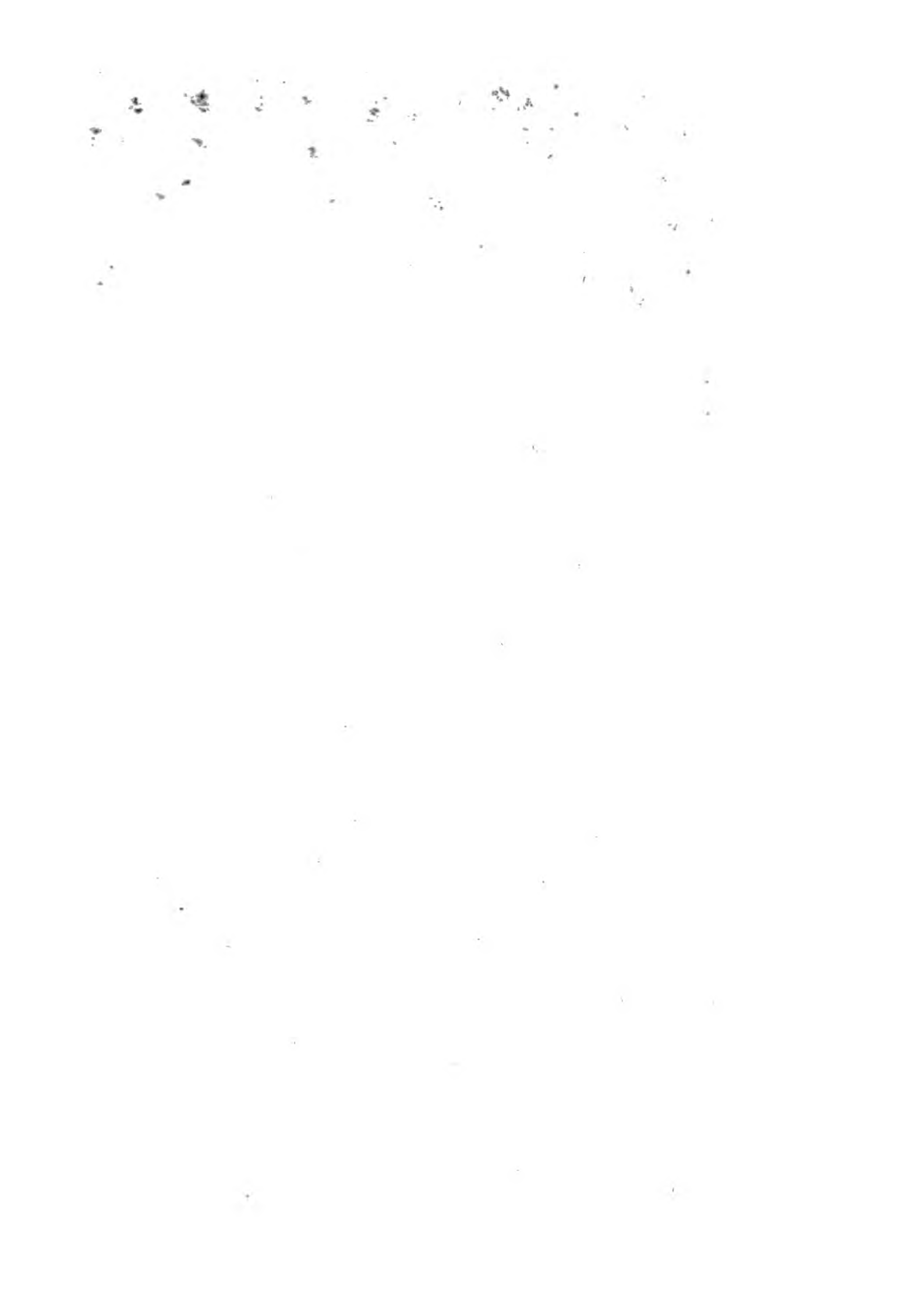
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A

**LAW GRAMMAR;**

OR, AN

**INTRODUCTION**

TO THE

**Theory and Practice of English Jurisprudence.**



1870

Dear Mother  
I received your letter of the 10th and was  
glad to hear from you. I am well and  
hope these few lines will find you the same.  
I have not much news to write at present.  
The weather here is very pleasant now.  
I have been thinking of writing you for some  
time but have been so busy that I could not  
find time. I have been very busy with my  
studies and with the household. I have  
not much news to write at present.  
I have been thinking of writing you for some  
time but have been so busy that I could not  
find time. I have been very busy with my  
studies and with the household.

Yours affectionately

John Doe

I have not much news to write at present.  
I have been thinking of writing you for some  
time but have been so busy that I could not  
find time. I have been very busy with my  
studies and with the household.

A  
LAW GRAMMAR;  
OR, AN  
INTRODUCTION  
TO THE  
THEORY AND PRACTICE  
OF  
ENGLISH JURISPRUDENCE.

CONTAINING  
RUDIMENTS AND ILLUSTRATIONS

OF

- |                        |                            |
|------------------------|----------------------------|
| 1. THE LAWS OF NATURE, | 14. THE FOREST LAW,        |
| 2. THE LAW OF GOD,     | 15. THE GAME LAW,          |
| 3. THE LAW OF NATIONS, | 16. THE STATUTE LAW,       |
| 4. THE LAW POLITIC,    | 17. THE MUNICIPAL LAW,     |
| 5. THE CIVIL LAW,      | 18. THE RIGHTS OF PERSONS, |
| 6. THE COMMON LAW,     | 19. THE RIGHTS OF THINGS,  |
| 7. THE LAW OF REASON,  | 20. CIVIL INJURIES,        |
| 8. GENERAL CUSTOMS,    | 21. MODES OF REDRESS,      |
| 9. ESTABLISHED MAXIMS, | 22. CRIMES & MISDEMEANORS, |
| 10. THE ROMAN CODE,    | 23. MODES OF PUNISHMENT,   |
| 11. THE CANON LAW,     | 24. THE COURTS OF JUSTICE, |
| 12. THE MARINE LAW,    | 25. THE VOCABULA ARTIS,    |
| 13. THE MILITARY LAW,  | 26. A GENERAL INDEX.       |

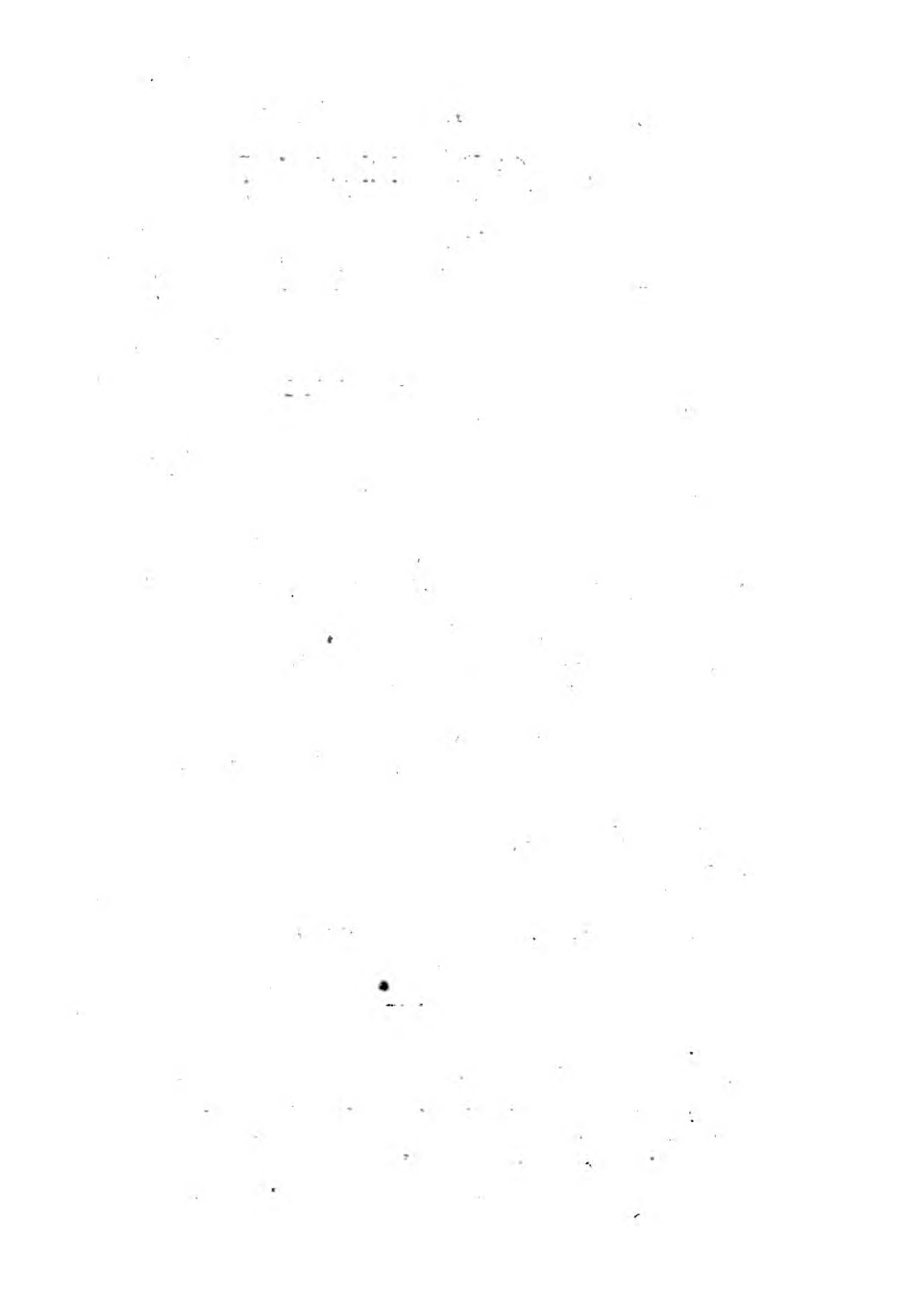


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L O N D O N :

PRINTED FOR G. G. J. AND J. ROBINSON, PATER-NOSTER-ROW;  
T. WHIELDON, FLEET-STREET; W. CLARKE, PORTUGAL-  
STREET; AND OGILVY AND SPEARE, HOLBORN.

M D C C X C I.



A  
LAW GRAMMAR;  
OR, AN  
INTRODUCTION  
TO THE  
THEORY AND PRACTICE  
OF  
ENGLISH JURISPRUDENCE.

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CHAPTER THE FIRST.

INTRODUCTION.

**T**HE Laws of England, like those of every other civilized community, are established upon the *primitive relations* which subsisted among mankind in a state of nature, independent of human institutions.

The general foundation of the system from which these primitive relations arise, is the nature of MAN considered under three several circumstances of his existence. **FIRST**, With respect to God, as the creature of an all-wise, all-powerful, and beneficent

Burlamaqui,  
I. vol. 37. 158.

B cent

## I N T R O D U C T I O N .

cent Creator, from whom he has received his life, his reason, his liberty, and every other advantage which he enjoys. **SECONDLY**, With respect to himself, as a being composed of an organized body and a rational soul, endowed with many different faculties, prone to self-love, and necessarily desiring his own felicity. **THIRDLY**, With respect to society, as forming part of the species, and placed on earth near several other beings of a similar nature, with whom he is not only inclined, but obliged, by the condition of his nature, to live in continual intercourse. These three modes of existence embrace all the particular relations of man; and impose upon his conduct, through every part of life, three great and essential duties, towards his God, himself, and his fellow-creatures.

But human institutions modify the precepts of nature, and introduce *secondary relations* among mankind. These new relations arise from viewing the whole race of mankind, as divided into many separate states, commonwealths, and nations, and considering them with respect to each other; or from viewing the aggregate body of individuals of which each community is composed, and considering them with respect to the governors and the governed.

To form, therefore, a just idea of *the Rudiments of THE MUNICIPAL LAW of England*, it will be previously necessary to consider, in a summary manner, the several kind of *relations* which accompany the establishment of Civil Societies in general; which we shall endeavour to do by giving *particular definitions* of the respective laws to which these relations have given birth.

## CHAPTER

CHAPTER THE SECOND.

*Definitions of Particular Laws.*

FROM what has been already observed of the nature of man, and his connections with society, it appears that all LAW is either *natural* or *instituted*; and that the power or authority which gives it sanction, and may be called its efficient cause, is either the voice of God through natural reason, or the voluntary and arbitrary pleasure of some being or beings properly authorized for this purpose. But this will appear more distinctly from the following definitions of

Taylor's El. of  
C. L. 99.  
Selden on For.  
c. 17.

1. *The Law of Nature in general.*
2. *The Law of Human Nature.*
3. *The Law of Religion.*
4. *The Law of Nations.*
5. *The Political Law of Societies.*
6. *The Civil Law of Societies.*

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§. 1. *Of the General Law of Nature.*

LAWS, in their most general signification, are the necessary relations arising from the nature of things; and in this sense all beings have their laws, the Deity his laws, the material world its laws, the intelligences superior to man (a) their laws, the beasts their laws, and man his laws.

Montesq. Sp.  
of Laws, b. 1.  
c. 1.

(a) Cicero de  
Nat. Deo. l. 2.

The existence of a God, that is of a first, intelligent, and self-created being, on whom all things depend, as on their first cause, and who depends himself on no one, is one of those truths which shew themselves to us at the first glance, by the many evident and sensible proofs which surround us on every side. We behold an infinite number of objects which form all together the assemblage we call the Universe: something, therefore, must have always existed; for were we to suppose a time in which

Cumberland's Law of Nat. 54.  
Cumb. Prom. 129.  
Mont. S. of L. 3.  
Cumb. Essays. Burlam. 128.

there was absolutely nothing, it is evident that nothing could have ever existed; because whatsoever has a beginning, must have a cause of its existence, since nothing can produce nothing. The chain therefore and subordination of causes among themselves, which necessarily admits a first cause; the admirable structure, order, beauty, and regularity of the universe, which could not proceed from a blind fatality; and the existence of intelligent beings, which neither chance nor motion could ever have produced; are all so many demonstrations, that there must always have existed a Father of spiritual beings, an Eternal Mind, the Source from whence all other beings derive their existence.

Paley's Philosophy, 1. vol. p. 66.

Montesq. Sp. of Laws, 3.

As soon as we have acknowledged a Creator, it becomes evident that he must have a supreme right to prescribe such rules as he pleases for the government of the universe he created; for having given existence to all things by his own will, he may likewise, at his pleasure, preserve, annihilate, or change them. But as the scheme of creation was conceived by his *wisdom*, and executed by his *power*, so also is it preserved by his *goodness*: for being related to the universe as Creator, the rules by which he created all things are those by which he preserves them; he acts according to these rules, because he made them; and he made them because they are relative to his wisdom, his goodness, and his power.

These rules will be found in the fixed and invariable relations which subsist reciprocally among all parts of the universal system.

See the Introduction to Blackstone's Commentaries, 38, 39.

In bodies moved, the motion is received, increased, diminished, or lost, according to the relations of the quantity of matter and velocity which each of them possess; for when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter from which it can never depart, and without which it would cease to be; and when he put that matter into motion, he established certain laws of motion to which all moveable bodies must conform.

Vegetable

Vegetable and animal life are governed by laws more numerous indeed than those of motion, but equally fixed and invariable. The whole progress of plants, from the seed to the root; and from thence to the seed again; the method of animal nutrition, digestion, secretion, and all other branches of vital œconomy; are not left to chance, or the will of the creature itself, but are performed in a wonderful manner, and guided by unerring rules laid down by the Great Creator.

In those beings who have neither the power *to think* nor *to will*, these rules must be invariably obeyed so long as the being itself subsists, for its existence depends on that obedience: and these general rules thus dictated by the Superior Being, and collected from the facts which these relations produce, are denominated **THE GENERAL LAWS OF NATURE**,

§. 2. *Of the Laws of Human Nature.*

MAN, considered as a *physical or mechanical being*, Montesq. Sp. of Laws, 4. is, like other bodies, under the guidance and dominion of the general laws of nature; but he is also a free and *intelligent being*, necessarily endued, from his situation in the chain of created things, with both power *to think*, and liberty *to will*.

Subject, however, from the finite nature of his constitution, to ignorance and error, the Creator, in his infinite goodness, has established certain immutable rules of human action or conduct, founded on those relations of justice that existed in the nature of things antecedent to any positive precept, in which are contained the moral duties he indispensably requires from his creature MAN\*, in the general regulation of his behaviour (a); and on the practice of which all his happiness depends (b). These are the

Cumberland's Law of Nat. 1. Comm. 41.

(a) Burlamaq. 225.

(b) Puffendorf, 8.

\* Such, among others, are these principles; "that we should live honestly, should hurt no body, and render to every one his due;" to which three general precepts JUSTINIAN has re-

duced the whole doctrine of the law: *Juris præcepta sunt hæc, honestè vivere, alterum non ledere, suam cuique tribuere.* Just. Inst. Harris's edit. p. 6. 1. Com. 40.

Cumb. Intro. 16, 23, 30. 1. Burlamaq. 145.



(c) Taylor's  
Elem. of Civil  
Law, 99, 105.  
1. Burl. 156.  
Grotius, 10.  
(d) Cumb. L.  
of N. 94.  
Tay. El. C. L.  
105.

eternal laws of good and evil, to which the Creator himself, in all his dispensations, conforms; and which he has enabled human reason to discover, so far at least as they are necessary for human actions (c), by enduing the human mind with the faculty of seeing, comparing, examining, judging, and pronouncing (d) the moral deformity or moral necessity that there is in any act, according to its suitableness or unsuitableness to a reasonable nature.

The dictates therefore of *Right Reason*, exercised in such a manner as God who communicated it intended it should be employed, are called, **THE LAWS OF HUMAN NATURE** \*.

\* These laws are also defined to be certain propositions of unchangeable truth, which direct our voluntary actions, without choosing good or refusing evil, and impose an obligation to external actions, even without civil laws. Cumberland's Laws of Nature, 39.

### §. 3. *Of the Laws of Religion.*

Burlamaqui,  
1. vol. p. 160.

SINCE the exercise of Right Reason brings us acquainted with God as a self-existent being, and sovereign lord of all things, and in particular as our Creator, Preserver, and Benefactor, it follows, that we ought to acknowledge his absolute perfection, and our own dependance. This acknowledgment, by a natural consequence, inspires the mind with sentiments of respect, love, fear, and admiration for the divine excellencies of our Maker, and with an entire submission to his will, and teaches us to honour, love, adore, and obey him. Love and gratitude cannot be refused to a Being supremely beneficent; the fear of offending him is a natural effect of the idea we entertain of his justice and power; and obedience cannot but follow from the knowledge of his legitimate authority over us, and of his wisdom and bounty in conducting us by the road the most agreeable to our nature and happiness. The assemblage of these sentiments, deeply engraven in the heart, is called—**PIETY**.

A mind penetrated with pious sentiments, will naturally find itself disposed to speak and act in the manner

manner which reason points out as more conformable to the divine will and perfections; and the rules of conduct which reason and piety suggest, constitute the first principles of the doctrines of—  
MORALITY.

But beside this manner of honouring God by following the precepts of morality, a good mind will consider it a pleasure and a duty, not only to strengthen in itself these sentiments, but to excite them in others. Hence external worship, as well public as private, is derived; and the duties pointed out by the performance of this worship, which attaches man to God, and to the observance of his laws, by those sentiments of respect, love, submission, and fear, which the perfections of a Supreme Being, and our entire dependance on him as an all-wise and all-bountiful Creator, are apt to excite in the human mind, constitute what we distinguish by the name of—NATURAL RELIGION.

And if human reason were clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, MAN would require no other guide to discover what the Law of Nature directs in every circumstance of life. But the seductions of interest and mistaken self-love, the prejudices of infancy, the errors of education, and the evil habits of life, obscure the clearest dictates of *Right Reason*; and by the suggestions of sense he is hourly hurried away from his moral duty by a thousand impetuous passions, and is incessantly transgressing the laws established to promote his real happiness. Puffendorf, 6. Montef. Sp. of L. 5.

Such a being is every instant in danger of totally forgetting the precepts of his Creator. The Divine Providence therefore, in compassion to the frailty, the imperfections, and the blindness of human reason, hath been pleased at sundry times, and in divers manners, to remind him of his duty by the laws of religion, and to discover and enforce its precepts by an immediate and direct revelation. The doctrines thus delivered, which are to be found only in the holy scriptures, are called THE LAWS OF REVEALED

RELIGION, and appear on comparison to be really a part of the original Law of Nature.

Upon these two foundations, the Law of Nature and the Law of Revelation, depend all human laws; for being coeval with mankind, and dictated by God himself, they are of course superior in obligation to any other, and are binding all over the globe, in all countries and all times: no human laws, therefore, are of any validity if contrary to these; and such of them as are valid, derive all their force and all their authority, mediately or immediately, from this original.

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§. 4. *Of the Law of Nations.*

Moevii Prodro. IN defining the Laws of *Nature* and *Religion*, we  
 l. 1. c. 3. have considered mankind in their individual and na-  
 Fulb. L. of tural capacities, as unconnected with any other con-  
 Nat. 7. dition of society than that which results from a state  
 Tayl. El. 129. merely gregarious.

Hobbes de In this situation, however, human nature cannot  
 Cive, c. 14. long subsist. Mankind, from a sense of their own  
 § 4. weakness, soon perceive that their mutual depend-  
 Eden's Prin. of ence upon each other is necessary to their mutual  
 Penal Laws, 3. preservation. The consciousness of this necessity,  
 conjoined to the natural fondness of the species for  
 society, becomes an instinctive principle of union,  
 and induces them to quit the unlimited but preca-  
 rious enjoyments of individuals, for the greater  
 security and more permanent advantages which  
 REASON points out as capable of being derived from  
 the formation of a collective body, and the establish-  
 ment of society.

Montesq. Sp. When society is once formed, government results  
 of Laws, 7. of course; rules of conduct and covenants are then  
 Eden, 1. introduced; and the moral duties of benevolence,  
 justice, and adherence to compacts, become as evi-  
 dent to the human understanding, as they are essen-  
 tial to human happiness.

Puffendorf, But as it is impossible for the whole race of man-  
 bk. 7. c. 1 kind to be united in one great society, they must  
 Ff. 1. 1. 9. necess-  
 1. Bl. Com.

necessarily divide into many; and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. As none of these states, however, will acknowledge a superiority in the other, the law by which this intercourse is to be regulated, cannot be dictated by either.

THE LAW OF NATIONS, therefore, is a system 4. Bl. Com. 66, 67. of rules deducible by natural reason from the principles of natural justice, and established by universal consent among the civilized inhabitants (*a*) of the world, in order to decide all disputes, to regulate all ceremonies and civilities, and to ensure the observance of justice and good faith in that intercourse which must frequently occur between *them* and the *individuals* belonging to each; or they depend upon mutual compacts, treaties, leagues, and agreements between the respective communities; in the construction of which there is also no judge to resort to but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are all equally subject.

(*a*) "All countries," says Montaigne, "have a law of nations, not excepting the *Iroquois* themselves, though they devour their prisoners; for they send and receive Ambassadors, and understand the rights of war and peace. The mischief is, that their law of nations is not founded on true principles. Bk. 1. ch. 3. p. 8.

### §. 5. Of Political Law.

THE primitive and original society which nature established among men, was a state of equality and independence, in which each individual possessed the liberty of disposing of his person and his property after the manner he judged most convenient to his happiness, on condition of his acting within the limits of the Law of Nature, and of his not abusing it to the prejudice of other men: and if mankind, during the time they lived in natural society, had exactly conformed to nature's laws, nothing would have been wanting to compleat their happiness; nor would there

See Burlamaqui's Principles of Political Law, ch. 2.

there have been any occasion to establish a supreme authority upon earth. They would have lived in a mutual intercourse of love and beneficence; in a simplicity without state or pomp; in an equality without jealousy; strangers to all superiority but that of virtue, and to every other ambition but that of being disinterested and generous.

But they were not long directed by the perfect rule of nature; the vivacity of their passions weakened the force of nature's law, the strongest oppressed the weakest, they possessed nothing in tranquillity, they enjoyed nothing in repose, their natural liberty degenerated into wild licentiousness, and they were reduced to the most frightful and most melancholy situation. To screen themselves, therefore, from the evils with which they were afflicted in a state of nature, it was necessary that a multitude of individuals should unite in so particular a manner, that their preservation must depend on each other, to the end that they remain under the necessity of mutual assistance, and by this junction of strength and interests, be able not only to repel the insults against which each individual could not so easily guard, but also to restrain those who should attempt to deviate from their duty, and to promote more effectually their common advantage.

For this purpose, two things were necessary. **FIRST**, To unite for ever the wills of all the members of the society in such a manner, that from that time forward they should never desire but one and the same thing, in whatever related to the end and purpose of society. **SECONDLY**, It was requisite to establish a supreme power, supported by the strength of the whole body, (by which means they might overawe those who should be inclined to disturb the *public peace*) and to inflict a present and sensible evil on such as should attempt to act contrary to the public good. It is from this union of wills and of strength that the State or **BODY POLITICK** results; and the rules of conduct prescribed for the preservation of the general welfare of the State are called — **THE POLITICAL LAW**.

This

This general strength, or political power, may be in the hands of a single person or of many; and, as this power resides, the form of government takes its denomination. Thus, when the sovereign power is lodged in an aggregate assembly, consisting of all the members of a community, it is called a DEMOCRACY; when it is lodged in a council composed of select members, it is called an ARISTOCRACY; and when it is intrusted in the hands of a single person, it takes the name of MONARCHY. All other species of government, therefore, are corruptions of, or reducible to, these three.

Paley's Philos.  
vol. 2. p. 174  
and Algernon  
Sidney's cele-  
brated Treatise  
on Govern-  
ment, bk. 2.

§. 6. Of Civil Law.

The members of the community, besides those *Political Laws* which relate to the constitution and preservation of the State, have also another set of laws, as they stand in relation to each other; and as the conjunction of their wills forms what is called the *Civil State*, so the rules which each particular community establishes for its own internal government is called THE CIVIL LAW OF THE STATE.

Montesq. Sp.  
of Laws. 5.

For, as amidst the variety of human transactions it has been found that different systems of law will best suit different descriptions of people, every set of people has been left in a great measure at liberty to institute or strike out such a system as best agrees with their form of government, and the manner of their climate, time, constitution, and other circumstances. JUSTINIAN, therefore, says, "Quod quisque populus sibi jus constituit id ipse proprium civitatis, est vocaturque Jus Civile, quasi jus proprium ipsius civitatis."

Just. Inst.  
Harris's edit.  
P. 7.

The Civil Law is either *meram et simpliciter civile*, mere arbitrary positive institutions of a law-giver, and such only as bind from the sanction given them by this authority; or what may be called *jus civile mixtum*, where positive institutions make some alterations in the Law of Nature, either by adding to it, or taking from it, or else by determining and limiting

Taylor's El.  
133.  
Salmast. de Us.  
ch. 20.

## CIVIL LAW.

limiting what by former laws was indeterminate,

Montef. Sp. of  
Laws, p. 9.

The Law of Nature, therefore, may not improperly be considered as a text, and the Civil Law as a comment; for Law in general is the result and perfection of human reason, inasmuch as it governs all the inhabitants of the earth; and therefore the *Political* and *Civil Laws* of each nation ought to be only the particular cases in which human reason is applied.

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### *The Laws of England.*

See Hale's  
History of the  
Common Law,  
ch. 1.  
1. Bl. Com. 77.  
Wood's Inst. 4.  
Co. Lit. 11. b.  
110. b. 115. b.  
344. a.  
Fortescue in  
nois, 28.

THE LAWS OF ENGLAND are generally divided into two kinds: *Lex non Scripta*, the unwritten or Common Law; and *Lex Scripta*, the written or Statute Law.

The Common Law is not only constituted of the laws of nature, of nations, and of religion, the respective significations of which we have already defined, but of certain general and local customs, of principles and maxims, and of certain particular Laws.

The Statute Law depends upon the will of the sovereign power, or Legislature of the kingdom.

THE LAWS thus constituted are, in their ordinary jurisdiction, confined to the territory of ENGLAND only, but are made to extend, with more or less restrictions, to those places of which THE EMPIRE OF GREAT BRITAIN is composed

1. Bl. Com. 93.  
Bacon's Elements, 77.  
Baile's Nisi Prius, 1.  
Crompton on Courts, 7.  
Co. Lit. 1 b. 97.

The objects of them are the safety and preservation of *the persons* and *the properties* of individuals from *civil injuries* and *criminal violence*, and the promoting of that general peace and harmony upon which all the comforts and advantages of society depend,

To

To obtain these ends, *Courts of Justice* are necessarily instituted for the purpose of administering the laws, by affording relief to the injured, and inflicting punishment on the guilty.

Having therefore considered, in the two preceding chapters, the laws which must necessarily be recognized on the establishment of every society, we shall proceed in the succeeding chapters to describe,—3dly, The Common Law of *England*, with the grounds and foundation upon which it is raised. 4thly, The Statute Law. 5thly, The particular Places to which they extend. 6thly, The several Objects they embrace. 7thly, The Courts of Justice; to which we shall subjoin, 8thly, A short Vocabulary of those Words of Art, or Technical Expressions, peculiar to the Science of THE LAW.



## CHAPTER THE THIRD.

I. *Of the Common Law, and its Foundations.*

Burn's Ecc.  
Law, Pref. 79.

**T**HE COMMON LAW is so called because 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 places, and some to particular causes; yet that law which is common to the generality of all persons, places, and things, and hath a superintendency over those particular laws which are only admitted in relation to certain matters, is properly the Common Law of England.

Hale's Hist.  
Com Law,  
ch. 2 & 3.  
*post.*

This is usually called the *Lex non Scripta*. Not that the parts of which it is composed were merely oral, and communicated from age to age by word of mouth; for all of them have some monuments or memorials of their existence in writing, either in established maxims, declaratory statutes, records of pleas, books of reports, or tractates of learned men. But they are *unwritten laws*, because their authoritative and original institutions are not set down or verbally expressed in the same manner as the acts of the Legislature are, but have grown into use, and acquired their binding force and power by long immemorial usage, and the strength of general reception. The matter and substance of them indeed are in writing, but the formal and obligatory power of them grew by long use and custom; for customs generally received and admitted, gain, in this kingdom, the force of laws. It is custom only which gives power sometimes to the Common Law, and sometimes to the Civil Law, in the respective courts wherein they are used; both of which are controuled by the rules of the Common Law, when they cross the other customs of the kingdom that are more generally received.

Burn's Ecc.  
Law, p. 19.

The

The foundations, therefore, upon which the Common Law, as contradistinguished from the Statute Law, are erected, may be divided into,

1. *The Law of God.*
2. *The Law of Reason.*
3. *The General Custom of the Realm.*
4. *The Local Customs of certain Districts.*
5. *Principles, Maxims, and General Rules.*
6. *Certain Particular Laws.*

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§. 1. *The Law of God.*

THE LAWS OF GOD are the efficient causes of the Law of Nature; the principles of which, as already observed, God has sufficiently notified to man, so as to enable him by the light of natural reason to deduce from thence his several duties. This law, therefore, which includes in it the precepts both of natural and revealed religion, being known to all mankind, and stamped as it were upon our very hearts, has the same force, and is equally binding in every part of the globe; for as all human institutions are founded on the Laws of God, so no human laws ought to be suffered to contradict them.

Burlamaqui's  
Law of Nature  
and Nations  
1. vol.

The doctrines of this law are discoverable by that moral instinct which inhabits the breasts of all mankind, and prompts them, by a natural bent and inclination, to approve of certain things as good and commendable, and to condemn others as bad and blameable, independent of reflection: to this sense the faculty of reason is added, to enable us to illustrate, to prove, to extend, and to apply what our moral instinct has before given us to understand.

Burlamaqui.

There are, however, a great number of indifferent points upon which both the divine law and the natural leave a man at his own liberty; but which are found necessary, for the benefit of society, to be restrained within certain limits: and herein it is that human laws have their greatest force and efficacy; for with regard to such points as are not indifferent, human laws are only declaratory of, and act

1. Bl. Com.  
43.

act in subordination to, the former. To instance in the case of murder: This is expressly forbidden by the *divine*, and demonstrably by the *natural law*; and from these prohibitions arises the true unlawfulness of the crime. Those human laws that annex a punishment to it, do not at all increase its moral guilt, or superadd any fresh obligation in *foro conscientiae* to abstain from its perpetration. Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws; such, for instance, as the exporting of wool to foreign countries; here the inferior legislator has scope and opportunity to interpose, and to make that action unlawful which before was not so.

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§. 2. *The Law of Reason.*

THE LAW OF REASON, with respect to the *natural duties* of man, is of the same import with the Law of God; but considered as a foundation of the Laws of England with respect to *civil obligations*, it is to be understood scientifically: for although it is said that reason is the body, life, and perfection of law, and that *nihil quod est contra rationem est licitum*; yet it is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's *natural reason*; for *nemo nascitur artifex*.

Co Lit. 97. b. This legal reason, says *Sir Edward Coke*, hath been fined and refined by an infinite number of grave and learned men, and by long experience grown to such perfection, that the old rule may be justly verified of it, *Neminem oportet esse sapientiores legibus*: No man out of his own *private reason* ought to be wiser than the law, which is the perfection of reason.

1. Bl. Com. 76. The law, therefore, presumes that those precedents and rules which have been from time to time established

blished by the Courts of Justice, were founded in the perfection of reason, unless indeed they manifestly appear to be absurd and unjust; for although the reason upon which they were made may not be obvious at first view, yet such a deference is paid to former times, as to suppose that they did not act without good consideration.

§. 3. *General Customs of the Realm.*

THE establishment of Law in England is of very high antiquity, but the government of the kingdom having experienced many vicissitudes from either the conquests or accession of foreign nations anterior to the coming in of William the First, during which the original Britons were mingled and incorporated with Romans, Picts, Saxons, Danes, and Normans, it becomes impossible to trace the first introductions of those general customs which now constitute, in a strict sense, the Common Law of the realm. It is indeed insisted, with great admiration of the excellency of these customs, that during the time those several nations prevailed, the ancient customs of the realm remained unaltered; but the probability is, as *Lord Bacon* has expressed it, that our Laws are as mixed as our language, compounded of British, Roman, Saxon, Danish, and Norman customs; and as our language is so much the richer, so the Laws are the more compleat.

Hale's History  
Com. Law,  
ch. 2.

Bacon's Ele-  
ments, p. 32.  
See also  
Reeves's His-  
tory of English  
Law, vol. 1.  
p. 3.

Upon the accession of William the First, the Laws commonly known by the name of *Edward the Confessor's Laws* were the general and standing Laws of this kingdom, being composed of the Danish, the Mercian, and the West Saxon customs which then prevailed (a). By this code of Common Law, and the several alterations which have been since made in it,

(a) See Lamb.  
119. where this  
manual, as  
Lord Hale  
calls it, is  
printed.

1. The proceedings and determinations in the King's ordinary courts of justice, are guided and directed.

C

2. It

2. It settles, for the most part, the course in which land shall descend by inheritance.
3. It ordains the manner and form of acquiring and transferring property.
4. It fixes the rules of expounding deeds, wills, and acts of parliament.
5. It assigns the respective remedies of civil injuries; and
6. The several species of temporal offences, with the manner and degree of punishment.

It also includes an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example,

7. That there shall be four superior courts of record, *viz.* the Chancery, the King's Bench, the Common Pleas, and the Exchequer.
8. That the eldest son alone is heir to his ancestor.
9. That property may be acquired and transferred by writing.
10. That a deed is of no validity unless sealed and delivered.
11. That wills shall be construed more favourably and deeds more strictly.
12. That money lent upon bond is recoverable by action of debt.
13. That breaking the public peace is an offence; and punishable by fine and imprisonment.

All these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage; that is, upon the General Custom, or the Common Law of the Realm, for their support.

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#### §. 4. *The Local Customs of certain Districts.*

Another branch of the unwritten Laws of England are Particular Customs, or Laws which affect only the inhabitants of particular districts; such as,

FIRST,

FIRST, The Custom of *Gavelkind* in Kent, and Gavelkind. some other parts of the kingdom; which ordains, among other things, which will be particularly mentioned in considering *Gavelkind* as an estate, “that not the eldest son only of the father shall succeed to his inheritance, but all the sons alike.” Most of the Customs of this kingdom, variant from the Common Law, are founded on some particular points of convenience peculiar to the few places wherein they obtain: but the Custom of *Gavelkind* lays claim to a more noble original, being derived from the universal law of the whole world; for anciently all the children being equally near in blood, and entitled to the same affection and support from their parents, partook alike of the possessions descending from them, till the more refined policy of later ages chose to raise distinctions where nature made none.

SECONDLY, The Custom of *Borough English*, which Borough English. prevails in certain ancient boroughs; by virtue of English. which the youngest son shall inherit his father as to the lands of which he is seised in fee simple or fee tail, in preference to all his elder brothers. It is called *Borough English*, because, as some hold, it first prevailed in England; and the reason of it seems to be, that in these boroughs people chiefly maintained and supported themselves by trade and industry; and the elder children being provided for out of their father's goods, and introduced into his trade in his life-time, were able to subsist of themselves without any land provision; and therefore the lands descended to the youngest son, he being in most danger of being left destitute (a). The law takes particular notice of the Customs both of *Gavelkind* and *Borough English*; and therefore there is no occasion to prove that such Customs actually exist, but only that the lands in question are subject

Lit. 165.  
Noy, 106.  
Co. Lit. 110.  
2. Lev. 138.  
3: Keb. 475.

(a) See the Preface to 3, Modern Reports, page , where it is said, that this custom originated from the privilege which THE LORD claimed during the feudal times of sleeping the first night with his vassal's bride; so that the lands descended to the youngest, from the supposed illegitimacy of the eldest child.

## LOCAL CUSTOMS.

thereto; but all other private Customs must be particularly pleaded, and as well the existence of such Customs shewn, as that the thing in dispute is within the Custom alledged.

**Freebench.**      **THIRDLY,** The Custom of *Freebench*; by which a widow, in many boroughs, is entitled for her dower to all her husband's lands; whereas at the Common Law she shall be endowed for one-third part only.

**Copyholders.**      **FOURTHLY,** The Customs of Copyhold Manors, of which every one hath more or less, and which bind all the copyhold tenants that hold of the said manors. The original of this tenure arose from grants of lands made by lords to their villeins to hold of them by base tenures: those villeins or tenants were enrolled on the lord's roll, and were said to hold by copy thereof; and were capable of taking no greater estate than at the will of the lord; for otherwise they would have been enfranchised: yet to prevent the frequent ending of these estates, they granted them in fee, but still at the will of the lord, who, notwithstanding such grant, might have ousted them when he pleased; which being a very great inconvenience, was, it seems, altered by some positive law, (though such law does not now appear) which preserved their estates to them and their heirs during their services, but yet in other respects left them only estates at will.

Co. Lit. 76.  
9 Co. 76.  
Roll. Rep. 236.  
4. Co. 21.  
Co. Copyh. 6.  
Prec. Ch. 574.  
1. Bac. Abr.  
457.

**London.**      **FIFTHLY,** The Customs of *London* with regard to trade, apprentices, widows, orphans, and a variety of other matters; for this ancient city being the metropolis and chief town for trade and commerce within the kingdom, it was necessary that it should have certain customs and privileges for its better government; which though derogatory from the general law of the realm, yet being for the benefit of the citizens, and for the advantage of those who trade thereto and therefrom, have been confirmed both by judicial determination and legislative authority. *Consuetudo præscripta et legitima vincet legem* \*. If any of the Customs of *London* be pleaded, and denied, and issue be taken thereupon, the existence

(\*) Co. Lit.  
113:

existence of it shall be tried by a writ directed to the Mayor and Aldermen, to certify whether there is such a custom or not; and they shall make their certificate by the mouth of their Recorder *ore tenus*; but the existence of all other particular customs shall be tried by a jury (a).

(a) *Appleton v. Stoughton*, Cro. Car. 516, 517.

SIXTHLY, The Custom of holding divers inferior Courts with power of trying causes in cities and trading towns; the right of holding which, when no royal grant can be shewn, depends entirely on immemorial and established usage.

Inferior courts.

SEVENTHLY, The Custom of Merchants, or *Lex Mercatoria*, is a branch of the Law of Nations; for as no municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffic and merchandise, neither can they have a proper authority for this purpose; these transactions being, with respect to foreign trade, carried on between the subjects of independent states, and the municipal laws of one state being no guide or rule of action for the subjects of another. The affairs of commerce therefore are peculiarly regulated by this law of their own, which is composed of a system of customs acknowledged and taken notice of by all commercial nations (b.) These customs, although they differ from the general rules of the Common Law, are yet ingrafted into it, and made a part of the general law of the land (c); and being part of the law, their existence cannot be proved by witnesses (d), for the judges are bound to take notice of them *ex officio* (e); but they may send to the merchants to know their customs, as they send to civilians to know their law, or they may direct an issue for the trial of it by merchants (f): and when they are established, they are considered of the utmost validity in all commercial transactions; for it is a maxim of law, that "*Cuilibet in sua arte credendum est.*" Even in matters relating to domestic trade this law frequently prevails; as, for instance, with regard to the drawing, the acceptance, and the transfer of inland bills of exchange. So also by this law the

(b) Pref. to Molloy, 23.

(c) Co. Lit. 11. b. 2. Roll. Rep. 114.

(d) 3. Burr. 1669.

(e) 3. Bac. Ab. 585.

(f) Urrich. 24. Hard. 486.



Stat. Merch. merchandizes, debts, and duties of joint merchants  
 Stat. pl. do not survive, but go to the executor of him who  
 Domest. Com. dies; for, *Jus accrescendi inter mercatores pro beneficio*  
 1 Bl. 274. *commercii locum non habet* (g). And this extends to  
 (g) Co. Lit. all merchants and traders, though they do not go  
 182. a. beyond sea (h). So also if a joint factor die, an ac-  
 (h) 2. Brownl. count lies against the executor of the deceased and  
 99. the survivor, or against the survivor alone (i); and  
 Show. 189. the jointenancy which prevails in other cases, is so  
 Salk. 444. completely destroyed by the interposition of this  
 2. Vez. 265. maxim in the case of merchants, that upon the death  
 (i) Ch. Caf. of a joint trader, the articles of partnership are *ipso*  
 127. *facto* extinguished, and the personal representative  
 Salk. 444. is not intitled to the benefits of the deceased's share  
 in the trade for the unexpired part of the term, un-  
 less it is specially provided for in the articles them-  
 selves (k). So also in cases among merchants, the  
 want of consideration in their contracts does not ren-  
 der them invalid, as at Common Law; for by the  
 law of merchants the *nudum pactum* does not exist (l).

(k) Pearce v. Chamberlain,  
 2. Vez. 33.

(l) Pillans v. Van Mierop,  
 3. Burr. 1663.

The essential  
 parts of a good  
 Custom.

THE existence of every particular Custom must be proved before the Courts will take notice of it, except, as has been already observed, in the cases of Gavelkind and Borough English; and when proved, the next enquiry is into the legality of it, for it is an established maxim that, *Malus usus abolendus est*. To make a particular Custom good it must be, 1. Ancient. 2. Uninterrupted. 3. Peaceably acquiesced in. 4. Reasonable. 5. Certain. 6. Compulsory: and, 7. Consistent.

Co. Lit. 110.  
 113.  
 Skin. 108.  
 Salk. 203.

FIRST, It must be *ancient*; that is, it must have been used so long that the memory of man runneth not to the contrary; for if any one can shew the beginning of it, it is no good custom; and continuance of a usage must be from the reign of Richard the First, which being the time of a limitation of a writ of right, is said to be a good title to prescription.

5. Co. 109.  
 Co. Lit. 114.

Hence it is, that though a lord of a manor may have waifs and strays by prescription, yet he cannot have the *goods of felons and fugitives* without grant from

from the King; for even custom must be immemorial, and the goods of felons cannot be forfeited without record, which presupposes the memory of that continuance.

SECONDLY, It must have been *continued*, “*continuum dico*,” says Lord Coke, “*ita quòd non sit legitime interrupta*.” It must therefore be an interruption of the *right*, and not of the *possession* only, for that will not destroy the custom. As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is good, though they do not use it for a number of years; but if the *right* be any-how discontinued for a day, the custom is at an end. 1. Bl.Com. 77.

THIRDLY, It must have been peaceably acquiesced in; for a custom being the frequent repetition of an act which at first was assented to by the people of a certain place, for their mutual conveniency and advantage, its being immemorially disputed, is a proof that such assent is wanting. 1. Bac. Ab. 670.  
43. Ed. 3. pl. 19.

FOURTHLY, Custom must not be unreasonable; and therefore a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth if no good legal reason can be assigned against it: but if it appear to be unreasonable in itself, as being against the good of the commonwealth, or injurious to a multitude, it is bad. Moor, 588.  
1. Leon. 217.  
3. Leon. 41.  
Salk. 203.  
Ld. Ray. 57.  
1135.

FIFTHLY, A Custom must be certain, or at least such as may be reduced to a certainty; for an uncertain thing cannot be supposed to have had a reasonable commencement; also the uncertainty of a custom destroys the supposition of its continuance time out of mind. Thus, a custom that the tenant of a manor who *first comes* to such a place shall have all the windfalls there, or that lands shall descend to the *most worthy* of the owner's blood, is void; for it is uncertain who will *first come*, in the first case; or who shall be deemed *most worthy*, in the second. But a custom to pay a year's improved value for a fine of a copyhold estate is good, though the value of the thing is uncertain; for it may be ascertained; and, *Id certum est quod certum reddi potest*. Roll. Ab. 565.  
Danvers, 33.  
Skin. 249.  
Hob. 225.

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SIXTHLY, A Custom must be compulsory; and therefore a custom that every man shall contribute to the maintenance of a bridge at his own pleasure, is idle and absurd, and indeed no custom at all; for customs cannot be left to every man's option, whether he will use them or no.

SEVENTHLY, Customs must be consistent with each other. Therefore, when a man has a lawful easement or profit by prescription, time whereof, &c. another custom which is also from time whereof, &c. cannot take it away, for the one custom is as ancient as the other: as if one has by custom a way over the land of *A*. to his freehold, *A*. cannot alledge a custom to stop the way (*a*); but he ought to deny the existence of the former custom.

(*a*) Aldred's  
Case, 9. Co. 58.

11. Mod. 160.  
Ld. Ray. 499.

Moor, 411.  
Cro. Eliz. 434.

These particular Customs being in derogation of the Common Law, are always construed *strictly*; for it is a general rule, that they shall not be *enlarged* beyond the usage on which they are founded. Therefore, where a custom exists in commoners to dig clay on a common, if a stranger dig the clay, the commoners cannot take it from him.

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§. 5. Of Established Maxims.

(*a*) Co. Lit.  
211.

A MAXIM is a sure foundation or ground of art, and conclusion of reason. It is so called, *quia maxima est ejus dignitas et certissima auctoritas, atque quòd maxime omnibus probetur*, so sure and uncontrollable as that they ought not to be questioned. A maxim may be considered all one with a *principle*, a *rule*, a *common ground*, a *postulatum*, or an *axiom*; for it would be a matter more curious than useful to make nice distinctions between them (*a*). Established Maxims are one of the principal grounds of the Common Law of England, for their authority rests entirely upon general reception and usage. The existence and validity of these Maxims are to be determined by the Judges of the several Courts of Justice; for  
the

they are the depository of the laws; the living oracles who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land (b). But when once established to be a rule of the Common Law, their authority is so strong that it will not suffer contradiction; for, *Contra negantem principia non est disputandum* (c); and they are of equal weight with Acts of Parliament themselves (d). Of these *Maxims* and *General Rules* the books of law are full; but the chief and most useful of them are the following.

(b) 1. Bl. Com. 69.

(c) Co. Lit. 10. 343. a. Year Book, 11. Hen. 4. pt. 9.

“ ACTA EXTERIORA INDICANT INTERIORA  
SECRETATA.”

Thus, for instance, where *the law* gives authority to a man to enter into an inn for accommodation, or to a landlord to enter his house to take a distress for rent, or to a reversioner to see if waste has been committed, or to a commoner to enter his common to feed his cattle; if they enter according to their authority, and then do any act beyond that which they have licence to do; as if the guest steal plate from the inn, or the landlord distrain damage-tenant, or the reversioner injure the premises, or the commoner cuts down a tree, the law will intend that they entered for such purposes: but if *the party* give authority to enter, and it is abused, the person abusing such authority may be punished for his misdeed, but shall not be considered a trespassor *ab initio* (e). So also if a multitude go to make a forcible entry, although only one of them use the violence, yet they are all guilty; for the act committed discovers the intention for which they assembled (f). If a landlord enter the premises of his tenant, and take an ox, and im-

Wingate, 108.

(e) The Six Carpenters Case, 8. Co. 146.

(f) Co. Lit. 257.

(d) In every art and science, says Lord Coke, there are *principia et postulata*, of which it is said, *aliorum ne quaesiveris et principia probant et non probantur*, because every proof ought to be by a more high and supreme cause, and no-

thing can be more high and supreme than the principles themselves, and therefore ought to be APPROVED, because they cannot be proved. 3. Co. 40. Co. Lit. 11. a. F. N. B. Preface.

*pound it*, the taking shall be intended for distress; but if he *kill it*, the subsequent act declares what his intention was *ab initio* (g). Thus also where a wife, originally intending to poison her husband only, mixed arsenic with an electuary which had been sent by an apothecary for her husband to take, and the apothecary being taxed with a knowledge of its poisonous contents, stirred it, and eat it, and died the ensuing day in consequence thereof; the wife was adjudged guilty of the murder of the apothecary; for the law joins the original intent with the subsequent event which happened thereupon, *quia eventus est, qui ex causâ sequitur, et dicuntur eventus quia ex causâ eveniunt* (h). For all crimes have their conception in a corrupt intent, and have their consummation in some particular fact, which though it be not the fact at which the intention of the malefactor was levelled, yet he shall derive no advantage from the error, if another particular crime ensue of a higher nature; and therefore, *In criminalibus sufficet generalis malitia intentionis cum factô paris gradûs* (i).

(g) Year Book,  
12. Ed 4. pl.  
8.  
28. Hen. 6.  
pl. 5.

(h) Agnes  
Gore's case,  
9. Co. 81.  
See also 9. Co.  
136.  
Dyer, 98. 224.

(i) See Ba-  
con's Law  
Tracts, p. 80,  
81.

## II. "A COMMUNI OBSERVANTIA NON EST RECEDENDUM."

Thus, if a man gives another a cup of wine, the donee shall not have the cup; but if he give him a hoghead of wine, he shall have the hoghead also; for the phrase made use of in speaking upon this subject shall explain the meaning of the party (k). So also *Littleton* speaking of a particular kind of indenture in the third person says, "and this firm is the most sure making, because it is most commonly used (l); for, *Magister rerum usus*."

(k) Plowd. 86.

(l) Co. Lit.  
229. b.  
1. Co. 24. 42.  
4. Co. 77. 93.  
Hob. 83. 114.

## III. "ACTORI INCUMBIT ONUS PROBANDI."

Therefore it is not enough for a plaintiff to destroy his adversary's title to the subject in dispute, but he must prove a superior or exclusive title in himself (m); for every suitor must recover upon the strength of his  
OWN

(m) Hob. 103.  
4. Co. 71. b.

own case, and not by the weakness of the defendant's;  
*Melior est conditio defendentis.*

IV. "ACTUS DEI NEMINI FACIT INJURIAM."

The words, "Act of God," do not signify every event, the cause of which is incapable of being unravelled, as a fire, &c.\*; but something in opposition to the act of man, and which cannot happen by his intervention, as storms, lightning, and tempests; a *natural*, and not an *inevitable* accident (n).

Therefore if a house be blown down by tempest, the tenant is excused from waste, and is not obliged to rebuild it, except he has expressly covenanted to repair, &c. (o)

So also where two men are condemned in debt, and one was taken and died in execution, yet the taking of the other is lawful (p). So also if a defendant in debt dies in execution, the plaintiff may have a new execution by *elegit* or *fieri facias* (q).

So also where a common carrier undertook to carry goods for hire, which binds him to deliver them, and on the night of the following day after they were delivered into his custody a fire broke out in a distant booth from that in which he had deposited them, by which they were eventually consumed without any actual negligence in the carrier, it was admitted that he would not have been liable to pay for them, if this accident had been considered as the act of God (r); for, *Necessitas inducit privilegium quoad jura privata*; and the law chargeth no man with default where the act is compulsory and not voluntary, and where there is not a consent and election (s).

So also if performance of the condition of a bond is rendered impossible by the act of God, the penalty of the obligation shall be saved; as if a man be bound to appear in court on such a day, and

\* That a fire, unless it appears to have been occasioned by lightning or other natural cause, is not considered in law as the act of God, seems clear from 6. Ann.

c. 31. and 10. Ann. c. 14. which exempts tenants from actions for the damage, and thereby presupposes that such action would have lain at Common Law.

(n) By LORD MANSFIELD, in the case of Froward v. Pitard, 1. Term Rep. 33.

(o) Co. Lit. 53.

(p) 5. Co. 87.

(q) Lit. Rep.

325.  
Cro. Jac. 136.  
Godb. 273.  
Cro. Eliz. 850.  
And see the 21. Jac. 1. c. 24. which expressly provides for this case.

(r) Froward v. Pitard, 1. Term Rep. 33, 34.  
Lord Ray. 918.

(s) Bacon's Law Tracts, Reg. 5.

dies before the day arrives; for no prudence or foresight of the obligor could guard against such a contingency (*t*).

(*t*) Hargrave's  
Co. Lit. 206.a.  
note (1.)  
2. Bl. Comm.  
341.

V. "ACTUS INCEPTUS CUJUS PERFECTIO PENDET  
"EX VOLUNTATE PARTIUM REVOCARI POTEST:  
"SI AUTEM PENDET EX VOLUNTATE TERTIÆ  
"PERSONÆ VEL EX CONTINGENTI REVOCARI  
"NON POTEST."

In acts that are fully executed and consummate the law makes this difference, that if the first parties have put it in the power of a third person, or of a contingency, to give a perfection to their acts, then they have put it out of their own reach and liberty, therefore they cannot revoke them. But if the consummation depend upon the same consent which was the inception, the law doth not restrain the revocation; for as the party may frustrate the completion by omission and non-feasance, so he may dissolve it by an *express consent* before the time of its consummation (*u*). Therefore if two persons exchange land and neither of them enter, they may revoke or dissolve the exchange by mutual consent (*x*). So if *A.* contracts to lay a quantity of wine into the cellar of *B.* before *Michaelmas*; and *B.* contracts with *A.* to deliver to him a quantity of wheat before *Christmas*; the parties may by assent dissolve these contracts before the arrival of either of these times; but after the arrival of *Michaelmas* or *Christmas*, there is a perfection given to the contract by action on the one side; and although they may make cross releases, they can never dissolve the contract (*y*).

(*u*) Bac. Max.  
90.

(*x*) F. N. B.  
36.  
Year Book,  
13. Hen. 7.  
pl. 13.

(*y*) Bac. Max.  
91.

So also if *A.* contract with *B.* to deliver goods at such a price as *C.* shall name, if *C.* refuse to name the price, the contract is void; but the parties cannot dissolve it, because they have put it in the power of a third person to perfect (*z*).

(*z*) Ibid.

(\*) 31. Edw.  
1. 185.  
14. Edw. 4.  
pl. 2.  
38. Edw. 3.  
pl. 35.

Thus also, if a patron presents a clerk to a bishop, he cannot revoke the presentation; for he has put it out of himself, and given power to the bishop, by admission, to perfect his act begun \*.

"ACTUS

## VI. "ACTUS LEGIS NULLI FACIT INJURIAM."

Therefore if land out of which a rent-charge is granted be recovered from the possessor by *elder title*, by which the rent-charge would be avoided; yet the grantee shall have an action for it against the grantor, because the rent-charge was avoided by operation of law (a).

So also when the construction of any act is left to the law; the law, which abhorreth injury and wrong, will never so construe it as it shall work a wrong (b); for it is another maxim in law, *quod legis constructio non facit injuriam* (c): and therefore if tenant for life maketh a lease generally, this shall be taken by construction of law as an estate for his own life who made the lease; for if it should be a lease for the life of the lessee, it would be a wrong to him in reversion (d).

(a) Dyer, 60.  
2. Inst. 287.

(b) Co. Lit. 42.

(c) Plow. 161.  
Co. Lit. 183.

(d) Co. Lit.  
42. a. 183. b.

## VII. "ACTUS NON FACIT REUS NISI MENS SIT REA."

Therefore, in criminal causes, the act and wrong of a madman shall not be imputed to the dictates of a wicked and malicious mind; for a madman is *amens*, that is *sine mente*, without his mind and discretion; and, *Furiosus solo furore punitur*; A madman is only punished by his madness (e). But this defect of mental faculties, whether it be considered permanent, as in the case of *idiocy* (f), or only temporary, as in the case of *lunacy* or *madness* (g), must be unequivocal and plain; not an idle frantic humour or unaccountable mode of action, but an absolute dispossession of the free and natural agency of the human mind (h). The criminal acts of an infant also under seven years of age shall not be imputed to a guilty mind; but after that age, and until the age of fourteen, although the presumption shall be in favour of his innocence, yet if it appear by circumstances that he had sufficient understanding to distinguish between good and evil, he shall

(e) Co. Lit.

247.  
Wood's Inst.  
16.

(f) 1. Bl. Co.

304.  
F. N. B. 530.

(g) 1. Halc. 31.  
4. Co. 124.

(h) 1. Hawk.  
P. C. in notis.

be



(i) 1. Hawk. P. C. ch. 1. in notes. be answerable for his misconduct; for, *Malitia supplet aetatem* (i).

VIII. "ACTUS ME INVITO FACTUS NON EST MEUS ACTUS."

Therefore if a man be under *durefs of imprisonment*, or compulsion by an illegal restraint of liberty, until he seals a bond, deed, or other writing, he may plead this *durefs* and avoid it (k). So also those who join themselves to rebels for fear of death, and retire as soon as they dare, are no way guilty of the offence of high treason (l); and therefore those who supplied *Sir John Oldcastle* and his accomplices then in rebellion, with victuals, were acquitted, because it was found to be done *pro timore mortis, et quòd recesserunt quàm citò potuerunt* (m). But this maxim only applies to crimes so created by the laws of society; and therefore if a person kill another, the apprehension of fear or force will not excuse him from the guilt of murder (n); and in all cases, the fear which compels a man to do an unwarrantable action ought to be just and well-grounded: *Talis enim debet esse motus qui cadere potest in virum constantem et qui in se continet mortis periculum et corporis cruciatum* (o), or otherwise the act he doeth shall be esteemed his own. If a bond be delivered to another to the use of the obligee, and on its being tendered to him he refuses it, the delivery has lost its force; for it was an act against the consent of the obligee (p). So also if a bond be made to a *feme-covert*, and the husband disagrees to it, the obligor may plead *non est factum*, for by the refusal of the husband the bond is not his deed (q).

(k) 1. Bl. Co. 136.  
(l) 1. Hawk. P. C. 54.  
(m) 1. Hale 50. Co. P. C. 10. Foster, 14, 216. 4. Bl. Com. 30.  
(n) 1. Hale, 50.  
(o) Co. Lit. 162. a. 253. b.  
(p) Dyer, 112.  
(q) 5. Co. 119. Cro. Eliz. 54. Dyer, 167. 2. Leon. 100.

IX. "ACTIO PERSONALIS MORITUR CUM PERSONA."

Personal actions are such whereby a man claims a debt, or personal duty or damages in lieu thereof; and

1. Bl. Com. 317.

and likewise whereby a man claims a satisfaction in damages for some injuries done to his *person* or *property*. The former are said to be founded on *contracts*; the latter on *torts* or *wrongs*. Those founded on contracts are, 1. Account. 2. Assumpsit. 3. Covenant: and, 4. Debt. Those founded on torts affecting *the person* are, 1. Slander. 2. Malicious prosecution. 3. Assault and battery. 4. False imprisonment. 5. Injuries arising from negligence or folly. 6. Adultery. Those founded on torts affecting *personal property* are, 1. Deceit. 2. Trover. 3. Detinue. 4. Replevin. 5. Rescous. 6. Misbehaviour in office, trust or duty. 7. Case for consequential damages. In actions merely personal arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery and slander, the right of action dies with the person; and it shall never be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant committed, in their own *personal* capacity, any manner of wrong or injury. But in actions arising *ex contractu*, by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand; though the suits shall abate by the death of the parties, yet they may be revived by or against the executors, being considered rather actions against the *property* than the *person*, in which the executors have the same interest that their testator had before. This maxim therefore is not applicable to every species of personal actions; but is confined to those cases where the cause of action is a *tort*, or arises *ex delicto*, which are supposed to be by *force*, and *against the King's peace*; as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water-course, escape against a sheriff, and many other cases of the like kind; and in every case where the general issue must be, as in *trover*, NOT GUILTY: for in these cases the cause of action upon the face of the record arises *ex delicto* or *ex maleficio*; and all private criminal injuries

Onslow's  
N. P. 2.

3. Bl. Com.  
302.

Hambly v.  
Trott, Cowp.  
374.

See also Noy, 5.  
9. Co. 87.  
Ray. 71.  
Cro. Car. 539.  
Savil. 40.  
W. Jones, 173;  
Palm. 330.

ries or wrongs, as well as all public crimes, are buried with the offender.

X. "ACCESSORIUM NON DUCIT SED SEQUITUR SUUM PRINCIPALE."

Therefore on a grant of land for life, rendering a certain rent, with the reversion to another, the rent passes with the grant of the reversion, because it is incident to it; but the reversion would not pass by a grant of the rent (*r*). So if land to which common is appendant or appurtenant be recovered in an assise of *novel disseisin*, it is a tacit recovery of the common also (*f*). So also where the tenant in tail of a manor to which an advowson is appendant makes a feoffment of the manor *with the appurtenances*, and the feoffee re-infeoffs the tenant in tail, *saving to himself the advowson* on the death of the tenant in tail, his issue being *remitted* to the manor, is consequently remitted to the advowson also, notwithstanding its severance; for the manor is the principal to which the advowson is accessory (*t*).

(*r*) Co. Lit.  
152.

(*f*) Co. Lit.  
154.

(*t*) Co. Lit.  
349. b.

Thus also, in criminal matters, if a servant instigate a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder; though had he been present aiding and assisting, he would have been guilty as principal in petty treason, and the stranger of murder; for it is a maxim that, *Accessorius sequitur naturam sui principalis*; and therefore the accessory cannot be guilty of a higher crime than the principal (*u*).

(*u*) 3. Inst. 139.  
2. Hawk.  
P. C. 443.  
Dyer, 128. 254.  
4. Bl. Com. 36.  
See also Win-  
gate's Maxims,  
p. 221.

"ACCUSARE NEMO SE DEBET NISI CORAM DEO."

It is said to be against the law of God, the law of nature, and the law of the land, that any man should be obliged to accuse himself *upon oath*, before any Magistrate or Court of Justice (*x*); but this maxim seems applicable only where a full discovery of the truth tends to accuse the party himself of some legal crime: for although every oath is supposed to be

(*x*) See Hardr.  
Rep. 139,  
where this  
point is delibe-  
rately argued.

be

be made before God, by calling upon him to take notice of what we say, and invoking his vengeance if what we say be false; yet, as the Law of England constrains no man to accuse himself of a crime, and consequently imposes every oath of testimony with this tacit reservation (y), it is in criminal cases rejected altogether, except when an accomplice is admitted to give evidence against the partners of his crime. The examination, therefore, of a prisoner before a magistrate, taken *upon oath*, is void, and cannot afterwards be read in evidence against him in his trial, as his free and voluntary confession might have been (z). So also, when a bill in equity is instituted, praying a discovery which may subject the defendant to pains or penalties, or to some forfeiture, or something in the nature of a forfeiture, he may, for this cause, demur to the bill; for it is a general rule, that no one is bound to answer, so as to subject himself to punishment, in whatever manner that punishment may arise, or whatever may be the nature of the punishment (a). Thus, on the trial of *Lord George Gordon* for High Treason, a witness being sworn to tell the whole truth, was asked, on the cross examination, if he was a Roman Catholic; but the Court ruled, that he was not obliged to answer it, because his answer might subject him to penalties (b).

(y) Paley's  
Philosophy,  
vol. 1. 193.

(z) Per Gould,  
Justice,  
Chelmsford  
assize, 1787,  
in the case of  
Cath. Bertie.  
See also 2.  
Hawk. P. C.  
604.

(a) 2. Vezey,  
245.  
1. Eq. Ca. Ab.  
131.  
Mitford's  
Pleadings, 157.

(b) Douglas,  
593.

XI. "AFFECTIO TUA NOMEN IMPONIT OPERI TUO."

Therefore, although livery and seisin made by one who is before in possession of the land be void, because, *Quod semel meum est amplius meum esse non potest*; yet, if the lessor and lessee come upon the land on purpose to make and take livery, that entry vests no possession until livery (c).

(c) Co. Lit.  
421.

XII. "ALIQUIS NON DEBET ESSE JUDEX IN PROPRIA CAUSA."

Therefore, a prescription that the lord of a manor hath been used to distrain cattle *damage feasant*, and

(*d*) Littleton, Sect. 212. to detain them till fine be made to him for the damage, *at his will*, is void; because it is against reason, that if wrong be done to any man, he should thereof be his own judge (*d*). So also, where a fine was levied before a sheriff who was a party to the fine, it was for this cause reversed (*e*); *quia non potest esse iudex et pars*. So also, if there be an action in the Court of the Mayor and Aldermen upon a bye-law, where the penalty is given to the Mayor, it is error (*f*). So also, a Justice of Peace being concerned, an order before him, *et aliis sociis suis*, is bad (*g*). So also, the same person cannot be both judge and attorney for the party (*h*).

(*e*) 1. Co. Lit. 141.  
1. Roll. Ab. 492, 496.  
2. Roll. Ab. 92.

(*f*) 1. Salk. 398.  
(*g*) Salk. 607.  
4. Com. Dig. 5.  
14. Vin. Abr. 573.  
(*h*) 8. Co. 18.  
Hob. 87.

(\*) Noj's Max. XII. "A MAN CANNOT QUALIFY HIS OWN ACT \*."  
15.

Therefore, if a parson make a lease for *forty years*, and the patron and ordinary confirm the said demise for *twenty years* only, yet the confirmation shall extend to the whole term of *forty years* (*k*).

(*k*) 5. Co. 81.

### XIII. "AMBIGUUM PACTUM CONTRA VENDITOREM INTERPRETANDUM EST."

An ambiguous deed is to be expounded against the feller. As if tenant in fee simple grant to any one an estate for life generally, it shall be construed an estate for the life of the grantee (*l*). For the principle of self-preservation will make men careful not to prejudice their own interest by the too extensive meaning of their words; and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them. But here a distinction must be taken between *an indenture* and *a deed poll*; for the words of an indenture executed by both parties, are to be considered as the words of them both; for though delivered as the words of one party, yet they are not his words only, but the other party hath given his consent to every one of them. But in a deed poll executed only by the grantor, they are the words

(*l*) Plowd. 156.

words of the grantor only, and shall be taken most strongly against him (*m*). And, in general, this rule, being a rule of some strictness and rigour, is the last to be resorted to (*n*); for Courts of Justice will endeavour to construe the words of parties so as to effectuate their deeds, and not to destroy them; more especially when ambiguous words, abstractedly taken, may admit of either meaning (*o*):

(*m*) Co. Lit. 42. 134.  
 (n) 2. Bl. Com. 380.  
 (o) By LORD MANSFIELD, Cowp. Rep. 725. See also 2. Bl. Com. 379.

XIV. "AMBIGUUM PLACITUM INTERPRETANDUM CONTRA PROFERENTEM."

This Maxim proceeds upon the presumption, that every man will make the best of his own case (*p*). Therefore, in an action of debt upon a bond against an executor, if he pleads a recovery in debt and judgment thereon, and that he had not more assets than would satisfy that judgment, without saying that it was on a *specialty*, it shall be intended a recovery on a *simple contract* debt (*q*):

(*p*) 1. Co. Lit. 303. b.  
 Cro. Car. 50.  
 Plowd. 46.  
 103. 202.  
 10. Co. 59.  
 Strange, 230.  
 10. Mod. 143.  
 (q) 1. Freeman, 215.  
 Vaughan, 94.

XV. "AMBIGUITAS VERBORUM LATENS VERIFICATIONE SUPPLETUR."

Verbal ambiguities are of two kinds, viz. *Ambiguitas Patens*; which is when the ambiguity is apparent upon the face of the deed itself; and, *Ambiguitas Latens*; which is where the ambiguity is not apparent from the mere inspection of the deed, but is brought to light by the application of some extrinsic and collateral matter:

See Bacon's Law Tracts, 99. 201.

The first kind can never be explained by averment; for the law will not suffer a matter of specialty to be coupled with matter of averment; as thereby all instruments might be rendered hollow, and that made to pass by *averment*, which the law says shall only pass by *deed*. On a grant, therefore, to two persons and *their heirs*; the omission, to which of their heirs the estate was intended to be limited, cannot be supplied by averment. An infinite number of cases might be put to illustrate this

Maxim; for it holdeth generally, that all verbal ambiguity upon the face of deeds shall never be helped by averment; but that, if they cannot be made good by construction, or, in some cases, by election, the deed shall be deemed void for uncertainty.

The second kind, or *Ambiguitas Latens*, may be helped by averment. Therefore, if a person grants the manor of *S.* to one and his heirs, and the truth be, that he had the manors both of *North S.* and *South S.* this ambiguity is matter of fact; and it may be averred which of them it was that the grantor intended should pass. So also, if a man grants ten acres of wood in *Sale*, in which place he has one hundred acres, the grantee may *elect* which ten he will take: and the reason is plain; for the presumption of law is, where the thing is only nominated by *quantity*, that the party had indifferent intentions, which should be taken; and there being no cause to help the uncertainty by intention, it shall be helped by election.

#### XVI. " APICES JURIS NON SUNT JURA."

The Law of England respecteth the effect and substance of the matter, and not every nicety of form or circumstances (*r*); and therefore, *Sir Edward Coke* commends the Statute of *Q. Elizabeth*, which provides, that after demurrer the Judges shall give judgment, without regarding any imperfection, defect, or want of form in the pleadings: an excellent and a profitable law, concurring with the wisdom and judgement of ancient and modern times, that have disallowed nice and curious exceptions, tending to the overthrow or delay of justice (*f*); for, *Nimia subtilitas in jure reprobatur* (*t*); *Qui hæret litera hæret in cortice* (*u*); and, *Summum jus est summa injuria* (*x*). Thus, where a man who was seised of five acres of land, to the whole of which there was common appurtenant, and aliened one of the acres only; it was held, that the right of common was not thereby extinguished, but that an apportionment should be made according to the several

(*r*) Co. Lit. 283.  
396.

(*f*) 4. Co. 9.

(*t*) Co. Lit. 54.

363.

(*u*) 2. Inst. 495.

(*x*) Co. Lit.

304. b.

6. Co. 65.

10. Co. 125.

4. Co. 46. b.

t. Strange, 253.

several quantities of land ; for otherwise a great inconvenience and mischief would ensue ; as by this means all the right of common throughout the kingdom might in the course of time be extinguished (y).

(y) By Lord  
Hobart,  
Noy's Rep. 30.

XVII. " ARGUMENTUM AB IMPOSSIBILI PLURIMUM VALET IN LEGE."

The law compels no man to impossible things ; *Lex non cogit ad impossibilia* ; and, *Impossibile est quod naturæ rei repugnat*. Therefore, where a tenant holds of his lord by *the rose*, or by a bushel of roses, to be paid at the feast of St. John the Baptist ; if such tenant die in the winter, the lord cannot distrain until the time that roses, by the course of the year, may have their growth ; for they are *fructus fugaces*, which cannot be kept, and therefore impossible to be delivered until the season returns ; and the law will take notice of the order and cause of nature ; *Lex spectat naturæ ordinem* (z).

(z) Co. Lit. 927  
2. Bl. Comm.  
340.

So also, if the condition of a bond be impossible at the time of making it, the law renders the condition void, and the bond shall stand single and unconditioned.

XVIII. " A VERBIS LEGIS NON EST RECE-  
DENDUM."

Therefore it is said, that Judges ought not to make any construction against the *express letter* of a statute ; for nothing can so well express the meaning of the legislature as their own *direct words* ; for, *Index animi sermo* ; and it would be dangerous to give scope to make a construction in any case against the express words, *when the meaning doth not appear contrary*, and when no inconvenience will thereupon follow (a). But this maxim more peculiarly applies to the construction of penal statutes, which must be construed *strictly* \*. Thus, where the statute 1. Edward 6. c. 12. having enacted, that those who are convicted of stealing *horses* should not have the be-

(a) 5. Co. 6.  
118. b.  
(\*) Douglas  
706.



benefit of clergy, the Judges conceived that this did not extend to him that should steal but one *horse*. So also, when the 14. *Geo.* 2. c. 6. made the stealing of sheep and other cattle a capital felony, the Act was held to extend to nothing but sheep, until, by 15 *Geo.* 2. c. 14. the words *other cattle* were explained to mean bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name (b). So also, the 9. *Geo.* 1. c. 22. and 27. *Geo.* 2. c. 15. which makes the *sending* a threatening letter felony, was held not to extend to a person *delivering* such a letter; for although the Legislature probably meant to punish the person *delivering* such a letter, yet as they had not so expressed themselves, the Court did not conceive itself authorized to recede from the words of the statute (c).

(b) 1. Bl. Com. 38.

(c) Hammond's Case, Leach's Crown Law, p. 387.

(d) See Bacon's Law Tracts, p. 61, 62. for illustrations of this Maxim.

For the law construeth neither *penal laws* nor *penal facts* by intendment, but considereth the offence in degree, as it stood at the time when it was committed; *Resimatio prateriti delicti ex postremo facto nunquam crescit* (d).

### XIX. "BASTARDUS NULLIUS EST FILIUS; AUT FILIUS POPULI."

A Bastard is one that is not only begotten, but born, out of lawful matrimony; for if he is born only a day after marriage, he is a legitimate child (e). He is only entitled to such rights as he himself shall *acquire*; for he can *inherit* nothing, being looked upon as the son of nobody (f). Yet he may gain a surname by reputation, though he has none by inheritance (g). All other children have their primary settlement in their father's parish, but a bastard in the parish where he is born; for he hath no father (h). The incapacity of a bastard consists principally in his disability of being heir to any one; neither can he have heirs but of his own body; for, being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. A bastard may be legitimated by Act of Parliament.—If a husband be out of England,

(e) 1. Bl. Com. 454.

(f) Fortescue, c. 40.

(g) Co. Lit. 3.

(h) Salk. 427.

England, or, as the law expresses it, *extra quatuor maria*, for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastard (*i*); but generally, during the coverture, access of the husband shall be presumed, unless the contrary can be shewn (*k*); for the general rule is, *presumitur pro legitimatione* (*l*). In divorce *à mensâ et thoro*, if the wife breeds children, they are bastards. 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. So also, in divorce *à vinculo matrimonii*, all the issue born during the coverture are bastards (*m*).

(*i*) Co. Lit. 244.  
 (*k*) Salk. 123.  
 3 P. Wms. 276.  
 Strange, 925.  
 (*l*) 5. Co. 9. b.  
*Semper presumitur pro legitimatione puerorum.*  
 5. Co. 98.  
 Wood Inst. 65.  
 (*m*) Co. Lit. 244.

XX. “ BENIGNIOR SENTENTIA IN VERBIS GENERALIBUS SEU DUBIIS EST PRÆFERENDA.”

Therefore in an action for these words against a Justice of the Peace, “ Mr. Stanhope hath but one manor, and that he hath gotten by swearing and forswearing,” it was held they were not actionable, because, among other reasons, he may be forsworn in common conversation; in which case the *forfeathering* would not be perjury (*n*); for, *Sensus verborum est duplex, scilicet mitis et asper; et verba semper accipienda sunt in mitiore sensu* (*o*). So also, in an action for saying that such a person “ hath burnt my barn,” it shall be taken *civiliter* and not *criminaliter* by intendment that the barn was full of corn; in which case alone the words would be actionable (*p*); for an *innuendo*, although it may explain or apply, cannot add to or change the sense (*q*). But it is said by Mr. Justice Buller, that the old Maxim, that words shall be taken in *mitiori sensu*, is now exploded; and that the rule at this time is, that they shall be taken in the same sense as they would be understood by those who hear or read them (*r*). The old rule, however, appears still in some measure to prevail; for in an action for these words, “ I am thoroughly convinced that you are guilty of the death of), and rather than you should go without a hangman, I will hang you;” it was

held, that the words "*guilty of the death*" necessarily imputed a charge of murder; but that if they had been "*cause of the death*," the milder construction should have prevailed; for a man may innocently be the cause of another's death (*f*).

(*f*) Peake v. Oldham, Cowp. 276.

XXI. " BONI JUDICIS EST AMPLIARE JURISDICTIONEM."

Lord Mansfield says, that the true text of this Maxim is, "*Boni judicis est ampliare JUSTITIAM*;" and therefore a repleader shall be granted where the issue is immaterial and void, and does not at all determine the right (*t*).

(*t*) 1. Burr. 301. 304.

XXII. " CAUSA ET ORIGO EST MATERIA NEGOTII."

Therefore, although the law allows persons to enter a tavern for the purpose of being accommodated with what the tavern affords; yet if a person enter into a tavern and commit a trespass, he shall be adjudged a trespassor from the beginning (*u*).

(*u*) Six Carpenters case, 8. Co. 146.

So also when the bailiff of the Lord of a Manor takes a horse or other cattle as an estray, in the doing of which act he is justified and permitted by law; yet if, after such seizure, he works, or otherwise uses the horse he has then seized, this is an abuse of his authority, and the law considers him as a trespassor *ab initio* (*x*).

(*x*) 1. Salk. 221.  
Cro. Jac. 147.  
Yelv. 96.  
2. Wilf. 313.  
3. Wilf. 20.  
1. Term Rep. 12.

So if a man *non compos mentis* give himself a mortal wound, and afterwards he becomes of sound memory; and then dies of the wound; yet because the original cause of his death, *viz.* the wound, was given during his insanity, he shall not be adjudged *felo de se*; for his subsequent death shall relate back to the original act which was the cause of his death (*y*).—

(*y*) 3. Inst. 54.  
Plowd. 260.  
Moor, 140.  
4. Co. 22.  
1. Co. 99. b.  
(*z*) 4. Bl. Com. 203.  
1. Hale, 380.  
1. Hawk. P. C. Leach's edit. 134, 135.

And upon the same principle (*z*), a servant who kills his master, whom he has left upon a grudge conceived against him during his service, is guilty of petty treason; for the act of killing shall relate back to the situation

situation he was in at the time the treacherous intention was conceived.

### XXIII. "CAVEAT ACTOR."

Therefore if a stranger takes upon him to act as executor without any just authority, as by intermeddling with the goods of the deceased, and many other transactions, he is liable to all the trouble of an executorship, without any of the profits or advantages (a). So also a rightful executor must take care, in exhausting the assets which come to his hands, to observe the rules of priority which the law has established with respect to the payment of the testator's debts; for if he pays those of a lower degree first, as debts on simple contract before those of a higher nature, as debts on specialties, he will be liable to pay those of a higher nature out of his own estate (b); *quia culpa est se immiscere rei ad se non pertinenti* (c).

Thus, also, where a plaintiff states his title defectively or inaccurately, it is incumbent on the defendant to take care and demur, and not to join issue; for if the plaintiff recovers, it shall be presumed after verdict, that all circumstances necessary to support the action were proved (d).

So if a lessee has broken any of the covenants of his lease, and the lessor has notice of the breach, he must afterwards take care not to accept rent from the lessee; for that will avoid the forfeiture (e).

### XXIV. "CESSANTE CAUSA CESSAT EFFECTUS."

Thus, if a lessee commit waste, he subjects himself to an action; but if before action brought he repairs the place wasted, and thereby removes the cause, a subsequent action for the waste shall cease (f).

Thus also, before the reign of Edward the First, a protection would lie *quia moratur in Wallia*; but since that kingdom has been incorporated with, and made parcel of England, no such protection will lie;

(a) 2. Bl. Comm  
507.  
5. Rep. 33.  
Went c. 14.

(b) 1. And.  
129.  
2. Bl. Com.  
511.

(c) On this  
Maxim the  
offence of  
MAINTENANCE is  
founded.  
2. Inst. 208. 444  
1. Hawk. P. C.  
(d) Douglas,  
683.

(e) 2. Term  
Rep. 425.

Co. Lit. 204.  
(f) Whelpdale's case, 5.  
Co. 119.

(g) Calvin's case, 7. Co. 21.  
Ballen's case, 9. Co. 55.

(h) Cro. Eliz. 352.

(i) Fitzgerald's case, Green's B. L. 8.

(k) Lady Laneborough's case, 2. Black. 1179.

Mr. Baddeley's case, 2. Black. 1079.

Schurz's case, 2. Black. 1195.

Lady Percy's case, 1. Term Rep. 5.

Barwell v. Brooks Hill, 24. Geo. 3.

B. R. Cooke B. Law, p. 36.

(l) 2. Inst. 11.

(m) Loft's Principia, p. 11. Max. 139.

(n) Noy's Maxims, 5. ed. p. 3.

lie; for the cause was, that Wales was then an independent kingdom (g).

So also to an action of *assise* or *quod parcellat* for a nuisance, it is a good plea, that the nuisance which is the cause of action is removed (b).

Thus, also, a married woman is not liable to be sued for the debts she contracts, because of her *coverture*; but if she be divorced (i), or enter into a bond of separation, and live apart from her husband, openly and avowedly with the means of providing for herself; as if she carry on trade as a sole trader, or have a sufficient separate maintenance, or if her husband be transported (k); in short, if she be completely separated from, and no longer under, the coverture of her husband, but acts in every respect as a *feme sole*, the husband, who was before liable for her debts, is exonerated, and she, who was before exonerated, becomes liable; for the cause having ceased, the effect shall also be determined (l); *Cessante ratione legis cessat ipsa lex*.

In illustrating this Maxim also, it may not be improper to mention another, that, "*Causa vaga et incerta non est causa*" (m); and therefore, as it would be infinite for the Law to judge the causes of causes, and their impulsions one of another, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree (n).

## XXV. "COMMUNIS ERROR FACIT JUS."

Thus, common recoveries, which were at first introduced upon feigned and unlawful ground, having by length of time become the common assurances of land, the Judges will not now suffer the validity of their operation to be disputed: for the Law favours what is beneficial to the public; and a great part of the inheritances of the kingdom depending on this title and security, it converts the common error into a right (o).

(o) Plowd. 33. 5. Co. 40. 4. Inst. 240. Wood's Institutes, 241.

(p) Finch's case, 6. Co. 67.

—But see an observation respecting this Maxim, Douglas' Reports, 102, note (1).

So also, where a *yeoman* has been generally mistaken for a *gentleman*, this latter title shall be allowed as a legal addition to his name (p).

XXVI. "CONSUETUDO MANERII ET LOCI EST  
OBSERVANDA."

Local Customs, as we have already shewn, are adopted by and ingrafted into the Common Law; for it is said, "*Consuetudo est altera lex* \*;" and that, "*Consuetudo vincit communem legem*;" and therefore, wherever a Custom prevails, it must be observed; for the Custom of a manor is the Law of the manor. Therefore, although a copyholder has in judgment of law only an estate at will (q); yet Custom has so established and fixed his estate, that it may be defendible, and his heirs shall inherit it, according to the maxims and rules of the Common Law, as incident to every estate descendible; *quia quod tacite intelligitur deesse non videtur* †; and therefore his estate is not merely *ad voluntatem domini*, but *ad voluntatem domini secundum consuetudinem manerii*; so that Custom is the life and soul of copyhold estates (r).

So also, a Custom within a parish, that tenants, whether by parole or deed, shall have the *way going cross*, after the expiration of their term, is a good Custom, and must therefore be observed (f).

So also, a Custom within a manor, that all the inhabitants shall grind all their corn and malt which by them or any of them shall be used or spent, ground *within the manor*, is good (t); but a Custom to grind all their grain whatsoever by them spent or sold, is bad; for, *Consuetudines speciales strictè sumendæ* (u). Wherever Custom is silent, the rules of the Common Law must prevail (x); and therefore an action of trespass will lie against persons who enter into the harvest-field of another for the purpose of what is called *leafing* or *gleaning*; for it has been determined, that a particular Custom for this purpose in poor and indigent householders cannot support such a practice (y); and that the right cannot be claimed as part of the general Common Law of the land (z).

There cannot be a legal Custom in any place in contradiction to Acts of Parliament; and therefore the Legislature having established a uniform standard of

Co. Lit. 63.

\* Noy's Max.

45.

4. Co. 21.

(q) 3. Co. 8.

9. Co. 105.

Cro. Car. 45.

† See Wragg

v. Spray, 1.

Term Rep.

466, 474.

(r) 4. Co. 21,

22.

(f) Dougl.

201.

1 Term Rep. in

Com. Pleas, 5.

(t) Dougl. 218.

(u) Jenk. Cont.

83.

3. Keb. 499.

(x) 1. Term

Rep. 474.

(y) 2. Term

Rep. 758.

(z) 1. Term

Rep. in Com.

Pleas, 51.

of weights and measures, and the 13. and 14. *Car.* 2. c. 26. having said that every pound of butter shall contain *sixteen ounces*, a Custom that every pound of butter sold in a particular market-town shall contain *eighteen ounces*, is bad; although perhaps a Custom that butter shall be sold in *lumps* or yards, of any given weight, may be good (a).

(a) Noble v. Durel, 3. Ter. Rep. 273.

### XXVII. " CONSENSUS TOLLIT ERROREM."

Therefore in a writ of right, if the jury who are to try the mere right are once impannelled by the four knights, with the consent of both parties, none of the twelve so chosen can be afterwards challenged (b). So if an issue be tried by another jury than it ought to be, the verdict cannot be set aside as for a mis-trial, if the venue was changed by the consent of the parties (c).

(b) Co. Lit. 37. a. 294. 5. Co. 40. b.

(c) Cro. Eliz. 664. Co. Lit. 126. a. Mr. Hargrave's edit. note (1) 5. Co. 26. b.

### XXVIII. " CONVENTIO PRIVATORUM NON POTEST PUBLICO JURI DEROGARE."

No private contract or agreement prejudicial to common right, or repugnant to the general interest of the commonwealth, shall prevail in law. Therefore no condition or limitation, be it by act executed, or by limitation of an use, or by devise in a last will, can bar a tenant in tail from aliening by a *common recovery* (d); for unless some means be preserved to unfetter intailed estates, they might be made perpetual; and perpetuities are against the reason and policy of the Common Law, and detrimental to the interests of society, by precluding men from the opportunity of disposing of their estates as the exigencies of their families may require (e).

(d) 9. Co. 128. Cro. Jac. 697. Hob. 170.

(e) Mildmay's case, 6. Co. 41. 10. Co. 38.

So also a contract, or promise made by a FRIEND of a Bankrupt, when he was upon his last examination before the Commissioners, that in consideration the Assignees and Commissioners would forbear to examine him touching certain sums of money which the Bankrupt was charged with having received,

ceived, and not accounted for to his Creditors, HE would pay to the Assignees such sums of money as the Bankrupt had received and not accounted for, is void, notwithstanding the Assignees agreed to the proposal, and it was for the interest of the Creditors to accept it; for such an agreement is against the policy of the Bankrupt Laws (f). (f) Norcor v. Wallace, Hil. Term, 20. Geo. 3. 3. Term Rep. 17.

So also, although wagers are in some cases legal, yet if two voters lay a wager with respect to the event of an election of a Member to serve in Parliament before the poll begins, it is illegal; for it is against the fundamental principles of the Constitution, which requires that every voter should be free from pecuniary influence in giving his vote, and the moment such a wager is laid both parties are fettered (g). (g) Allen v. Hearne, 1. Ter. Rep. 59.

XXIX. "CUI LICET QUOD MAJUS, NON DEBET QUOD MINUS NON LICERE."

Therefore, where a Custom prevails that copyhold lands may be granted to any person in *fee simple*, a grant of them in *tail*, or for *life*, or for *years*, is within the Custom; for a fee simple being the larger estate includes all the inferior kinds (h). (h) 4. Co. 23. 5. Co. 115. 9. Co. 49.

So also, if a Custom enables a man to let lands for *three lives*, it will enable him to let them for *one life* (i); for, *Omne majus includit minus*. (i) 6. Mod. 67. Cro. Eliz. 323, 373.

So also, under a power of appointing real and personal estate "to and amongst such of the testator's relations as shall be living at the time of his death, in such parts, shares, and proportions," an exclusive appointment to one relation is good (k). (k) Titcher v. Biles, 1. Ter. Rep.

XXX. "CUICUNQUE ALIQUIS QUID CONCEDIT, CONCEDERE VIDETUR, ET ID SINE QUO RES IPSA ESSE NON POTEST."

Therefore, if a lessee *at will* sow the land, and the lessor after it is sown, and before it is ripe, put him out, yet the lessee shall have the corn, and free entry, Co. Lit. 56.



(*l*) Lit. Sect. 68. entry, egress, and regress; to cut and carry it away (*l*).

So also, if a house is let at will, and the tenant enter with his goods, and afterwards the lessor puts him out, yet he may enter the house again to fetch away his goods (*m*).

(*m*) Lit. Sect. 70.

So also, where a man granted a *free and convenient* way for the purpose of carrying coals, and it was found that the grantee could not conveniently carry his coals without making a framed waggon-way, it was determined that he had a right to make such a way, in order to enjoy the full effect of the grant (*n*).

(*n*) 1. Term Rep. 570.

So also, 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 the grantee a way to go to it; and therefore the grantee may cross the land of the grantor for this purpose, without trespass (*o*).

(*o*) 2. Bl. Com. 36.  
Finch's Disc. on Law, 63.

XXXI. "EJUS EST DARE EJUS EST DISPONERE."

Thus the King, with whom the prerogative of mercy resides, may, by the Common Law, extend that mercy on what terms he pleases, and annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend (*p*).

(*p*) 4. Bl. Com. 401.  
See Calvin's case, 7. Co. 5. b.

So where *A.* bargained and sold a manor, to which an advowson was appendant, to *B.* and his heirs, with a proviso that *B.* should regrant the advowson to *A.* during his life; on non-performance by *B.* it was resolved, that *A.* might lawfully enter for the condition broken; because it was not unlawful or unjust that the bargainer, from whom the land moved, should annex what condition soever he pleased to the estate of the land (*q*).

(*q*) Id. Cromwell's case, 2. Co. 71.  
Wingate's Maxims, 53.

So if a man holds land by a capon, or an egg, or twelve-pence rent, the lord cannot enter and take which of them he pleases for rent arrear, although he may distrain; but out of many of these things the

the tenant may *give* the lord which of them he will (*r*). (r) Woodland's case, Plowd. 26.

XXXII. "CUJUS EST SOLUM EJUS EST USQUE AD COELUM."

Land, in its legal signification, is of an indefinite extent upwards as well as downwards; and this is the Maxim of Law *upwards*; and therefore no man may erect a building to over-hang another's ground; and *downwards*, whatever is in a direct line between the surface of the land and the centre of the earth belongs to the owner of the surface, as is every day's experience in the mining countries (*f*). (f) 2. Bl. Com. 18. Cro. Eliz. 118. 9. Co. 54. Co. Lit. 166. Wood's Inst. 254.

XXXIII. "CUJUS EST DIVISIO ALTERIUS EST ELECTIO."

Therefore, where an estate descends to *coparceners*, if the eldest parcener *divides* or makes partition, she shall not chuse which portion of the estate she shall have; but the *election* shall be left to the other (*t*). And it is said, a prescription that a farmer may deliver the tenth of all his wool without any sight or touch of the nine parts by the parson, is, upon the strength and force of this Maxim, void; for that it is unreasonable that the farmer should first *divide* his wool, and then *elect* which portion he pleases for the parson (*u*). (t) Co. Lit. 166. 3. Co. 22. 2. Bl. Com. 189. (u) Bishop of Carlisle's case Hob. 107.

XXXIV. "DA TUA DUM TUA SUNT, POST MORTEM TUNC TUA NON SUNT."

Therefore if a thief steal away the shroud from the body of a dead person, the indictment must describe the shroud to be the property of those who buried the deceased, for a dead man can have no property (*x*). (x) 3. Inst. 110. 12. Co. 113. 1. Hale 515. 2. Hale, 290. 1. Hawk. 145. 3. Bullt. 18. 4. Bl. Com. 236.

XXXV. "DEBILE FUNDAMENTUM FALLIT  
OPUS."Wingate, 113.  
Noy, 12.(y) Co. Lit.  
128. b.(z) Co. Lit.  
270. a.(a) Proctor's  
case, Dyer, 223.  
Wilkes's case,  
4. Burr. 2560.  
Barrington's  
case, Mich. 30.  
Geo. 3. in B.R.

Thus, where an outlaw brings an action of debt, detinue, or the like, the right to bring which is forfeited by the outlawry, the defendant may plead the outlawry in bar, and by that means destroy the action; for the ground on which it is founded being forfeited to the law, the action raised thereon of course must fail (y). Thus also, if a man makes a lease for years, and before the lessee enters, he makes a release to him, it is void; for, until entry, the lessee hath only *interesse termini*, and no possession; and a release which enures by way of enlarging an estate, cannot work without a possession; for, until possession taken, the lessor hath no reversion to release (z). So also, if the return of an *exigent* be erroneous, the outlawry which is grounded thereupon is erroneous also; because the writ of *exigent* is the warrant by which they proceed to outlawry (a).

XXXVI. "DE FIDE ET OFFICIO JUDICIS NON  
RECIPITUR QUÆSTIO."(b) Bacon's  
Max. 83. See  
the arguments  
in Johnston v.  
Sutton, 1. Ter.  
Rep. 530.

The law entertains so sacred a respect for the certainty of judgments, and the credit and authority of the office of Judges, that it will not permit the assignment of any errors which tend to impeach them of abusing their trust and office; but matters of fact or mistakes of law may be assigned for error (b).

## XXXVII. "DE MINIMIS NON CURAT LEX."

(c) Plow. 329.  
(d) Hargrave's  
Co. Lit. note  
(10) p. 54. a.

Therefore, where an action of waste is given, if the waste done be only of the value of two-pence, the plaintiff shall not have judgment (c); and it is said, that the waste ought to be to the value of forty pence at least (d).

So also to constitute a felony by larceny, it is indispensably necessary that the things stolen should amount to more than the value of twelve-pence (*e*). (*e*) 1. Hale, 530. Leach's Crown Law, 182.

## XXXVIII. "DE MORTUIS NIL NISI BONUM."

Therefore, although a sentence of divorce may be repealed after the death of the parties, yet no sentence can be given to declare the marriage null and void, after the death of the parties; for that would be to traduce the dead, by bastardizing their issue (*f*). (*f*) Kenne's case, 7. Co. 42. 8. Co. 101. Co. Lit. 244.

## XXXIX. "DERIVATA POTESTAS NON POTEST ESSE MAJOR PRIMITIVA." Noy, 8.

Therefore, when a man demised land for years, and the lessee opened a coal-mine therein, and assigned over his term to a third person, it was held, that the assignee was not entitled to work the mine, although it had been opened by his assignor; for as the land only, and not the coal-mine, was demised to the lessee, he could not assign over a greater interest than he had in it (*g*). (*g*) Co. Lit. 321. 5. Co. 113. a. Wing. Max. 67. Noy's Max. 8.

## XL. "DIES DOMINICUS NON EST JURIDICUS."

No proceedings can be had, or judgment given, or supposed to be given, on a Sunday (*b*); for in all the four Terms the sabbath-day is *dies non juridicus* (*i*); and therefore, where a writ of summons in a common recovery was made returnable in a month from the day of Easter, which happened to be Sunday, and the tenant in tail, who was vouchee, died the next day, the judgment was reversed because it could not be given till the day after the vouchee's death, and then it came too late (*k*). (*b*) 3. Bl. Com. 278. (*i*) Co. Lit. 135. a. (*k*) Swan v. Broome, 3. Burr. 1596.

So also, if a fine be levied pursuant to 4. Hen. 7. c. 24. and any of the proclamations be made on a Sunday, all the proclamations are erroneous (*l*). (*l*) Wingate's Maxims, 7.

So if a writ of *scire facias*, out of the Common Pleas, bear *teste* on a Sunday, it is erroneous (*m*).

(*m*) Dyer, 168. By the statute 29. Car. 2. c. 7. no arrest can be made, or process served, upon a Sunday, except for treason, felony, or breach of the peace (*n*).

(*n*) 3. Bl. Com. 290. And upon this statute it is held, that a person convicted upon a penal Act of Parliament cannot be apprehended on a Sunday for non-payment of the forfeiture, it not being a constructive breach of the peace; but if a penal Act authorises proceedings in a criminal as by indictment, the defendant under such mode of proceeding may be arrested on a Sunday (*o*).

(*o*) King v. Myers, 1. Ter. Rep. 265.

So an attachment for non-performance of an award, or for non-payment of costs, is only in the nature of a civil proceeding, and therefore the party cannot be arrested on it on a Sunday (*p*).

(*p*) 1. Term Rep. 265. 1. Atk. 58.

No sale upon the Lord's Day shall be considered a sale in market overt, so as to alter the property (*q*); and the Legislature hath restrained certain matters from being transacted on a Sunday, under particular penalties (*r*).

(*q*) Wray, 8.  
(*r*) See them all enumerated 1. Hawk. P. C. 11. 3. Burn's Justice, 106.

#### XLI. "DOLUS ET FRAUS UNA IN PARTE SANARI DEBENT."

As it would be highly unjust to permit a man to derive any benefit from his own wrong, the law watches with great anxiety to remedy the effects of fraud and deceit. Therefore, if a man be bound to appear at a day, and before the day the obligor cast him into prison, the bond is void (*f*). So also, if a man makes a *false affirmation*, with intent to defraud, whereby another person receives damage, an action on the case in the nature of deceit will lie against him, although he would not have derived any benefit from the effect of his affirmation (*t*). So also in obtaining insurances, if the assured, or his agent, make any misrepresentation to the underwriters respecting the circumstances of the ship or voyage upon which the insurance is to be made, the policy will be *ipso facto* void (*u*).

(*f*) Noy's Max. 34.

(*t*) Pasley v. Freeman, 3. Ter. Rep. 51. Hilary, 29. Geo. 3.

(*u*) See Mr. Parke's Treatise on Marine Insurances, 2d edit.

#### XLII. "DOLUS"

XLII. " DOLOSUS VERSATUR IN GENERALIBUS." Wing. 636.  
Noy, 34.

Therefore, a bishop cannot refuse a clerk upon a general allegation that he is *scismaticus*, or an heretic, but he must accuse him of some particular crime or error, otherwise bishops might fraudulently deprive all patrons of their presentations (x). So also, a grant of ALL the grantor's goods generally without exception, is considered an ensign and mark of fraud (y); and therefore, if such a grant be made by a trader, it is not only void against his creditors, but it is *ipso facto* an act of bankruptcy within the statute 1. Jac. 1. c. 15.; and a deed with a mere colourable exception of certain parts of such trader's effects, will not alter the effect of the deed (z).

(x) Specot's case, 5. Co. 57.  
(y) Twine's case, 3. Co. 81.  
(z) 1. Burr. 467.  
2. Burr. 827.  
Dougl. 822.  
Cooke's B. L. 111.  
1. Bl. Rep. 362. 441.  
Cowp. 123.  
2. Bl. Rep 976.

XLIII. " DOMUS SUA EST UNICUIQUE TUTISSIMUM REFUGIUM."

Every man's house is considered as his castle, as well for his defence against injury and violence, as for his repose (a); and therefore, to violate this security is considered of so atrocious a nature, that the alarmed inhabitant, whether he be the owner or a mere inmate, is permitted by the law to repel the violence, even unto the death of the assailant, without incurring the penalties of excusable homicide (b). Thus also, burglary, which consists in breaking and entering a dwelling-house in the night-time with intention to commit a felony, is considered as the highest and most aggravated crime a man can be guilty of (c). Upon this maxim also, a man's house shall afford the owner protection against civil process; and therefore neither the outer-door nor the window can be broken open to execute a writ of *fieri facias* against his goods, or a *capias ad satisfaciendum* against his person (d): but it has been solemnly determined, that this privilege does not extend to an inner door, and that a bailiff in execution of mesne process may break open the door

(a) 5. Co. 92.  
(b) Leach's Hawkins. 1. vol. 165. in *notis*.  
(c) 4. Bl. Com. 227.  
Lord Auckland's Principles of Penal Law, 273.  
(d) Year Book, 18. Edw. 4. pl. 4.

(e) *Lee v. Ganfel, Cowp.* 1. of a lodger, having first gained peaceable entrance at the outer door of the house (e).

XLIV. "DORMIT ALIQUANDO JUS; MORITUR NUNQUAM."

Co. Lit. 279.  
2. Inst. 161.

2. Bl. Com.  
325.

Right is considered in such high estimation, that the Law preserveth it from death or destruction; and although it may for a time be suppressed with respect to the person intitled to it, it can never be entirely extinguished. As if my tenant for life makes a lease to *A.* for life, remainder to *B.* and his heirs, and I release to *A.*; although this extinguishes *my right* to the reversion, as it respects myself, and shall enure to the advantage of *B.*'s remainder, as well as *A.*'s particular estate, yet in truth the *right itself* is not extinct, but doth follow the possession; for *the right of freehold* is thereby transferred to *A.* during his life, and after his decease *the right of inheritance*, which before was *my right* in reversion, devolves upon *B.* and his heirs.

XLV. "DORMIUNT ALIQUANDO LEGES; NUNQUAM MORIUNTUR."

(f) 2. Inst.  
161.

(g) *White v. Boot*, 2. Term Rep. 274. Sed vide 3. Term Rep. 362.

Therefore, an Act of Parliament cannot be abolished by *non user* (f). Thus, where the 21. *Jac.* 1. c. 4. requires, that before any *qui tam* action shall be commenced, an affidavit shall be filed that the offence was committed within a year before; but the practice had been for many years not to file this affidavit; yet the court held, that, as long as the statute remained unrepealed, it was their duty to see it carried into execution (g).

XLVI. "DOMINIUM A POSSESSIONE COEPISSÉ DICITUR."

The reason why a peaceable possession without contradiction makes a right in Law is, that thereby there

there may be certainty of title to estates (*b*). In every complete title to lands, there must be both the right of possession and the right of property conjoined; *juris et seisinæ conjunctio*. If, therefore, the possession of an estate be in one person and the property in another, and he with whom the right resides suffers the possession to descend to the heir of the possessor, the heir, whose ancestor had only a bare and naked possession, has by this descent acquired the right of possession, though not the right of property: but if the proprietor suffer him to continue uninterruptedly in possession for threescore years, he thereby acquires a right of property also, against all the world, and his title cannot be impeached by any dormant title whatsoever (*i*).

(*b*) Jacob's Grammar, 87.

(*i*) 2. Bl. Com. 176 to 196. See Co. Lit. 115.

XLVII. "ECCLESIA DECIMAS ECCLESIA SOLVERE NON DEBET."

Therefore a vicar, upon a general endowment, shall not pay tithes of his glebe to the parson, if he keeps it in his own hands. So if a vicar is endowed of all the small tithes arising within the parish, he shall not have the small tithes arising upon the glebe lands of the parson, while they are in his own hands; but it is otherwise if the glebe be in the occupation of a lay tenant,

11. Co. 14. Cro. Eliz. 479. 578. Wood's Inst. 159.

XLVIII. "ÆSTIMATIO PRÆTERITI DELICTI EX POSTREMO FACTO NUNQUAM CRESCIT."

The Law construeth neither penal laws nor penal facts by intendments, but considers the offence in degree as it stands at the time when it was committed; so that if any subsequent circumstance or matter arise which, conjoined with that which happened at the beginning, would draw it to a higher degree, yet the law will not thereby extend or amplify the offence. Therefore, if a man be wounded, and the percurfor is voluntarily let go at large by the gaoler, and afterwards the man dies; yet

Bacon's Law Tracts, 62.



this is no felonious escape in the gaoler. So if a man compass and imagine the death of the person who afterwards becomes king, he not being a person within the statute of treasons, this imagination precedent is not high treason. So if a man use slanderous words of a person upon whom some dignity afterwards descends, by which he becomes a peer of the realm; yet he shall have only a simple action on the case, and not an action of *scandalum magnatum* on the statute. BUT NOTE, it is said, *præteriti delicti*; for any accessary before the fact is subject to all the contingencies pregnant of the fact, if they be pursuances of the same fact; as if a man command or counsel one to rob a man, or beat him grievously, and murder ensue, in either case he is accessary to the murder, *quia in criminalibus præstantur accidentia.*

#### XLIX. "EQUALITY IS EQUITY."

2. Vent. 353.  
1. Vern. 49.  
1. Saik. 155.  
Heath's Maxims, 9.

Therefore, where an heir buys in an incumbrance for less than is due upon it, he shall be allowed no more than what he really paid for it, as against other incumbrances upon the estate; for the taking away one man's gain to make up another's loss, is making them both equal; and the gain the heir would have made, if the whole money due on the incumbrance should be allowed him, shall be taken from him to make up the loss of the other incumbrancers upon the estate. Thus, also, where a testator devised two several estates for the payment of his debts, and devised also an annuity out of one of them; the trustees sold that estate out of which the annuity was payable; EQUITY decreed the other estate to stand charged with the annuity; for, by charging the other estate with the annuity, the heir will not gain the accidental advantage of having his estate discharged of the annuity, nor the annuitant lose his annuity; and so both are equal.

1. Chancery Cases 295.

## L. "EQUITY RELIEVES AGAINST ACCIDENTS."

Therefore, where a bond was given to pay an annuity out of the profits of an office which was taken away by the usurpers in the grand rebellion; the office being revived upon the Restoration, the obligor was sued on the bond; but, upon his bill to be relieved, the Court decreed him only to pay the annuity for so many years as the office continued. Thus, also, where the trustee of an infant received forty pounds of the infant's money, and the trustee was robbed of 200l. whereof the 40l. was part, it was decreed, That he should be allowed the forty pounds in his accounts; for he is only bound to keep it with as much care as he does his own.

1. Chancery  
Cases, 72.

2. Ch. Caf. 2.

## LI. "EQUITY PREVENTS MISCHIEF."

Therefore, if there be lessee for life, remainder for life, the reversion or remainder in fee, and the lessee in possession wastes the lands; though he is not punishable for waste by the Common Law, yet he shall be restrained in Chancery, for this is a particular mischief; and though he is not punishable during the continuance of the remainder, yet he is punishable after,

Moor, 554.  
Vern. 23.  
Heath's Max.  
30. and the  
cases there  
cited.

## LII. "EQUITY WILL NOT SUFFER A DOUBLE SATISFACTION."

Therefore, where a grandfather devised lands to his son to pay ten pounds a year to the son's three daughters, and the father gave 200l. in marriage with one of them, it was decreed, That the ten pounds a-year should be included in the two hundred pounds,

Tothil, 78.

LIII. "EXCUSAT AUT EXTENUAT DELICTUM IN CAPITALIBUS, QUOD NON OPERATUR IDEM IN CIVILIBUS."

Bacon's Law  
Tracts, 60, 61.

In capital cases, *in favorem vitæ*, the Law will not punish in so high a degree, except the malice of the will and intention appear; as in *murder* when compared with *manslaughter*: but in civil trespasses, and injuries of a inferior nature, the Law rather considers the damage of the party wronged than the malice of the offender; as in slander, WHEREBY a man is damnified in his name and credit. So, if a man be killed by misadventure, as by shooting an arrow at butts, this hath a pardon of course; but if a man be hurt or maimed only, an action of trespass lieth; though it be done against the party's mind and will, and he shall be punished as deeply as if he had done it of malice. So if an infant within years of discretion, or a madman, kill another, he shall not be impeached thereof; but if they put out a man's eye, or do him like corporal hurt, he shall be punished in trespass.

LIV. "EX FACTO JUS ORITUR."

2. Inst. 49.  
Sed vide  
2. Hawk. P.C.  
549.

Therefore it is said by Lord *Coke*, that in the case of a trial in the High Court of Parliament, after the Lords are assembled together to consider of the evidence, they cannot send to the High Steward to ask the Judges any question of law, but in the hearing of the prisoner, in order that he may hear whether the case be rightly put; for, *De facto jus oritur*,

LV. "EXPEDIT REIPUBLICÆ UT SIT FINIS LITIIUM."

Therefore, where a fuitor is barred in any action real or personal, by judgment upon demurrer, confession, or verdict, he is barred as to that or the like action of the same nature for the same thing for

(k) Ferrers'  
case, 6. Co. 7.

ever (k),

Awards

Awards are to be favoured in Law, because they prevent and compose suits and controversies; and therefore, although the parties do not discover all their differences to the arbitrators, yet the award shall be good; for otherwise the concealment of some trifling cause of action, on the one side or the other, might be practised, and the ground of contention continued (l).

(l) 8. Co. 98.  
9. Co. 79.

The general statute 32. Hen. 8. c. 36.\* of fines shall bind the king, though he is not named, because the object of it was the settling and quieting of estates, and the prevention of debates and controversies (m).

(m) 11. Co. 75.

A barrator is, in judgment of Law, one of the most dangerous and pernicious vermin of the commonwealth; because, whereas the Law endeavours to settle peace and amity, and to suppress discord and contention, he is *feminator litium et oppressor vicinorum suorum* (n).

(n) 8. Co. 37.

And, upon this Maxim, every plea that a man pleadeth ought to be triable, for without trial the cause can receive no end (o).

(o) Co. Lit.  
303. b.

LVI. "EX NUDO PACTO NON ORITUR ACTIO."

Pl. Com. 305.

A consideration of some sort or other is so absolutely necessary to the forming of 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, however he may be bound in honour or conscience, cannot be compelled by Law to perform it (p). As if one man promises to give another 100l.; here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other (q). And it is a general rule, That wherever a person promises, without a benefit arising to the promissor, or a loss to the promisee, it is void (r), as being without a legal consideration. But as all promises shall be taken most strong against the promissor, the Law will endeavour to find a good consideration, if possible, in order to support a fair contract (s); and

(p) Dr. & St.  
D. 2. c. 24.  
2. Bl. Com.

445.  
Salk. 129.  
2. Burr. 1670.  
(q) 2. Bl. Com.

445.  
(r) 2. Bull.  
259.

1. Bac. Abr.  
170.

(s) Poph. 148.  
2. Roll. Rep.  
104.

therefore

therefore any degree of reciprocity will prevent the *pact* from being *nude*; nay, even if the thing be founded on a prior moral obligation, it is no longer *nudum pactum*; as a promise to pay a just debt, though barred by the statute of limitations (*t*); or, a promise by a bankrupt after the bankruptcy, to pay a debt due before, in consideration of the creditor agreeing to take no dividend (*u*); and as this *maxim* was principally established to avoid the inconvenience that would arise from setting up mere *verbal promises*, for which no good reason could be assigned (*x*), it does not apply where the promise is authentically proved by *written documents* (*y*); and therefore, if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of consideration in order to evade the payment; for every bond, from the solemnity of the instrument (*z*), and every note, from the subscription of the drawer (*a*), carries with it internal evidence of a good consideration: and 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 (*b*),

(*t*) 2. Bl. Com. 445.  
 (*u*) Trueman v. Fenton. Cowp. 548.  
 (*x*) Plowd. 308.  
 3. Burr. 1671.  
 (*y*) See vide Lord Mansfield's opinion, 3. Burr. 1671.  
 (*z*) Hardr. 200.  
 1. Ch. Rep. 157.  
 (*a*) Ld. Ray. 760.  
 (*b*) 2. Bl. Com. 446.  
 Noy's Max. 24.  
 8. Co. 80.

LVII. " EXPRESSIO EORUM QUÆ TACITE INSUNT, NIHIL OPERATUR."

Therefore, if a man grant a manor for years, with an exception of the wood and underwood *growing and being* upon the said manor; the words "*growing and being*" are words of superabundance, because, without them, the Law will imply as much (*c*).

(*c*) Ives' case, 5. Co. 11.  
 See Wingate's Maxims, 235.  
 2. Hawk. 445.  
 Co. Lit. 191. 2. 205.  
 Hob. 170. 208.  
 8. Co. 56. b. 145. a. 10. Co. 39. a. 1. Mod. 190. 2. Saund. 351. Wood's Inst. 140.

LVIII. " EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS."

Therefore, says *Littleton*, if the condition upon a mortgage be, to pay to the mortgagee, or *his heirs*, the money, and before the day of payment the mortgagee dies, the feoffor cannot pay the money

to

to the executors, for the payment ought to be to the heir; and the Law, adds Lord Coke, shall never seek out a person, when the parties themselves have appointed one; for, *Expressum facit cessare tacitum* (d). (d) Co. Lit. 210. So, also, where a man was bound to pay 20l. to such a person as the obligee should by his will appoint, and the obligee named a person executor, but made no other appointment, it was resolved, that the executor should not have the twenty pounds (e). So, also, where a statute treating of "deans, prebendaries, parsons, vicars," and others having spiritual promotion; *deans* being the highest persons named, *bishops*, who are of still a higher order, are not included under the general words. (e) Lord Nottingham's MSS. notes to Co. Lit. 210. a. Sed vide 1. Freem. 476. 2. Co. 46. 3. Bl. Com. 88.

## LIX. "EXPRESSUM FACIT CESSARE TACITUM."

Thus, where a lease expressly reserves the rent to the lessor only, it shall not be intended a reservation to the lessor and his heirs; but if no person be mentioned, the reservation shall be extended by implication to the lessor and his heirs. So, also, where a man, by indenture, "demises and grants" land for term of years; and also, by the same deed, expressly covenants, that the lessee shall enjoy the demised premises, without "eviction by him, or any by his procurement;" the express covenant, which extends only to eviction by the lessor or his agents, shall supersede the covenant in Law arising from the words "demise and grant," which otherwise would have implicitly warranted the possession of the lessee against all persons whatsoever. Nokes v. James. Cro. Eliz. 674. 1. Peere Wms. 56.

## LX. "EX TOTA MATERIA EMERGAT RESOLUTIO."

Therefore, it is the office of a good expositor of an Act of Parliament, to make construction of all the parts together, and not of one part alone by itself; *Nemo enim aliquam partem rectè intelligere possit, antequàm totum iterum atque iterum perlegerit.* Thus, for example, although the first branch of 11. Hen. 7. The case of Lincoln College, 3. Co. 59. See Wingate's Maxims, 238.

c. 20. makes the discontinuance, alienation, warranty, and recovery, made by the wife of the inheritance of her deceased husband void and of none effect; yet the following clause, "and it shall be lawful for any person to whom the said inheritance shall appertain, to enter," being connected with the first clause by the conjunction "and," clearly expounds the generality of the words preceding; and therefore the sense of both together is, that they shall be void and of none effect, *by the entry* of him to whom the interest, title, or inheritance, after the decease of the wife, doth appertain; and shall stand in force between the parties themselves, and against all others, save only against such as have title. So, also, if land be veited in the king and his heirs, by Act of Parliament, saving the right of *A.*; and *A.* has at that time a lease of it for three years; here *A.* shall hold it for his term of three years, and afterward it shall go to the king: for this interpretation furnishes matter for every clause of the statute to work and operate upon; and it is a rule, That one part of a statute must be so construed by another, that the whole may, if possible, stand: *ut res magis valeat quam pereat.*

1. Bl. Com. 89.

Dougl. 30.

All statutes *in pari materia* are to be construed as one law.

LXI. "FORMA NON OBSERVATA INFERTUR  
ADNULLATIO ACTUS."

12. Co. 7.

Therefore, where the style and proceedings of the Ecclesiastical Courts, after the passing of the statute 1. *Edw.* 6. c. 2. were in the name of the bishops, and not in the name and under the seal of the king, in the manner that statute directs, their proceedings were adjudged to be unlawful.

LXII. "FORTIOR ET POTENTIOR EST DISPOSITIO LEGIS QUAM HOMINIS."

Co. Lit. 233. a.  
2. Roll. Rep.  
315. 325.

Therefore, where an estate depends upon a condition in Law, as if a man grant the office of parker for life, the law annexes a condition, that the

the grantee shall well and lawfully keep the park, and do that which to such office ought to be done, or otherwise the grantor and his heirs may oust him; and this condition, which, by intendment of Law, is annexed to the estate, is as strong as if it had been reduced to writing.

So, also, if a man seised in fee devises 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.

2. Bl. Com.  
241.  
1. Roll. Abr.  
626.  
Salk. 241.  
Ld. Ray. 728.

LXIII. "FRAUS EST ODIOSA ET NON PRÆSUMENDA."

Therefore a will, says LORD COKE, shall not of common intendment be supposed to be made by collusion; for, *Nulla impossibilia aut inbonesta sunt præsumenda vera autem et honesta et possibilia (f)*. So also, says LITTLETON, if a feoffee granteth the deed to the feoffor, such grant shall be good, and then *the deed* and the property thereof belongeth to the feoffor; and when the feoffor hath the deed in hand, and is pleaded to the Court, it shall be rather intended that he cometh to the deed by lawful means than by a wrongful mean (g); for, "*Omnia præsumuntur,*" says his commentator, "*legitimè facta donec probatur in contrarium injuria non præsumitur (h).*"

(f) Co. Lit.  
78 b.  
Cro. Car 550.

(g) Littleton,  
Sect. 377.  
(n) Co. Lit.  
232. b.  
10. Co. 56.  
and the cases  
there cited.

It has therefore frequently been decided, That fraud is a question of fact, and not an inference of law (i), and shall never be intended or presumed; but must be expressly averred, and positively found by a jury (k).

(i) 1. Term  
Rep. 263.  
(k) 10. Co. 56.

LXIV. "FRAUS ET DOLUS NEMINI PATROCINARI DEBENT."

Therefore, a recovery in dower or other real action, a remitter to a feme-covert or an infant, a warranty or sale in market-overt, the king's letters

3. Co. 78. and  
see the opinion  
of Mr. Justice  
Doderidge as  
ters



to this maxim, Palm. 158. ters patent, a pardon, a fine, a presentation, and all acts temporal and ecclesiastical; obtained by fraud and covin, shall not bind the parties.

LXV. "FRAUS EST CELARE FRAUDEM."

1. Vern. 240.

Therefore, where one *Pitt*, by the agency of one *Muschamp*, obtained a rent-charge of 300l. for the sum of 300l. from the Earl of Anglesea; it was held, That the grant was void, although *Pitt* did not transact the affair with the Earl himself, but, being told by *Muschamp* that such a bargain might be had, left it to him to deal therein between them; for it was construed, by the Court, that this method of carrying on the contract was in itself an evidence of fraud.

LXVI. "FREIGHT IS THE MOTHER OF WAGES."

Abernethy v.  
Laudale,  
Douglt. 542.

Therefore, an officer or sailor who has engaged to serve on board a letter of marque for certain wages during the voyage, and a share of all prizes, is not intitled to any part of the wages if the ship is taken before she completes her voyage, although he shall have been sent from the ship, previous to the capture, as prize-master on board a prize taken in the course of the voyage; for, by LORD MANSFIELD, freight is the mother of wages, and the safety of the ship the mother of freight.

LXVII. "FREQUENTIA ACTUS MULTUM  
OPERATUR."

Therefore, although a corporation be created by a charter, directing that the choice of its mayor, bailiffs, and other principal officers, shall be made by the commonalty; yet if by continual usage those officers have been chosen by a select number of the commonalty, or by the burgessees, albeit no constitution can be shewed to warrant such election, it is good in law, because it hath been so often  
put

put in execution (l). Thus, also, where it has been the usage in a parish to rate persons to the poor for their *stock in trade within the parish*, such persons are liable under the statute 43. *Eliz.* c. 2. to be rated to the poor in consequence of such usage (m). But no antiquity, however remote, can give sanction to a usage bad in itself; nor ought usage to be permitted to prevail against principles and clear law, unless in cases where the contrary would be inconvenient, and induce worse effects (n).

(l) 4 Co. 77. b. Wingate, 708.

(m) *Rex v. Hill, Cowp.* 613.

(n) *The case of General Warrants*, 3. Burr. 1767.

LXVIII. “FRUSTRA EST POTENTIA QUÆ NUNQUAM VENIT IN ACTUM.”

Therefore, a remainder limited to the right heirs of *B.* if there be no such person as *B. in esse*, is void; for a remainder ought to vest in estate during the particular estate, and ought to take effect in possession, when the particular estate ends; but here there must two contingencies happen; first, that such a person as *B.* shall be born; and, secondly, that he shall also take during the continuance of the particular estate; which make it *potentia remotissima*, a most improbable possibility, which the Law will not suppose can ever happen. So, also, a remainder limited to a man's son by name, is bad, if he has no son of *that name*; for the Law will not conceive it possible that he should not only have a son, but a son of a particular name. So, also, a limitation of a remainder to a *bastard* before it is born, is bad; for the Law will not presume that such a thing will ever happen; and, *Vana est illa potentia quæ nunquam venit in actum.*

*Cro. Eliz.* 509.  
2. Co. 51.  
1. Co. 66. 129.  
3. Co. 201.  
*Raym.* 54.  
*Co. Lit.* 284.  
2. Bl. Com. 170.

LXIX. “FRUSTRA LEGIS AUXILIUM INVOCAT QUI IN LEGEM COMMITTIT.”

Therefore, when thieves, having an intent to rob, pretend business to get into a house by night; or raise hue and cry, and bring the constable, to whom the owner opens the door, and when they come in they bind the constable, and rob the owner;

(o) 3. Inst. 64. owner; this being done in abuse of the Law is,  
 22. Aff. 42. by interpretation, esteemed to be an actual breaking  
 Year Book, and burglary, and the whole act shall be imputed  
 20. Edw. 3. to the thieves (o); *Meritò beneficium legis amittit qui*  
 pl. 120. *legem ipsam subvertere intendit (p).*  
 Wood's Inst. 370.  
 (p) 2. Inst. 53.

LXX. "FRUSTRA SIT PER PLURA, QUOD FIERI  
 POTEST PER PAUCIORA."

Reynolds' case, Thus, if the office of the Marshalsea become  
 9. Co. 95. forfeited, the king shall be put in possession there-  
 of by seizure, without office; so it is also of the  
 temporalities of a bishop, for every necessary cer-  
 tainty appears on record in the Exchequer. Thus,  
 Year Book, also, a person who is debtor to the king upon re-  
 1. Hen. 6. pl. 4. cord in the Court of Exchequer, if he be seen in  
 court, he may be brought in to answer without  
 process.

Wilkinson v. Thus, also, where one *Jacques* was committed to  
 Jacques, 3. the Fleet, and permitted by the warden to escape,  
 Term Rep. for which escape a judgment in debt had been re-  
 392. covered against the warden, which judgment *Jacques*  
 afterwards satisfied, and obtained a release from the  
 warden, but still continued to reside in the Fleet,  
 though he went out when he pleased; it was held  
 by the Court of King's Bench, that any creditor  
 might lawfully enter a detainer against him, with-  
 out being put to original process, while he was  
 in fact resident within the walls of the prison,  
 although he was not there by compulsion.

LXXI. "FURIOSUS SOLO FURORE PUNITUR."

4. Bl. Com. 24. Therefore, in criminal cases, idiots and lunatics  
 3. Inst. 6. are not chargeable for their own acts, if committed  
 1. Hale 34. under the incapacities of a defective or vitiated  
 understanding, not even for treason itself. Also,  
 if a man in his sound memory commits a capital  
 offence, and before arraignment for it he becomes  
 mad, he ought not to be arraigned for it; because  
 he is not able to plead to it with that advice and  
 caution

caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed; for peradventure, says the humanity of the English Law, had the prisoner been of sound memory, he might have alledged something in stay of judgment or execution.

*Non compos mentis* is of four sorts. FIRST, *Idiota*, Co. Lit. 247. which is a person who from his nativity, by a perpetual infirmity, is insane. SECONDLY, He who by sickness, grief, or other accident, wholly loseth his memory and understanding. THIRDLY, *A Lunatic*, 2. Inst. 14. who hath sometimes his understanding, and sometimes not, *aliquando gaudet lucidis intervallis*; and therefore he is called *non compos mentis*, so long as he hath not understanding. FOURTHLY, He who by his own vicious acts for a time depriveth himself of his memory and understanding; as he that is drunken. But this kind of *non compos mentis* shall give no privilege or benefit to him or his heirs; for a drunkard is *voluntarius demon*, and whatever hurt or ill he doeth, his drunkenness aggravates it: *Omne crimen ebrietas et incendit et detegit*. And these defects, whether permanent or temporary, must be unequivocal and plain; not an idle frantic humour or unaccountable mode of action, but an absolute disposition of the free and natural agency of the human mind (q). Co. Lit. 247. 8. Co. 170. Plow. 19. (q) Leach's Hawkins, 1. vol. p. 2. in notis.

LXXII. " GENERALE DICTUM GENERALITER (r) Vide post. EST INTELLIGENDUM (r)." Max. 75.

Thus the statute of Merton, 20. Hen. 3. c. 2. 2. Inst. 81. which enacts, " That widows may bequeath the Wood's Inst. 9. " crop of their ground, as well of their dowers as " of other their lands and tenements," is to be understood to extend to all the five kinds of dower, viz. 1. By Common Law. 2. By Custom. 3. Ad Co. Lit. 39. b. ostium

*ostium ecclesiæ.* 4. *Ex assensu patris.* And, 5. *De la plus beale.*

LXXIII. "GENERALE NIHIL CERTI IMPLICAT."

Fitzherbert's  
Natura Brevi-  
um, 20.  
Wingate, 635.  
Pl. 5.

Therefore, in an assignment of errors, a general assignment is not good; as to say, *in omnibus erratum est*, for that expresses no certainty; but the assignment ought to be special and certain, as *in hoc erratum est*, &c. and so shew the certainty of the things; and then again to say, *et in hoc erratum est*, and shew another thing, *et sic de singulis*, in which he will assign errors.

Barpole's case,  
8. Co. 98.

A submission was general of all actions, demands, &c. and the award was, that one of the parties should pay to the other twenty pounds. It was objected, that it did not appear that award was made of all matters in controversy, and therefore void; but it was adjudged good; for, as the submission was general of all actions, demands, &c. *generale nihil certi implicat*; and therefore, it stands well with the generality of the words, that there was but one cause depending in controversy betwixt them.

See the case of  
Owen v. Hurd,  
2. Term Rep.  
644.

LXXIV. "GENERALE TANTUM VALET IN GENERALIBUS, QUANTUM SINGULARE IN SINGULIS."

Dyer, 50.  
1. Palm. 495.  
Mob. 173.

Therefore, the words of the statute 27. Hen. 8. c. 27. "That all grants by letters patent to be made for term of life or years of any office concerning the lands within the survey of the Court of Augmentation, &c. shall be sealed with THE GREAT SEAL of that Court," were held to imply a negative; so that, if the grant be under THE GREAT SEAL of England, it shall be void.

Dr. Foster's  
case, 11 Co.  
59. b. 64 & 65.

So, also, the 35. Eliz. c. 1. against popish recusants, which recites, "That, for the more speedy levying and recovering, for and by the queen, of all and singular the pains, duties, forfeitures and payments which should become payable by that Act, &c. BE IT ENACTED, that all and every the said pains, duties, forfeitures and payments shall

“ shall and may be recovered and levied to her majesty’s use by action of debt, bill, plaint, &c.” was held to imply a negative in respect of the generality of the words; for if the queen shall recover “ *all and singular* the pains,” &c. and “ *all and every* the pains,” &c. then no other person can recover *any* of them; *et qui omne dicit nihil excludit, et generale tantum valet in omnibus, quantum singulare in singulis.*

LXXV. GENERALIA VERBA SUNT GENERALITER INTELLIGENDA (f).” (f) Vide ant. Max. 72.

Therefore, the statute 1. Hen. 7. c. 1. to restrain unlawful hunting in the night, being, “ That *if any person or persons* shall be convicted of the offences therein described, they shall be punished as felons,” extends, says LORD COKE, “ to *all persons* of what estate or degree soever, and as well to women as to men; for the words are, “ if any person;” and, *Generalia verba sunt generaliter intelligenda.*

So, also, the 43. Eliz. c. 7. which recites, that the offences, the robbing of orchards and taking away fruit-trees, &c. are now more commonly committed by *lewd and mean persons* than in former times; AND ENACTS, “ that *all and every* such lewd person and “ persons” who shall be guilty thereof shall be punished as the Act directs, is held to extend to persons who bear the description and addition of *gentlemen*, as well as to those who in the stricter sense of the words may be supposed to be comprehended under the description of lewd and *mean persons*.

LXXVI. “ GLOSSA VIPERINI EST QUÆ CORRODIT VISCERA TEXTUS.”

Thus, the statute of Gloucester enacts, “ That the heir of the woman shall not be barred of action if he demandeth the heritage, or the marriage of his mother by writ of entry, which his father aliened in his mother’s time, whereof no fine

“ is levied in the King’s Court ;” and so says LITTLETON, if the husband of the wife alien the heritage or marriage of the wife in fee with warranty, &c. by his deed in the country, it is clear law that this warranty shall not bar the heir unless he hath affets by descent ; for, says LORD COKE, it would be inconvenient to intend the statute in such a manner as that he who hath nothing but in right of his wife should, by his fine levied with warranty, bar the heir without affets. And this exposition is *ex visceribus aētūs*.

LXXVII. “ GRAMMATICA FALSA NON VITIAT  
CHARTAM.”

Therefore, if a bond be made *noverint, &c. me A. tenerie et obligarie B. in 10l. ad quam, &c. obligamus me*, it will be good ; for the parties and sum are proper ; and any words whereby it may be collected that the obligor binds himself are sufficient (t). So, if a bill be *cognovit se debere et indebitat. Fere sumam 20l. solvere B.* it will be good (u). So, where the words are not Latin or English, as if a man be bound in 20 *nobilis* for nobles ; or in *octogesimo* instead of *octinginta libris* (x) ; or in *sewteen* for *seventeen* pounds, or *therty* for *thirty* pounds (y) ; yet the bond will be good, for the sense and intention of the parties may be collected from the words. But where words are insensible, and the intent of the parties cannot be known, the obligation will be void (z) ; as if a man be bound in 20 *liveris* instead of *libris*, or in *viginti literis* (a).

(t) Yelv. 193.  
Cro. Jac. 261.  
(u) 2-Vent. 106.  
(x) 2. Roll.  
Ab. 146.  
Cro. Jac. 203.  
Hob. 75.  
(y) 10. Co. 133.  
Cro. Jac. 607.  
(z) 4. Com. Dig.  
280.  
(a) Noy, 109.  
2. Roll. Ab. 146.

LXXVIII. “ HE THAT CANNOT HAVE THE EFFECT  
OF THE THING SHALL HAVE THE THING ITSELF.”

Noy’s Max. 37. As, if a termor grant his term to another *habendum* immediately after his death, the grantee shall have the term from the time the grant is made.

LXXIX. " HE WHO WILL HAVE EQUITY MUST DO EQUITY."

Therefore, if a husband sues in the Ecclesiastical Court for a portion due to his wife, the Court of Chancery will order an injunction to stay the proceedings there, until he makes a competent settlement. Tothil, 114.

So, also, if a man marries a woman whose estate is in the hands of trustees, and applies to a Court of Equity to compel the trustees to convey the estate, he shall not have such equity, without doing equity to his wife, by making a suitable settlement or provision for her. Vern. 40. Cooke's Bank. Law, 323.330.

So, also, where a man mortgaged his estate, and afterwards the mortgagee advanced and lent him more money upon his bond; upon an application by the mortgagee to the Court of Chancery to redeem, the Court said, although there was no special agreement that the land should stand as a security for the bond debt, yet as the mortgagee is applying to the Court for equity, he must consent to pay both debts before he can redeem. Vern. 244. Salk. 84.

LXXX. " HE THAT HATH COMMITTED INEQUITY SHALL NOT HAVE EQUITY."

Therefore, where a defendant, by a trick, got a deed into his hands, and burnt or cancelled it, THE COURT OF CHANCERY would not direct a trial at law; which would not have been denied, if the defendant had not been guilty of a fraud. 1. Ch. Caf. 293.

So, also, where the plaintiff, having debauched the defendant, to whom he made false addresses of marriage, and got her with child, gave her a bond for 500l. conditioned for the payment of 50l. but omitted to mention any place where the money was to be paid. On an action being commenced at law, he brought his bill in Equity, and offered to pay the 50l. into court; but the Lord Chancellor refused to relieve him by granting an injunction. 2. Ch. Caf. 15. Sed vide 6. Mod. 101. and 4. and 5. Ann. c. 16. by which Courts of Law are now empowered to stop proceedings for

the penalty of a bond, on payment of principal, interest, and costs.



## LXXXI. "HÆREDEM DEUS FACIT, NON HOMO."

Co. Lit. 7.  
2. Bl. Com. 201

*Hæres*, in the legal understanding of the Common Law, implies, that he is *ex justis nuptiis procreatus*; for, *hæres legitimus est quem nuptiæ demonstrant*, and is he to whom lands, tenements, or hereditaments, by the act of God and right of blood, do descend of some estate of inheritance; for, *Solus Deus hæredem facere potest, non homo: Dicuntur autem hæreditas et hæres ab hærendo, quod est arctè insidendo, nam qui hæres est hæret; vel dicitur ab hærendo, quia hæreditas sibi hæret; licèt nonnulli hæredem dictum velint, quod hæres fuit, hoc est dominus terrarum, &c. quæ ad eum perveniunt.*

Co. Lit. 7. 29.  
2. Bl. Com. 246.

A monster, who hath not the shape of mankind, cannot be heir or inherit any land, albeit it be brought forth within marriage; but although he hath deformity in any part of his body, yet if he hath human shape he may be heir.

1. Roll. Abr.  
625.  
2. Bl. Com. 247.  
Co. Lit. 8.

A bastard cannot be heir; for, *Qui ex damnato coitu nascuntur, inter liberos non computentur.*

Every heir is either *male* or *female*, or an *hermaphrodite*, which is both male and female; for an hermaphrodite (which is also called *Androgynus*) shall be heir either as male or female, according to the kind of sex which most prevails.

2. Bl. Com. 208.

An heir, also, may be apparent or presumptive. Heirs apparent are such whose right of inheritance is indefeasible, provided they outlive the ancestor. Heirs presumptive are such who, if the ancestor should die immediately, would, in the present circumstances of things, be his heirs, but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose presumptive hopes may be hereafter cut off by the birth of a son: nay, if the estate hath descended by the death of the owner to such brother, or nephew, or daughter; in the former cases, the estate shall be divested and taken away by the birth of a posthumous child; and in the latter, it shall also be totally divested by the birth of a posthumous son.

Bro. tit.  
"Discent,"  
58.

The word "descent," says Lord Coke, is derived from the Latin *descendere*; *ID EST, ex loco superiore in inferiorem movere*; and, in legal understanding, it is taken, when land, &c. after the death of the ancestor, is cast by course of law upon the heir, which the law calleth a descent. And this is the noblest and worthiest means whereby lands are derived from one to another, because it is wrought and vested by the act of Law and right of blood unto the worthiest and next of the blood and kindred of the ancestor; and therefore it hath not in the *Common Law* the same signification that it hath in the *Civil Law*; for the civilians call him *heredem qui ex testamento succedit in universum jus quod defunctus habuerat*; but by the *Common Law*, he only is heir who succeeds by right of blood: and this agreeth well with the etymology of the word "heir," to whom the lands descend.

Co. Lit. 237.

Co. Lit. 237.b.

LXXXII. "HÆRES EST NOMEN JURIS, FILIUS EST NOMEN NATURÆ."

Therefore, corruption of blood takes away the purity of the *heir*, but not of the *son*: Thus, if a man be attainted and murdered by a stranger, the eldest son shall not have the *appeal*, because the appeal is given to the heir; for the youngest sons who are equal in blood shall not have it: *Jura sanguinis nullo jure civili dirimi possunt*. But if an attainted person be killed by his son, it is petty treason, for the purity of a son remains.

Bacon's Maxims, page 72.

Thus, also, if a man be attainted and have a charter of pardon, and be returned on a jury between his son and a stranger, the challenge remains; for the father may maintain the suit of his son, though the blood be corrupted.

Thus, also, if the uncle by the mother's side be attainted and pardoned, and land descend from the father to the son within age, held in foccage, the uncle shall be guardian in foccage; for that favour-eth so little of the heir, that the possibility to inherit shall not shut it out.

Year Book, 33. Hen. 6. pl. 55.

## LXXXIII. "HÆRES EST NOMEN COLLECTIVUM."

(b) 1 Vent. 215. Therefore, a devise to one for life, and at his decease to his heir, conveys an estate in fee; for the word heir is *nomen collectivum* (b). So, also, a condition that *the heir* of the devisor shall pay such a rent-charge, or the estate shall go to another person, is broken if the heir of the heir do not pay (c).

(c) Cro. Jac. 145.

## LXXXIV. "HÆRES EST ALTER IPSE, ET FILIUS EST PARS PATRIS."

3. Co. 12.  
Moor, 169.  
2. Inst. 396.  
Hertl. 127.  
Cro. Car. 296.

Therefore, if a man be seised of three acres of land, and acknowledges a recognizance or a statute, &c. and infeoffs *A.* of one acre, and *B.* of another acre, and the third descends to his heir; in this case, if execution be sued only against the heir, he shall not have contribution, for he comes to the land without consideration, and the heir fits in the seat of his ancestor; *Et hæres est alter ipse, et filius est pars patris*; and, as it is said, *Mortuus est pater et quasi non est mortuus, quia reliquit similem sibi*; and therefore, the heir shall not have contribution against any purchaser, although *in rei veritate* the purchaser came to the land without any valuable consideration; for the consideration of the purchaser is not material in such case.

## LXXXV. "HOMO POTEST ESSE HABILIS ET INHABILIS DIVERSIS TEMPORIBUS."

Bury's case,  
5. Co. 98.

Therefore, where a husband was divorced from his first wife by sentence of the Spiritual Court, where it appeared that the wife, for three years after the marriage, *remansit virgo intacta, propter perpetuam impotentiam generationis in viro, et quod vir fuit ineptus ad generandum*, but after this divorce married a second wife, and children were born during the coverture; it was contended, that, by reason of his perpetual impotency, the issue which he had by the second

second wife were *illegitimate*; but it was adjudged, after many arguments and great deliberation, by all the Judges of England, that the issue by the second wife were *legitimate*; for it is clear, that, by the divorce *causâ frigiditatis* the marriage was dissolved *à vinculo matrimonii*, and having a right to marry again, it shall be presumed that the children were his; for a man may be *habilis et inhabilis* at different times.

LXXXVI. "HUSBAND AND WIFE ARE ONE PERSON."

The very being or legal existence of the woman is suspended during the marriage; or at least is incorporated and consolidated in that of the husband; under whose wing, protection, and cover, she performs every thing, and is therefore called in Law French a *feme covert*, *famina viro co-operta*; she is said to be *covert baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. Therefore, a man cannot grant any thing to his wife, or enter into covenant with her; for the grant would be to suppose her separate existence; and to covenant with her would be only to covenant with himself; and therefore it is generally true, that all compacts made between husband and wife when single are voided by the intermarriage.

Upon this maxim also, if the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together. Also, if the wife be injured in her person or property, she can bring no action for redress without her husband's concurrence, and in his name as well as her own: neither can she be sued without making the husband a defendant.

Noy's Max. 29.  
Co. Lit. 112.  
1. Bl. Com. 442.

3. Mod. 186.

1. Roll. Ab.  
347.  
Salk. 119.  
1. Leon. 312.

LXXXVII.

## LXXXVII. "ID CERTUM EST, QUOD CERTUM REDDI POTEST."

Co. Lit. 96. a.  
Wing. Max.  
408.

Therefore, where a tenant holds his land by shearing all the lord's sheep on a particular manor, if the service be referred to the number of sheep it would be *uncertain*, for there may be sometimes a greater and sometimes a less number, and in such case the tenant would not be distrainable; it being a maxim, that no distress can be taken for a service that is not certain: but if the service be referred to the manor, it then becomes certain.

Cro. Car. 383.

So, also, an award that one of the parties shall pay the costs of such a suit, without naming any particular sum, is good; for, when the attorney hath delivered the bill of costs, the uncertainty as to the amount of them is removed.

Year Book,  
9. Edw. 4.  
Pl. 36.

So, also, if one man grant to another twenty shillings, or a robe, it is uncertain which of them he shall have; but, as it may be reduced to a certainty by the will of the grantor, the grant is good.

7. Bl. Com. 78.

A Custom to pay two-pence an acre in lieu of tithes, is good; but to pay sometimes two-pence and sometimes three-pence, as the occupier of the land pleases, is bad, for uncertainty. Yet, a Custom to pay a year's improved value for a fine on a copyhold estate, is good, though the value of the thing is uncertain; for the value may at any time be ascertained.

## LXXXVIII. "IGNORANTIA JURIS, QUOD QUIQUE TENETUR SCIRE, NEMINEM EXCUSAT."

An excuse cannot be founded on an ignorance of the Law, which every person is presumed to know. Thus, if a man thinks he has a right to kill a person excommunicated, or outlawed, wherever he meets him, which was once a vulgar and prevailing opinion, and does so, this is wilful murder; and his ignorance of the law will form no excuse in his favour (*d*).

(d) 4. Bl. Com.  
27.  
Dougl. 471.

## LXXXIX. "IGNORANTIA FACTI EXCUSAT."

Therefore, where the master of a house, being alarmed by the idea of thieves, rises suddenly with a rapier, and, in the dark, happens to kill a woman whom his servant had privately brought in to help her to do her work, he mistaking the woman for one of the thieves which he conceived were in the house; the Court resolved, That it was neither murder, nor manslaughter, nor felony, for such an ignorance of the fact makes the act itself morally involuntary.

Leyett's case.  
Cio. Car. 538.  
Foster, 299.  
1. Hale, 42.

XC. "IMPERSONALITAS NON CONCLUDIT  
NEC LIGAT."

Therefore, where an Act of Parliament recited that certain persons were "convicted and attainted, as by the records of their several attainders more fully appears," it was held, that the Act should not operate as an estoppel to prevent them from denying the fact of their attainders, because it is a mere recital and reference to the records, and not a full and absolute affirmation of the fact (*f*); and every (*f*) Plowd. estoppel must be by a precise affirmation of that which 398. maketh the estoppel, and not be spoken *impersonally*, or by way of *recital*; for a man shall not be *concluded* or *bound* by any thing less than a direct affirmation (*g*); and in estoppels certainty to *a certain intent in every particular* is required (*h*).

(*g*) Co. Lit. 51. b  
(*h*) Dougl. 159.

## XCI. "IMPOTENTIA EXCUSAT LEGEM."

Therefore, if the case of *making claim* to lands of a man be so languishing or so decrepid that he cannot by any means go to the land, nor to any parcel of it, if he command his servant to *make claim* for him, and such servant dare not go to the land, or to any parcel of it, for fear of beating, mayhem, or death, and goeth as near the land as he dares, and maketh claim for his master, such claim is good in law (*i*). So, also, if a usurpation be made of a church in the time

(*i*) Littleton,  
Sect. 434.

(k) Co. Lit.  
263.

time of vacation, this shall not prejudice the successor, by putting him out of possession, but he shall present to the next avoidance (k).

XCII. "IN ANGLIA NON EST INTERREGNUM."

1. Bl. Com. 249.  
Plowd. 177.  
234.

The Law ascribes to the king in his political capacity an absolute immortality; for immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of Law, without any *interregnum* or interval, is vested at once in his heir; who is, *eo instanti*, king to all intents and purposes. And so tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his *demise*; *dimissio regis, vel coronæ*; an expression which signifies merely a transfer of property; for when we say the *demise of the Crown*, we mean only, that in consequence of the disunion of the king's body natural from his body politic, the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual.

XCIII. "IN CONJUNCTIVIS OPORTET UTRUMQUE IN DISJUNCTIVIS SUFFICIT ALTERAM PARTEM ESSE VERAM."

Wing. 13.

The statute 26. Hen. 8. c. 3. enacts, "that every parson, vicar, &c. who, before they enter upon their benefice, do not satisfy, content, or pay, or compound, or agree to pay to the king the first fruits, &c. shall be taken to be intruders;" and therefore, although they do not pay down the first-fruits immediately, but only agree to pay them, or, as the usage is, give bond for them, it is sufficient; for the statute is in the *disjunctive* (l). So, also, the directions of 1. Eliz. c. 13. which made merchandise forfeited, "if the subsidy were not paid, or the collector not agreed with," is satisfied and performed, if either of these things be done (m).

(l) Fogassas' case,  
Plowd. 9. a.

(m) Ibid. 5.  
See also 10. Co.  
59.

But,

But in a condition consisting of two parts in the *copulative*, both parts must be performed (*n*). As (*n*) Wing. 14. if land be given in tail, on condition that if the tenant alien in fee, or tail, or for term of life, *and also*, if all the issues of the tenant in tail die without issue; that then it shall be lawful for the donor and his heirs to re-enter (*o*). (*o*) Littleton, sect. 364.

XCIV. "IN CRIMINALIBUS, SUFFICIT GENERALIS MALITIA INTENTIONIS CUM FACTO PARIS GRADUS."

All crimes have their inception in a corrupt intent, and their consummation and issuing in a particular fact, which, though it be not the fact at which the intention of the malefactor was levelled, yet the law giveth him no advantage of the error, if any crime ensue of as high a nature as that which he intended. Thus, if a poisoned apple be laid in a place with intention to poison one person, and another cometh there by chance and eateth it, this is murder in the principal that is the actor, and yet the malice *in individuo* was not against the person killed. So, if a thief find the door open, and go in by night, and robs a house, and is taken with the *mainour*, and break a door to escape, this is burglary; yet the breaking of the door was without any felonious intent, but it is one entire act (\*). Bacon, 30. Saunders' case, Plowd. 474. Crompton's Justice, p. 30.

So, if a gun or pistol be discharged with a murderous intent at any person, and it bursts and kills the person who discharged it, he is *felo de se*, and yet his intention was not to hurt himself; for, *felonia de se* and murder are *crimina paris gradus*; and therefore, if a man persuade another to kill himself, and be present when he doth so, he is a murderer. Bacon, 81.

(\*) It is recited by 12. Ann. c. 7. that there had been some doubt whether the entering into a mansion-house without breaking the same, with an intent to commit some felony, and breaking the same house in the night to get out, were

burglary; and thereupon it enacts, that such an offence shall be deemed burglary, and the person offending ousted from his clergy, in the same manner as if he had broken and entered the said house in the night-time, &c.



XCV. " IN JURE NON REMOTA CAUSA SED  
PROXIMA SPECTATUR."

Bacon, 35.

2. Hen. 4. pl. 3.  
26. Hen. 8.  
pl. 2.

It would be infinite, says LORD BACON, for the Law to judge the causes of causes, and their impulsions one upon another; it therefore contenteth itself with the immediate cause, and judges of acts by that alone, without looking to any farther degree. Thus, if a person, in consideration of natural love to his son, covenants with a stranger to stand seised to the use of the stranger, to the intent that he should infeoff the son, no use arises thereby to the stranger, because there is no immediate consideration between him and the covenantor. So, also, if a parson makes a lease and is deprived, or resigns, the successors shall avoid the lease; and yet the cause of deprivation, and more strongly of the resignation, moved from the party himself; but the law does not regard that, because the admission of the new incumbent is the act of the ordinary. This rule, however, fails in covinous acts, which though they be conveyed through many degrees, the law will take notice of the corrupt beginning, and continue them all as one entire act. Neither will it hold in criminal acts, except they have a full interruption; because, when the intention is matter of substance, and that which the law principally regards, the *first motive* shall be looked at, and not the *last impulsion*. Thus, where a man maliciously discharges a pistol at another, and, missing him, throws down the pistol and flies, and, on being pursued, turns and kills his pursuer with a dagger, if the law was to consider the last impulsive cause, the construction would be, that the death happened in his own defence; whereas, by considering the first motive, the construction would be, according to the truth, that the death was occasioned by and in execution of the first murderous intent.

XCVI.

XCVI. "IN PARI DELICTO POTIOR EST CONDITIO DEFENDENTIS."

Therefore, where an assurance was made on goods on board a vessel "at and from *London to New York*," subsequent to the passing of the statute 16. *Geo. 3. c. 5.* which prohibited all commerce with the province of *New York*, and confiscates all ships and their cargoes which shall be found trading, or going to or coming from trading with the said province, and the ship being taken by an American privateer, the assured brought an action on the policy to recover the loss from the underwriter. But LORD MANSFIELD said, it was a direct contravention of the law of the land, and *in pari delicto potior est conditio defendentis.* Jones v. Sug-  
ton, Dou-  
glas, 255.

So, also, if an insurance be made by a person who has no insurable interest, the policy for which is called a gaming policy, and made void by the statute 19. *Geo. 2. c. 37.* the assured cannot recover back the premium which he paid to the underwriter, after the ship has arrived safe; for being in fact an illegal transaction, it is immaterial whether the parties know it to be illegal at the time; for, *Ignorantia juris non excusat*, and the parties are in *pari delicto.* Lowry v. Bor-  
dicu, Dou-  
glas, 468. But it must not be understood, that in all cases where money has been paid on an illegal consideration, that it cannot be recovered back; for in cases of oppression, as where paid to a creditor to induce him to sign a bankrupt certificate, or upon an usurious contract, it may be recovered, for in such cases the parties are not in *pari delicto.*

Upon this principle, also, money paid by the insurer of policies or numbers of lottery tickets, contrary to the directions of 17. *Geo. 3. c. 46.* cannot be recovered by the lottery-office-keeper from the person insured; but the premium of insurance paid by the insured to the lottery-office-keeper may be recovered back. Dougl. 472,  
695.  
Browning v.  
Morris,  
Cowp. 791.

XCVII. " IN QUO QUIS DELINQUIT, IN EO DE JURE EST PUNIENDUS."

Co. Lit. 233.  
Wing. 202.  
Plowd. 373.  
1. Co. 14. b.

Therefore, if the keeper of a park kill any deer without warrant; or fell or cut any trees, woods, or underwoods, and convert them to his own use, it is a forfeiture of his office; for the destruction of *the vert* is, by a mean, the destruction of *the venison*. So, also, if he pull down any lodge, or any house, within the park, wherein hay is used to be put for feeding of the deer, or the like, it is a forfeiture of his office.

XCVIII. " INTEREST REIPUBLICÆ NE MALEFICIA REMANEANT IMPUNITA."

Vaux's case,  
4. Co. 45.

Therefore, where a man is indicted, and the indictment is found to be insufficient, he may be detained and indicted again for the same offence; for, as the life of a man can never be in jeopardy upon an informal indictment, the law will not permit him to plead *autrefois acquit* in bar of the second indictment; because it is for the interest and safety of the community that offenders, if guilty, should receive condign punishment, or, if innocent, be acquitted; but neither their guilt nor innocence can be enquired into on an insufficient indictment. Upon the reason of this maxim also it is, that *bona waiviata*, or goods waived by a felon flying from the pursuit of justice, are forfeited to the king, and shall not be restored to the true owner, unless, by bringing the offender to justice, he entitles himself to a writ of restitution, which is now usually supplied by an order of the Court in which the felon is convicted; for negligence or fault injurious to the interests of society, may be imputed to the owner, from his delay to apprehend the offender before the goods are *waived*.

Foxley's case,  
5. Co. 109.

Dyer, 211.

Thus, also, the statute of 28. *Hen. 8. c. 15.* which authorises THE LORD CHANCELLOR to issue commissions for the trial of pirates, is said to authorise

THE

THE LORD KEEPER also to issue such commissions, from the public necessity and interest that the trials of such offenders should not be impeded by the Great Seal being in commission. And it is said by Lord Coke (p), that, for the furtherance of public justice by the suppression of crimes and other heinous offences, even penal statutes shall in many cases be taken by intendment. (p) Poulter's case, 11. Co. 44.

XCIX. "INUTILIS LABOR ET SINE FRUCTU NON EST EFFECTUS LEGIS."

Therefore, in pleading a plea which is merely in the negative, it should not be accompanied, as all pleas in the affirmative must be, with a verification; for, as a negative cannot be proved, the conclusion of "*et hoc est paratum verificare,*" &c. would be useless and absurd. Co. Lit. 303a  
Plowd. 342.

If there be tenant in tail with remainder in tail, and the remainder-man bargains and sells the land and all his estate, &c. by indenture inrolled, for the life of the tenant in tail, and to his heirs male, the remainder to the queen; the remainder to the queen is void, because, as the grantee for the life of the tenant in tail takes nothing by the grant, the remainder cannot take effect when the particular estate ends; for, having no beginning, it cannot have an ending; *Quod non habet principium nec habet finem*; and, *Vana est illa potentia quæ nunquam venit in actum*. Chomley's case, 2. Co. 51.

If land be given in tail, saving the reversion to the donor, and the tenant in tail afterwards infeoffs the donor in fee, this is no discontinuance of the estate tail; for the reversion is not discontinued, but remains as before in the donor; and it is a vain thing to give that to a man which he had before, because nothing can operate thereupon. Co. Lit. 335.  
Wing. Max. 111.

C. "JURA PUBLICA EX PRIVATO PROMISCUE DECIDI NON DEBENT."

Therefore, if a charter of feoffment be made with a letter of attorney to four or three persons jointly and severally 5. Co. 91.  
Yelv. 25.  
Cro. Eliz. 913.

Lamb. 84.  
Hutt. 127.

(q) Co. Lit.  
181. b.

severally to deliver seisin, *two* of them cannot make livery, because it is neither by them four or three jointly, nor any of them severally: But if the sheriff, upon a *capias* directed to him, make a warrant to four or three jointly or severally, to arrest the defendant, two of them may arrest him, because it is for the execution of justice, which is *pro bono publico*, and therefore shall be more favourably expounded than when it is only for private benefit (q).

Co. Lit. 182.

CI. "JUS ACCRESCENDI INTER MERCATORES PRO BENEFICIO COMMERCII LOCUM NON HABET."

Brac. Bk. 4.  
c. 9. §. 3.  
Fleta, Bk. 3.  
c. 4.  
2. Bl. Com.  
184. 399.

Co. Lit. 182.  
2. Brownl. 99.  
Noy, 55.  
1. Roll. Ab. 6.  
Cro. Car. 301.  
1. Vern. 217.

The right of survivorship is called by ancient authors the *jus accrescendi*, because the right, upon the death of one joint tenant, accumulates and increases to the survivors; or, as they themselves express it, "*pars illa communis accrescit superstilibus, de personâ in personam, usque ad ultimum superstitem.*" But, for the encouragement of husbandry and trade, it is held, that the stock on a farm, though occupied jointly, and also a stock used 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.

CII. "JUS ET FRAUS NUNQUAM COHABITANT."

(r) Wimbith's  
case, Plowd.  
51.  
Wing. Max.  
620.

(f) YearBook,  
35. Hen. 8.  
Dyer, 55. pl. 9.  
See 2. Brown's  
Cas. Ch. 167.  
(t) 1. Peere  
Wims. 239.

When *truth* is mixed with *covin*, or *covin* with *truth*, the conjunction embitters the whole composition, and converts goodness into wickedness, for they cannot continue together any more than fire and water (r). Thus, a verdict, which is said to be *veri dictum*, and ought to be formed with truth, and without the semblance of fraud or partiality, shall be set aside if the jury, before their agreement, eat or drink at the charge of either of the parties; for truth and such a badge of fraud and falsehood are incompatible (f). Thus, also, where there is either *suppressio veri*, or *suggestio falsi*, in any grant or other transaction, the Court will set it aside (t).

Therefore,

CIII. " JUSTICE SHALL BE PREFERRED TO  
GENEROSITY."

Therefore, it is the duty of an executor, before 2. Bl. Com. 512. he pays any of *the legacies* bequeathed by his testator, to see whether there be a sufficient fund left to pay *the debts* of the testator; the rule of equity being, that a man must be *just* before he is permitted to be *generous*; or, as BRACTON expresses the sense Brac. Bk. 2. ch. 26. of our Ancient Law, "*De bonis defuncti PRIMO deducenda sunt ea quæ sunt necessitatis, et POSTEA quæ sunt utilitatis, et ULTIMO quæ sunt voluntatis.*" For this purpose all the chattels of the deceased are vested by law in the executor, and a legatee cannot take a legacy, either *pecuniary* or *specific*, without his assent. And in case of a deficiency of assets, all the *general* legacies must abate proportionably in order to pay the debts; but a *specific* legacy, of a piece 2. Vern. 111. of plate, a horse, or the like, is not to abate at all, unless there be not sufficient without it. Upon this *Maxim* also, 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 2. Vern. 205. to exhaust the *residuum* after the legacies paid.

CIV. " THE KING CAN DO NO WRONG."

The Law attributes to the king in his political capacity absolute perfection; but this ancient and fundamental Maxim is not to be understood as if every Jenk. Cent. 308. 1. Bl. Com. 246. thing transacted by the government was of course just and lawful. It means only two things:

FIRST, That whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people; for this doctrine would totally destroy that constitutional independence of the Crown which is necessary for the balance of power in our free and active, and therefore compounded constitution.

SECONDLY, It means that the prerogative of the Crown extends not to do any injury; it is created for the benefit of the people; and therefore cannot

be exerted to their prejudice. Thus, if a bridge is repairable by a subject, and it falls to decay, and the king pardons him from repairing it, yet he shall be obliged to repair it notwithstanding the pardon; for all the king's subjects have an interest in it (u).  
 (u) Plowd. 487.  
 12. Co. 30.  
 2. Roll. Rep. 4.  
 Vaugh. 333.  
 8. Mod. 17.  
 (x) Dyer, 160. another (x).

## CV. "THE KING CANNOT BE NONSUITED."

1. Bl. Com. 270  
 Co. Lit. 139.  
 2. Roll. Ab. 130.

The reason on which this Maxim is founded is, that the king, in the eye of the Law, is always present in all his Courts, though he cannot personally distribute justice. And from this *ubiquity* it follows, that he can never be nonsuit, for a nonsuit is the desertion of the suit or action by the non-appearance of the plaintiff in Court. But the king's attorney, *qui sequitur pro domino rege*, may enter an *ulterius non vult prosequi*, which hath the effect of a nonsuit.

2. Roll. Rep. 410.

## CVI. "LEGES POSTERIORES PRIORES CONTRARIAS ABROGANT."

1. Bl. Com. 89.  
 Jenk. Cent. 73.  
 2. Roll. Rep. 410.

This Maxim is to be understood only where the latter statute is couched in negative terms, or, by its matter, necessarily implies a negative: as if a former Act says, that a juror upon such a trial shall have *twenty pounds* a-year, and a new statute comes and says he shall have *twenty marks*; here the latter statute, though it does not express, yet necessarily implies a negative, and virtually repeals the former. For, if twenty marks be made qualification sufficient, the former statute, which requires twenty pounds, is at an end. Thus, also, where the 5. Geo. I. c. 27. inflicts a fine not exceeding ONE HUNDRED POUNDS and three months imprisonment on such persons as shall be convicted of seducing artificers;  
 and

The King v. Cater, 4. Burr. Rep. 2026.

and the 23. *Geo.* 2. c. 13. inflicts a penalty of FIVE HUNDRED POUNDS and twelve months imprisonment on *the same offence*; LORD MANSFIELD held, that the latter statute was in this respect a virtual repeal of the former. So, also, where THE BLACK ACT, 9. *Geo.* 1. c. 22. made it death, without the benefit of clergy, to kill, wound, or destroy any red or fallow deer; and the 16. *Geo.* 3. c. 30. inflicted only pecuniary penalties on the first commission of the same offence, and on the second, felony with transportation for seven years; THE TWELVE JUDGES, on a case reserved for their opinion by *Mr. Justice Gould*, from the summer assizes at Hertford in the year 1785, were unanimously of opinion, that the 16. *Geo.* 3. c. 30. amounted to a repeal of the 9. *Geo.* 1. c. 22. so far as it related to this particular offence.

*Rex v. Davis*,  
Cases in Crown  
Law, p. 252.

CVII. “LEX CITIUS TOLERARE VULT PRIVATUM DAMNUM QUAM PUBLICUM MALUM.”

It is holden for an inconvenience, says *Lord Coke*, Co. Lit. 152. that any of the Maxims of the Law should be broken, though a private man suffer loss; for by the infringing of a Maxim, not only a general prejudice to many, but in the end a public uncertainty and confusion to all, would follow. Upon this Maxim also, it is held, Co. Lit. 47. Cro. Eliz. that a horse in a smith's shop, materials in a weaver's loom or warehouse, cloth or garments in a taylor's working-place, or sacks of corn or meal in a mill or market, cannot be distrained for rent; for being there by the authority of the Law, and for the general benefit of trade, it is better that the landlord should lose his usual remedy, than that the general interests of commerce should be endangered.

CVIII. “LEX NEMINI FACIT INJURIAM.”

The Law hateth injuries, and therefore it will neither do wrong itself, nor suffer any person to derive advantage by doing wrong. Wing. 562. 572.

Thus an executor *de son tort* is not allowed to retain the goods of the deceased, as a rightful executor



Colter's case, 5. Co. 30. cutor may do, to satisfy his own debt; for that would be to allow him to take an advantage of his own wrong.

Co. Lit. 264. Thus, also, if a *feme obligee* take the obligor to husband, this intermarriage shall operate as a release of the bond; but if a *feme executrix* take the debtor of her testator to husband, it shall not operate as a release: for in the first case no wrong is done; but in the second, it would be an injury to the estate of the deceased by causing a waste or diminution of it; and the Law shall never work a wrong.

See Dougl. 775.

### CIX. "LEX NON PRÆCIPIT INUTILIA."

Frost's case, 5. Co. 89. Wing. 112.

Therefore, where a man is in custody of the sheriff by process of Law, and afterwards another writ is delivered to the sheriff to take the body of him who is so in his custody, he is immediately by judgment of Law his prisoner by force of this second writ, although he make no actual arrest of him; for to what purpose should he arrest him, when he is already in his custody? *Et Lex non præcipit inutilia, quia inutilis labor stultus.* So, also, in PLEADING, that which is apparent to the Court by necessary collection out of the record need not be averred, for it were useless to aver that which is already apparent to the Court.

Co. Lit. 127. 179. 319.

Co. Lit. 303.

### CX. "LICITA BENE MISCENTUR, FORMULA NISI JURIS OBSTET."

Bacon, 101.

The Law gives such favour to lawful acts, that although they be executed by several authorities, yet the whole is good; as where tenant for life and the remainder-man in fee join in granting a rent, this is one solid rent out of both their estates, and not a double rent, or rent by confirmation. So, if a man seised of lands deviseable by Custom, and of other lands held in Knight's Service, devises *all his lands*; this is a good devise of all the customary land by the Common Law, and of two parts of the other

other lands by the statutes (\*). But if there be any form which the law has appointed to be observed, which cannot agree with diversities of authorities, there this Maxim fails. As in the case of three coparceners, and one of them alien her *purparty*, the feoffee and one of the other sisters cannot join in a writ of partition, because it behoveth the feoffee to mention the statute (†) in his writ; and, *Conventio privatorum non potest publico juri derogare*. Co. Lit. 166.

(\*) By 32. Hen. 8. c. 1. explained by 34. Hen. 8. c. 5. all persons seized in fee simple, except feme covert, infants, idiots, and persons of nonsane memory, might, by will in writing, devise two-thirds of their lands, &c. held in *chivalry*, and the whole of those held in *focage*; but the 12. Car. 2. c. 24. having changed the feudal tenures, of which knight's service was one, into free and com-

mon soccage, the whole of a testator's lands will now pass by a devise. 2. Bl. Com. 375. 43. Eliz. c. 4. Moor, 890.

(†) But see the statutes of 8. and 9. Will. 3. c. 3. and 7. Ann. c. 18. by which an easier method of carrying on the proceedings on a writ of partition than was used at the Common Law, is chalked out and provided.

CXI. " LUBRICUM LINGUÆ NON FACILE TRAHENDUM EST IN POENAM." Jacob.

Therefore, if one charges another that he has forsworn himself, it is not actionable, because it is a usual word of passion and anger for one to say that another hath forsworn himself (y). So, also, for the same reason, if one says of another that he is a villain, or a rogue, or a varlet, *vel similia*, no action can be maintained. So, also, where *Mr. Pym* spoke disaffected words of Charles the First, denying his political capacity, and ability to discharge the duties of the kingly office; it was held by all the Judges upon great deliberation, that, although the words were as wicked as might be, and an evidence of the corrupt heart of him that spoke them, yet they were not treason. 4. Co. 15. b. Cro. Eliz. 395. (y) See the reason of this founded on another Maxim, ante. p. 39. Max. XX. Cro. Car. 117.

CXII. " MALA GRAMMATICA NON VITIAT CHARTAM."

Neither false English nor bad Latin will destroy a deed (z). Therefore, where a bill was made in

English, viz. in *seventene* pounds, which is not English, yet it was adjudged a good bill (a), for the intention of the parties appeared. So, also, where a pardon of murder omitted the word *murdrum*, and had only *feloniam et interfectionem* inserted, yet it was allowed (b). So, also, if a grant of an annuity contains a proviso for the discharge of the grantor's person, with a double negative, viz. *nec aliquid in eo specificatum non aliquo modo se extendat*, &c. here NEC and NON do, in a grammatical construction, amount to an affirmative; for, *Negatio destruit negationem, et ambo faciunt affirmativum*: yet the Law, regarding the substance rather than the form, doth judge the proviso to be a negative according to the intent of the parties, in order that it may take effect, and not according to grammatical construction to destroy it.

(a) Cro. Jac. 607.  
10. Rep. 133.

(b) 2. Shower, 334.

Co. Lit. 146, 223. See also the Earl of Shrewsbury's case, 9. Co. 48. 2. 11. Co. 3. a.

CXIII. "MALEDICTA EXPOSITIO EST, QUÆ CORRUMPIT TEXTUM."

Wing. 26.  
2. Co. 24.  
See also the case of Magd. College, 11. Co. 70. a.

Thus, where *the Earl of Cumberland* demised lands to *Ann Baldwin* and *Anthony Baldwin* her son, and to the heirs of the said *Anthony*, HABENDUM to them from the date for ninety-nine years; THE COURT held, that although the word "heirs" was mentioned in the premises of the deed, and not mentioned in the *habendum*, yet that the two parts were not repugnant, but that *Ann* AND *Anthony* should have a joint estate for years; for it cannot be repugnant as to *Anthony* and yet good as to *Ann*: *Viperina est ista expositio quæ corrodit ventrem textus.*

CXIV. "MANDATA LICITA STRICTAM INTERPRETATIONEM RECIPIUNT, SED ILLICITA LATAM ET EXTENSIVAM."

Bacon, 81.  
3. Inst. 51.

In committing *lawful authority* to another, a man may limit it as strictly as he pleases; and if the party authorized transgresses his authority, though in circumstance only, it shall be void as to the whole act. But where a man moves another to commit an *unlawful act*, he shall not be excused from

from the consequences, because some circumstances have been not pursued. Therefore, if a person make a letter of attorney to another, authorizing him to deliver livery and seisin in a certain place or at a certain time, and he does it at a different place or time, the act is void, and the estate shall not pass. But, on the other hand, if one man command another to rob a certain person on *Shooter's bill*, and he robs him on *Gadshill*; or to rob him on such a day, and he doth it at a different day; or to kill him by *poison*, and he doth it by *violence*; in all these cases, notwithstanding the fact be not executed in circumstance, yet he will be accessory to the felony committed.

Dyer, 68,  
283. 337.

Plowd. 175.

See Foster's  
Crown Law,  
371; and 2.  
Hawk. P. C.

447.

CXV. "MINOR JURARE NON POTEST."

Therefore, it is a good cause of challenge against a juror that he is a minor, because he cannot take the oath. Thus, also, in criminal proceedings, it was formerly held that an infant, being incapable of taking an oath, might, from the necessity of the thing, in the case of a rape, be examined without being sworn; but it seems now to be completely settled, that wherever an infant has sufficient knowledge to understand the nature of an oath, and the danger of perjury, such infant may be sworn, be its age what it may.

Litt. sect. 259.  
Wood's Inst.  
88. *Sed quare.*

Co. Lit. 172. b.  
11. Mod. 228.  
2. Hale, 278.  
1. Stra. 700.  
1. Atk. 29.  
Case in  
Crown Law.

CXVI. "MUTATA FORMA PROPE INTERIMITUR SUBSTANTIA."

Thus, where one person cuts down the timber-trees of another, and squares them to make beams for a house, the rightful owner may seize them before they are actually so applied; but if they are once laid on and incorporated with the building, he cannot seize them, for their nature is then altered, and they are become part of the house: the owner, however, may bring an action for the damage. So, also, where one man gets the barley belonging to another and makes it into malt, it cannot be taken by the former owner, though its form is not lost, because

Dod. 132.  
Jacob's Law  
Grammar, 94.

See 3. B. Com.  
4, 5.

## ESTABLISHED MAXIMS.

because it is become a thing of another nature and use.

CXVII. "NECESSITAS INDUCIT PRIVILEGIUM QUOAD JURE PRIVATA."

Lord Bacon's  
Maxims, 55.

The Law charges no man with default, where the act which occasioned it was *compulsory* and not *voluntary*; or where there is not a *consent* or *election*; and therefore, if it is impossible for a man to do otherwise, or there is so great a perturbation of the judgement and reason as in presumption of Law man's nature cannot overcome, such necessity carries a privilege in itself.

Staundford's  
Pleas of the  
Crown, 26.

NECESSITY is of three kinds, *viz.* for the preservation of life; from the obligation of obedience; and the act of God.

4. Bl. Com. 28.  
Bacon, 55.

AS TO THE FIRST kind, if divers be in danger of drowning by a shipwreck, and one of them gets upon a plank to keep himself above water, and another who is upon the same plank thrust him from it to save his own life, by which means the person thrust from it is drowned; this homicide is justifiable. So, if a prison be on fire, and the prisoners to save their lives run out of it, this is no escape.

See 4. Bl.  
Com. 28.

THE SECOND kind of necessity is of obedience; and therefore where a husband and wife commit a felony, the wife shall be excused; for the Law intends her to have no will, in regard of the subjection and obedience she owes to her husband. So, also, if a warrant or precept come from the king to fell wood on the estate of a tenant for life or years, the tenant shall be excused from the waste, for he is bound to obey the king's writ.

Ante, p. 27.

THE THIRD species of necessity arises from the act of God, which we have already exemplified under the Maxim, "*Actus Dei nemini facit injuriam.*"

Lord Bacon,  
p. 57.

It must, however, be noted, that necessity privileges only *quoad jure privata*; and therefore, where the act is against the commonwealth, necessity is no excuse for doing it; for, *Necessitas publica major est quam*

*quàm privata*; and, *Privilegium non valet contra rem publicam*. Accordingly, although a captain is not answerable for goods which by necessity he throws overboard in a storm, in order to preserve the ship and remainder of her cargo; yet, if a captain be charged with ordnance and ammunition for the relief of a besieged town, he cannot, for any danger of tempest, justify the throwing of them overboard. So in the case of husband and wife, if they commit treason together, no plea of coverture shall excuse the wife; no presumption of the husband's coercion shall extenuate her guilt.

The privilege, also, which necessity induces is not allowed where it is *necessitas culpabilis*, arising from some fault or wrong in the party; and accordingly, if a drunken man commit felony, he shall not be excused, because his imperfect reason was occasioned by his own fault; and, *infirmitas culpabilis* will no more excuse than *necessitas culpabilis*. It is therefore with these exceptions that the well known Maxim of "*Necessitas non habet legem*," must be understood.

CXVIII. "NEC TEMPUS NEC LOCUS OCCURRIT REGI."

In pursuance of the principle that the king is not only incapable of *doing wrong*, but even of *thinking wrong*, the Law determines that in him can be no negligence or *laches*, and therefore no delay will bar his right. *Nullum tempus occurrit regi*, says Sir William Blackstone, is the standing Maxim upon all occasions; for the Law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects. But this Maxim is subject to various exceptions both at Common Law and by Statute.—FIRST, There are many cases in which the subject may make title against the king by *prescription*, as to treasure-trove, waifs, estrays, and such other things as may be seized without matter of record (*c*). SECONDLY, In some cases the king's right necessarily fails for want of execution in due time,

4. Bl. Com,

29.

Lord Bacon,

58.

Plowd. 13,

Jacob, 95.

1. Bl. Com,

247,

Finch Bk. 2.

Co. Lit. 90.

(c) Co. Lit. 114.

- time, either because the *subject* of his right *determines* before he claims it, or, because it is *speciallly limited in point of time*, by its creation. An instance of this is, where the land of tenant for life is found to be forfeited, and he dies before seizure by the king; for it is then too late to seize for the king, who, as STAUNDFORD expresses it, hath *surceased his time*, the estate forfeited being determined, and the right of entry being in him in reversion (*d*). The law is the same where the king is entitled to *the next presentation*; in which case, if another presents and the incumbent dies, the king cannot have the second or any subsequent presentation (*e*). THIRDLY, Sometimes lapse of time drives the king *to a suit*. Thus, if the king presents to a benefice already full with an incumbent, the king's presentee shall not be received by the ordinary, till the king has recovered his presentment by due course of law (*f*). FOURTHLY, There are several statutes which wholly extinguish the king's title, if not exerted within a limited number of years. By 21. *Jac.* 1. c. 2. the king is disabled from claiming any manors, lands, or hereditaments, except liberties and franchises, under a title accrued SIXTY YEARS *before the beginning of the then Session of Parliament*, unless within that time there has been a possession under such title. But the efflux of time rendering the provision continually more ineffectual, the 9. *Geo.* 3. c. 16. introduced one of a permanent kind, by limiting the king to SIXTY YEARS *before the commencement of the suit or proceeding for recovery of the estate claimed*.
- (*d*) Staundford's Prærog. 32. b.
- (*e*) Plowd. 243. 249. 7. Co. 28. a.
- (*f*) 13. Rich. 2. ft. 1. ch. 1. Staund. Præ. 32. 2. Inst. 358. Co. Lit. 344. Cro. Jac. 385. 2. Inst. 188. Hob. 152. 347.
- (*g*) Vide ante p. 84. Maxim, "The king cannot be non-sued."
- The other part of this Maxim is founded on the idea which the Law entertains of the king's *ubiquity*; for he is supposed to be present in every *place* where his presence is necessary (*g*).

CXIX. "NEGATIO CONCLUSIONIS EST ERROR  
IN LEGE."

Year Book,  
41. Edw. 3.  
pl. 22.  
48. Edw. 3.  
pl. 11.

Therefore, in a *præcipe*, if one pleads that the manor of Dale is *ancient demesne*, and that the land in demand is parcel of the manor, and so *ancient demesne*, the plaintiff cannot reply that the land in demand

demand is "NOT *ancient demefne*," because that is the conclusion upon the two propositions, *viz.* FIRST, That the manor is *ancient demefne*; and SECONDLY, that the land is parcel of that manor; for, *Sequitur conclusio ex præmissis*; and therefore it cannot be denied.

Wing. 268.  
See also Prid-  
dle's case,  
10. Co. 4. a.  
Sed vide 5.  
Com. Dig. 73.

CXX. "NEMO ADMITTENDUS EST INHABILITARE SEIPSUM."

A man of nonsane memory may, without the consent of any other person, purchase lands (*b*); and it is clear, that his heir or any other person interested may, after the death of such purchaser, take advantage of his incapacity, and avoid the grant (*i*); except the purchaser, upon recovering his senses, has, during his life-time, agreed to and confirmed the purchase (*k*). But it is said, that a *non compos* himself, though he be afterwards brought to a right mind, shall not be permitted to alledge his own *insanity* in order to avoid such grant; for that no man shall be allowed to stultify himself, or plead his own disability. *Sir William Blackstone* (*l*) has examined the progress of this Maxim from the reign of Edward the First to the reign of Henry the Sixth (*m*); and says, from these loose authorities the Maxim that "a man shall not stultify himself," hath been handed down as settled law. *Fitzherbert*, however, has used much argument, and produced many authorities, to shew that a *non compos* may plead his disability to avoid his own acts as well as an infant (*n*); but in Trinity Term 37. *Eliz.* the Judges of the king's bench, on a demurrer to a plea of *non-sane memory* to an action of debt on bond, held the opinion of *Fitzherbert* to be no law; and the books which treat generally on this subject seem to understand the Maxim as completely established (*o*). In the case of *Thompson v. Leach*, however, it was determined, after great argument and deliberation, by Lord C. J. HOLT, that a surrender made by a person *non compos mentis*, is void (*p*); and it is said by *Sir*

(*b*) Co. Lit. 2.

(*i*) Perk. 21.

(*k*) Co. Lit. 2.

(*l*) 2. Comm. 291.

(*m*) Britton, c. 28. fo. 66. Regist. 228. Mayn. 22. Ed. 1. in Seac. Year Book, 5. Edw. 3. pl. 70. 35. Ass. pl. 10. 39. Hen. 6. pl. 42.

Jenk. Cent. 40. (*n*) Natura Brevium, p. 466.

(*o*) 2. Bac. Abr. 527. 649. 3. Bac. Abr. 87. Perkins, 21. 2. Com. Dig. 8. 2. Term Rep. 390.

(*p*) 2. Will. & Mary. 3. Mod. 311. Comb. 469. 1. Eq. Cas. Ab. 279.

*William*



2. Com. 292. *William Blackstone*, that the Judges feeling the inconveniences of the rule have, in many points, endeavoured to restrain it.

CXXI. "NEMO EST HÆRES VIVENTIS."

Co. Lit. 8.  
2. Bl. Com.  
208.

Therefore, if a man seised of lands in fee hath issue a daughter who is heir apparent, she, during the life of her father, cannot have a writ *de ventre inspiciendo*, because, among other reasons, she is not *actual heir* but *heir apparent*; for, *Nemo est hæres viventis*; and this writ is given to the heir to whom the land is descended; and land cannot descend until the death of the ancestor; which gives birth to another Maxim upon this subject, that *Solus Deus facit hæredes*.

CXXII. "NEMO POTEST EXUERE PATRIAM."

1. Bl. Com.  
369.  
Co. Lit. 129.  
7. Co. 7.  
2. Peere Wms.  
124.  
Foster, 183.

NATURAL-BORN SUBJECTS are such as are born within the dominions of the Crown of England; that is, within the allegiance of the king: and ALIENS are such as are born out of it. Aliens owe a local and temporary allegiance to the king, in return for the protection they receive, only during the time of their residence within the kingdom; but natural-born subjects, immediately upon their births, owe a perpetual allegiance, which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by any thing but the united concurrence of Parliament. An Englishman, therefore, who removes to France or to China, owes the same allegiance to the King of England there as at home, and twenty years hence as well as now: for it is a principle of universal Law, that the natural-born subject of one prince cannot, by any act of his own, not even by swearing allegiance to another, put off or discharge his natural allegiance to the former; for this natural allegiance was *intrinsicè* and *primitivè*, and antecedent to the other, and cannot be devested without the concurrent act of that prince to whom it was first due. And this well known Maxim, says MR. JUSTICE FOSTER, of *Nemo potest exuere patriam*, comprehends the whole doctrine of natural allegiance. Upon this Maxim,

1. Hale's P. C.  
68.

Foster's Crown  
Law, 184.

says

says Lord HALE, if an Englishman born (*q*), though he never took the oath of allegiance, become a sworn subject to a foreign prince, and is employed by him as his ambassador to England, where he conspires against the king's life, he shall be tried for the treason like another subject, for no man can shake off his country, nor abjure his native soil, and prince, at his pleasure; and this case, it is said (*r*), was never yet denied to be Law.

(*q*) Dr. Storer's case, Dyer, 298, 300. Cambden's Eliz. p. 168.

(*r*) Foster, 60. 183.

This established Maxim proceeds upon the general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. It is therefore necessary to add, that the children of the king's ambassadors born abroad were always held to be natural subjects; for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent, so, with regard to the son, he is also held to be born under the king's allegiance, represented by his father the ambassador.

1. Bl. Com. 373.

7. Co. 18.

By 25. Edw. 3. stat. 2. all children born abroad, provided both their parents are at the time of their birth in allegiance to the king, and the mother had passed the seas by the husband's consent, might inherit as natural-born subjects. But by 29. Car. 2. c. 6. the 7. Anne, c. 5. and 4. Geo. 2. c. 21. these restrictions are still farther taken off; so that all children born out of the king's legiance, whose fathers were natural-born subjects, are now natural-born subjects themselves, to all intents and purposes, without any exception; unless their said fathers were attainted, or banished beyond sea for high-treason; or were then in the service of a prince at enmity with Great Britain. And it is further enacted by 13. Geo. 3. c. 21. "That all persons born out of the king's legiance, whose fathers are, by the above-mentioned statutes, intitled to the rights and privileges of natural-born subjects, shall be adjudged and taken to be natural-born subjects of the Crown of Great Britain, to all intents, constructions and purposes whatsoever, as if they had been born within

See Cro. Car. 601.

Cro. Eliz. p. 3. in notis.

“ within the kingdom, notwithstanding 12. & 13. *Will.* 3. c. 2. §. 3 (\*), PROVIDED their fathers were not attainted, banished, or in the service of a foreign prince, as above-mentioned.” The children of aliens born here in England are also, generally speaking, natural-born subjects, and intitled to all the privileges of Englishmen.

(\*) This statute enacts that no person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereof (although naturalized or made denizen, except such as are born of English parents), shall be of the Privy Council, House of Parliament, or enjoy any office of trust, or have any grant of lands, &c.

CXXIII. “ NEMO PUNITUR PRO ALIENO DELICTO.”

Co. Lit. 745.  
Wing. 336.

Therefore in *replevin* the defendant cannot claim property by his bailiff or servant; because if the claim turn out to be false, the claimant shall be fined for his contempt, which the lord cannot be, unless he make the claim himself; and, *Nemo punitur pro alieno delicto*. But it seems that this rule only applies in this case to replevins in the county court, for in the king's bench the bailiff is not liable to a fine; and therefore it has been held, that there one may make conuſance and claim property by a bailiff.

Hampstead v. Oldham, 1. Lev. 90. 2. Keb. 441. Fitzherbert's Natura Brevium, 61.

So, if a stranger make waste of his own wrong after the writ of *estrepement* delivered to the tenant, and against the tenant's will, the tenant shall not in that case be punished for the waste of the stranger.

1. Bl. Com. 430.  
4. Inst. 109.

But there seems an exception to the generality of this Maxim in some cases respecting master and servant; for in those things which a servant may do on behalf of his master, the master shall be answerable for the act of the servant, if done by his command, either expressly given or implied: *Nam qui facit per alium facit per se*. Therefore, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it; not that the servant is excused, for he is only to obey his master in matters that are honest and lawful. If an innkeeper

keeper's servants rob his guests, the master is bound to restitution; for his negligence in not providing honest servants is a kind of implied consent to the robbery: *Nam qui non prohibet, cum prohibere possit, jubet* (f). (f) See further on this subject, 1. Bl. Com. 431.

CXXIV. "NEMO PRÆSUMITUR ALIENAM POSTERITATEM SUÆ PRÆTULISSE."

Therefore, if tenant in tail discontinue the estate tail, and hath issue, and dies, and the uncle of the issue releases to the discontinuee, with warranty, and dies without issue; this is a collateral warranty, and shall bar the issue in tail, although the uncle had no right at all to the land intailed, because the Law presumes that the uncle would not unnaturally disinherit his lawful heir, being of his own blood, of that right which the uncle never had, but came to the heir by another mean. Co. Lit. 373. Wing. 285. See also 6. Co. 77.

Thus, also, where a man introduces his will, "For those worldly goods and estates wherewith it has pleased God to bless me, I give and demise to A. her heirs and assigns for ever, all my lands at B. and I give and bequeath to A. aforesaid all my land at C.;" it was adjudged that A. should only take an estate for life in the lands at C. and that the reversion should descend, although the will contained a legacy of one shilling to the heir at law; for, by LORD MANSFIELD, express words of limitation, or words tantamount, as, "all my estate," or, "all my interest," are necessary to pass an estate of inheritance; but, "all my lands in such a place," are not sufficient, for they are merely descriptive of the local situation, and only carry an estate for life; and, *words tending to disinherit an heir at law are not sufficient to prevent his taking, unless the estate be expressly given to somebody else.* Wright v. Sidebotham, Dougl. 763.

CXXV. "NEMO TENETUR ARMARE ADVERSARIUM SUUM CONTRA SE."

Therefore, where a juror is challenged for the hundred, or for cosinage, he is not bound to shew Co. Lit. 167. Wing. 665. that,

that he has not sufficient land, or that he is related to the party, but the person challenging must make it appear.

Dougl. 667.

So, also, in declaring on a deed, as in covenant, it is only necessary to state enough of the deed to shew a title to the action.

CXXVI. "NIHIL MAGIS ÆQUITATI CONSENTANEUM EST, QUAM UT IISDEM MODIS RES DISSOLVATUR QUIBUS CONSTITUITUR."

Jacob, 96.  
5. Co. 26.

Thus, where an estate is vested in the king by matter of record, it cannot be divested out of him, except by matter of record. An Act of Parliament cannot be avoided or repealed but by Parliament.— A bond cannot be discharged by a parol agreement. A deed under hand and seal can only be released by some other writing signed and sealed; for, as "nothing is more agreeable to equity than that every thing should be dissolved by the same means it was first constituted," every contract or agreement must be released by a matter of as high a nature as that is which is intended to be released.

CXXVII. "NIMIA SUBTILITAS IN LEGE REPROBATUR."

11. Co. 20.

Therefore, where an exception was taken against the confirmation of the charter of Queen's College in Oxford, because it was "*sub nomine Aulae Reginae*," whereas the charter itself was "*Aulae scholarum Reginae*;" the Judges held the variance trifling and immaterial.

Buck's Case,  
Cases in Crown  
Law, 137.

Thus, also, where a man made an affidavit that he "*understood*" and believed so and so; and being indicted upon it for perjury, the indictment charged that he had falsely sworn that he "*undertood*" and believed, &c. omitting the letter *s*; LORD MANSFIELD and the Court of King's Bench, after considering all the cases on the subject, held, that the variance was immaterial.

Hart's Case,  
ibid. 147.

So also, in an indictment of forgery, a bill of exchange, in reciting the bill, instead of "value received,"

“*ceived*,” it was “*value received*,” and adjudged immaterial.

CXXVIII. “*NULLUS COMMODUM CAPERE POTEST DE INJURIA SUA PROPRIA.*”

Thus in the case of lessor and lessee of lands for Jacob, 96. years, if they join in cutting down the timber-trees, the lessor cannot punish the lessee for committing waste; for then he would take advantage of his own wrong.

So, also, if a man be bound in a bond to appear at a certain place on such a day, and the obligee casts him into prison, so that he is thereby wrongfully prevented from performing the condition, the obligor shall not derive any advantage from the non-performance of the condition.

CXXIX. “*NOMINA SI NESCIIS, PERIT COGNITIO RERUM.*”

Right interpretations and etymologies are necessary in law; for, *Ad rectè docendum primum oportet nomina inquirere, quia rerum cognitio à rerum nominibus dependet.* Thus, by the etymology of the word “*soccagium*,” LITTLETON expounds the nature of the tenure, and distinguishes it from *Knight's Service*; by which it appears, that the names of things are diligently to be observed, to preserve proper distinction, and avoid confusion: *Nomina si perdas certè distinctio rerum perditur.*

Co. Lit. 68.  
Wing. 18.

Co. Lit. 86.

Thus, by enquiring into the etymology of the word “*penetrate*,” it seems to be as proper to say, “*the wound penetrates*,” as to say that “*the bullet penetrates*,” *quia PENETRO derivatur à PENITUS et INTRO.*

Long's case,  
5. Co. 122. a.  
Ld. Ray. 28.

So also it has been lately determined, that the word “*from*” may, in the vulgar use, and even in the strict propriety of language, be taken either *inclusively* or *exclusively*: Therefore, where tenant for life, with a power to lease in *possession* and not in *reversion*, granted a lease to his only daughter for twenty-one

Cowper, 717.  
725.

years, to commence "FROM the *day* of the *date*, the Court held it to be a lease in possession.

CXXX. "NON ACCIPI DEBENT VERBA IN DEMONSTRATIONEM FALSAM, QUÆ COMPETUNT IN LIMITATIONE VERAM."

Bacon, 76.

Dyer, 56. 376.

1. Roll. Ab.

613.

Jones, 379.

Cro. Car. 447.

473.

Therefore, if the parish of *Hurst* extends into the counties of *Wilts* and *Berks*, and a grant be made of a close "called *CALLIS*, situate and lying in the parish of *Hurst* in the county of *Wilts*;" whereas, in fact, the whole close lieth in that part of the parish which is within the county of *Herts*; yet the estate shall pass, because the description contains sufficient certainty, inasmuch as the close is pointed out by its *proper name*, and which certainty the false reference does not destroy; for the words "in the county of *Wilts*," shall not be taken to refer to *the close* only; and so be false, instead of to *the parish*, and so, in some sort, be true; but shall be construed, "a close called *Callis*, situated in the parish of *Hurst* in the county of *Wilts*." But if the grant had been "all my lands in the parish of *Hurst* in the county of *Wilts*," and all the grantor's lands had been in the county of *Herts*, nothing had passed.

Bacon, 77.

Cro. Eliz. 113.

476. 658.

3. Peere Wms.

56.

Cro. Jac. 22.

Thus, also, where a man grants "all and singular my lands in the tenure of *John Doe*, which I have purchased of *James Nokes*, as by an indenture of lease made to *Joseph Brown*, will more fully appear;" if the grantor has land wherein some of these references are true and the rest false, and no land wherein they are all true, nothing passes; as for instance, if he had land in the tenure of *John Doe* purchased of *James Nokes*, but not specified in the indenture to *Joseph Brown*; or if he had land purchased of *James Nokes*, and specified in the indenture to *Joseph Brown*, but not in the tenure of *John Doe*; but if he had had some land wherein all these demonstrations were true, and some land wherein part of the demonstration was true and part false, then they shall be intended words of limitation to pass only those lands wherein all these circumstances are true.

CXXXI.

CXXXI. "NON IMPEDIT CLAUSULA DEROGATORIA, QUO MINUS AB EADEM POTESTATE RES DISSOLVANTUR A QUIBUS CONSTITUUNTUR."

The *clausula derogatoria* is, by the common practical term, called *clausula non obstante*, and is of two sorts, *de præterito*; and *de futuro*; the one weakening and disannulling any matter past to the contrary; the other any matter to come. The *clausula non obstante de futuro*, is in judgment of law idle and of no force, because it would deprive men of that which of all other things is most incident to the human condition, *viz.* alteration and repentance. Therefore, although a man makes his last will and testament *irrevocable* in the strongest words, yet he is at liberty to *revoke* it; for acts which are in their natures revocable, cannot, by any strength of words, be fixed and perpetuated.

As to the dispensing power which was formerly exercised as a part of the king's prerogative, it is enacted by 1. *Will. and Mary*, it. 2. c. 2. that every dispensation by *non obstante*, of or to any statute, or any part thereof, shall be held void and of none effect, except a power of dispensing be allowed in such statute.

CXXXII. "NON OFFICIT CONATUS NISI SEQUATUR EFFECTUS."

Therefore, persons who hold offices of trust and confidence shall not forfeit them by a bare endeavour or intention to do an act, although they declare their intention by express words, except the act itself be put in execution; as if the keeper of a park shall say, "I will kill all the game within my custody," or, "I will cut down so many trees in the park," but in fact kills none of the game, nor fells any of the trees, this is no forfeiture; for a cause of forfeiture must be some act done, and not a bare intention or enterprise, of which the party



may repent before the execution of it, and upon which no prejudice enfues.

CXXXIII. “NON POTES ADDUCI EXCEPTIO  
EJUSDEM REI, CUJUS PETITUR DISSOLUTIO.”

Year Book,  
7. Hen. 4. pl.  
39.  
7. Hen. 6. pl.  
44.  
Bacon, 37.

Therefore, if a man be attainted and executed, and his heir brings a writ of error on the attainder, the corruption of blood which followed upon the attainder cannot be pleaded to interrupt his conveying in the writ of error, for that would be to preclude the possibility of an attainder ever being reversed; and it would be absurd and repugnant to itself, to admit a plea in bar of such matter as is included in, and to be defeated by, *the same suit*. But whether this rule shall take place where the matter of the plea is to be avoided in *another suit*, than that to which it is pleaded, seems doubtful. LORD BACON is of opinion, that the rule does extend to such cases; for otherwise this mischief might ensue, that the party might plead the matter across either of them in the contrary suit, and by that means intercept the progress of both suits, and prevent right. Thus, if a man be attainted on two several erroneous attainders, the corruption of blood might be pleaded *transversely*, and so the writ of error barred upon both.

CXXXIV. “NON VIDETUR CONSENSUM RETINUISSE SI QUIS EX PRÆSCRIPTO MINANTIS ALIQUID IMMUTAVIT.”

Bacon's Maxims, 98.

Thus, if one man threaten another to the fear of his life unless he will give him a bond for forty pounds, and the party threatened refuses to give the bond for that sum, but offers a bond for twenty pounds, or any less sum, the law will not consider this bond to have been *voluntarily* given, although the promise and offer of it proceeded from himself, but they will rather consider that he had firmness enough to resist the larger demand, but was compelled by fear to offer the lesser; for although choice  
and

and election be in general evidence of consent, yet as the transaction commenced by *durefs*, it shall not be presumed to have ceased and determined, because the party *dureffed* made the motion and offer. But if he had drawn any consideration to himself; as if he had said, "I will give you the bond you demand, if you will give me that piece of plate;" the *durefs* would be discharged, except it had been first moved by the party committing the *durefs*; as if he had said, "Take this piece of plate, and give me a bond for forty pounds;" for in this case the gift of the plate would have been good and the bond void. *Sed quære.*

CXXXV. "NO MAN CAN DO AN ACT TO HIMSELF."

A Man cannot present himself to a benefice, or make himself an officer, or sue himself, or summon himself; and therefore if a sheriff suffer a common recovery it is error, because he cannot summon himself. Dyer, 188.

Upon this Maxim it is that the doctrine of *remitter* is principally founded (*t*); and therefore, where a man possesses an inchoate right, and cannot obtain the legal right because there is nobody to sue but himself, the law will put him in the same plight as he would have been in if he had recovered by judgment of law against another (*u*). Thus, in real estates, if *A.* disseises *B.* that is, turns him out of possession, and dies, leaving a son, *C.*; whereby the estate descends to *C.* the son of *A.*; *B.* is barred from entering thereon, till he proves his right in an action: now, if afterward *C.* the heir of the disseisor makes a lease for life to *D.* with remainder to *B.* the disseisee for life, and *D.* dies; hereby the remainder accrues to *B.* the disseisee; who thus gaining a new freehold by virtue of the remainder, which is a bad title, is by act of law *remitted*, or in of his former and surer estate; and therefore there is no remitter to a right for which the party has no remedy by action. (t) Co. Lit. 349. b. ?  
(u) Litt. Sec. 661.  
3. Bl. Com. 20.

2. Bl. Com. 511. So also in personal property, in the case of a *legal executor* who is also a creditor to the testator, the law allows him to retain his own debt against all others of an equal or inferior degree; for as the other creditors may bring actions against him for their debts, and he cannot bring an action against himself, the Law, by a species of remitter, enables him to retain the amount of his demand; for the benignity of the Law is such, that where, to preserve the Principles and Maxims of the Law, it depriveth a man of his remedy, it will rather put him in a better degree and condition than in a worse: *Nam quod remedio destituitur, ipsa re valet; si culpa absit.*
3. Bl. Com. 20.
- Bacon, c. 9.

CXXXVI. "NULLUM SIMILE EST IDEM."

- Cro. Eliz. 197.  
4. Co. 18.  
Lane, 61.  
Doctrina Placitandi, 56.
- Therefore, in an action for slandering a man's title to the manor of *Hely*, the declaration stated that the defendant had said, "I have a lease of the manor of *Hely* for ninety-nine years:" to this declaration the defendant pleaded, that after the decease of her husband, "*talis indentura qualis in narratione specificatur,*" came to her possession among other writings, &c. An objection was taken, upon demurrer, that this was not a direct answer to the indenture alledged in the declaration; for, *talis indentura* is not *eadem indentura*, because, *Nullum simile est idem*; and the Justices were clear and unanimous, that for this reason the plea was bad.

CXXXVII. "OMNE SACRAMENTUM DEBET ESSE DE CERTA SCIENTIA."

4. Inst. 279.
- The word Witness, says LORD COKE, is derived from the Saxon verb WETEN, which signifies SCIRE; *Quia de quibus sciunt testari debent*; and, *Omne sacramentum debet esse certæ scientiæ.* In Latin, a witness is called TESTIS à testando, and *Testari est testimonium perhibere*; from whence springs the Maxim, *Plus valet unus oculatus testis, quam auriti decem*; for, *Testis de visu præponderat aliis*: for, as all demonstration, says LORD CHIEF BARON GILBERT, is founded on the view of a man's own proper senses
- Law of Evidence, p. 3.

by a gradation of clear and distinct perceptions, so all probability is founded upon obscure and indistinct views, or upon report from the sight of others. The attestation of a witness, therefore, must be to what he knew, and not to that only which he hath heard, for a mere hearsay is no evidence; although under certain circumstances it may be allowed in corroboration of what has been directly sworn. The general rule is, that testimony upon oath must clearly express the fact sworn to, to have been so far within the party's own and certain knowledge, that perjury may be assigned upon it, if it shall turn out that he has intentionally sworn what is false.— Therefore, an affidavit to hold a man to bail, where the words were “*in indebted,*” instead of “*is indebted,*” was rejected as containing no assertion; for there is nothing predicated. So, also, an argumentative affidavit is insufficient; as, if a legatee swear that the executor made him such a promise, and *therefore* he is indebted. But assignees, executors, &c. who are plaintiffs, are allowed *ex necessitate rei* to swear to a debt as to their *belief* only; for they cannot have *certain knowledge* of the fact of its existence, and therefore cannot take a *positive oath*. And although it has been generally conceived, and said by great authority (x), that “perjury cannot be assigned in any thing which is not within the *knowledge* of the deponent; as if he swears upon *his belief*, &c. for that what he swears upon his *belief* is not within the compass of his oath;” yet that opinion is now entirely exploded: for it has been declared by Lord Chief Justice DE GREY in the Common Pleas (y), and by LORD MANSFIELD in the King's Bench (z), that a man may be indicted for perjury in swearing that he *believes* a fact to be true which he must *know* to be false.

Law of Evidence, 149, 150.

2. Wilson, 224.

1. Term Rep. 716.

1. Term Rep. 83.

(x) Ld. Ch. Baron Gilbert's Law of Evidence, 55.

(y) Miller's case, 3. Wilf. 427.

2. Black. 881. Cases in Crown Law, 304.

(z) Pedley's case, Trinity Term, 1784.

CXXXVIII. “OMNE MAJUS CONTINET IN SE MINUS.”

Therefore if a man tender a greater sum of money than he is bound to pay, yet the tender is good; for, *Quando plus fit quam fieri debet videtur etiam illud fieri* 5. Co. 115. *quod*

Wade's case, 5. Co. 115.

*quod faciendum est: Et in majore summa continetur minor.* So also where a man is empowered to make *assigns*, he hath thereby an implied power to appoint a *deputy*; for, *Cui licet quod majus est non debet quod minus non licere*; as where the office of steward is granted to a man and *his heirs*, he may make a *deputy*. Thus, also, a man in prison shall not be bound by a recovery by default for want of answer in a Court of Record in a real action, which is matter of *record*; and *à multo fortiori* he shall not be bound by a descent *in pais* which is matter of *deed*, and consequently of an inferior nature; for the argument, says LORD COKE, *à minore ad majus*, always holds affirmatively, and the argument *à majore ad minus*, negatively; the reason of which is, *quod in minori valet, valebit in majori; et quod in majori non valet, nec valebit in minori.*

Lord Shrewsbury's case,  
9. Co. 48.  
Ante, p. 45.

Co. Lit. 260.

Ibid.

Bacon's Max.  
76.

The Statute of 1. Edw. 6. c. 3. enacts, that those who are attainted for stealing *horses* shall not have their clergy; and therefore as penal statutes are to be construed strictly and literally, the Judges held that it did not extend to a person stealing one *horse* only, and the Legislature was obliged to supply the defect: but, says LORD BACON, if the statute had taken clergy from those who should steal *one horse*, no question could have been made but that he who stole *more than one* would have been within it: *Quid omne majus continet in se minus.*

CXXXIX. " OMNE ACTUM AB AGENTIS  
INTENTIONE EST JUDICANDUM."

The intention of the acting parties, in forming contracts and obligations, is the chief thing which the Law regards. Thus, where a bond was made, " KNOW ALL MEN, &c. that I *John Doe* am held and firmly bound to *Richard Roe* in the sum of twenty pounds to be paid to the said *John Doe*," mistaking the name of the obligor for that of the obligee; yet the bond was adjudged to be good, for the intention of the parties clearly and manifestly appears. The Law will likewise take one word for another in deeds, to supply the intention of the parties;

Cowper, 725.

Plowd. 141.  
2. Saund. 157.

Plowd. 156.  
Hob. 27.  
2. P. 279.

ues ;

ties; as where a man has a *remainder*, and he grants it to another by the name of a *reversion*; yet the grant is good, notwithstanding the property thus conveyed is mis-termed. And in construing wills the intention of the testator is always the governing principle, so far at least as that intention can be reconciled with the established rules of law.

1. Peere Wms. 457.  
2. Bl. Com. 381.

CXL. " OMNIA PRÆSUMUNTUR SOLEMNITER ESSE ACTA."

Therefore, says LORD COKE, speaking of the presumptions of law in the case of a charter of feoffment, if all the witnesses to the deed be dead (as no man can keep his witnesses alive, and time wearieth out all men), then violent presumption, which stands for a proof, is continual and quiet possession; for, *Ex diuturnitate temporis omnia præsumuntur solemniter esse acta*.

Co. Lit. 6. b.  
3. Term Rep. 170.

So, also, if a landlord sues for rent due at Michaelmas 1754, and the tenant cannot prove the payment, but produces an acquittance for rent due at a subsequent term *in full of all demands*, this is a violent presumption of his having paid the former rent, and is equivalent, says *Sir William Blackstone*, to full proof; for though the actual payment is not proved, yet the acquittance, *in full of all demands*, is proved, which could not be without such payments; and therefore it induces so violent a presumption, that no proof shall be admitted to the contrary.

3. Bl. Com. 371.

Co. Lit. 373.  
Gilb. Evidence 161. Sed vide 2. Term Rep. 366, Stratton v. Rastal.

CXLI. " ONE THING SHALL ENURE FOR ANOTHER."

Noy, 41.

Thus where A STATUTE MERCHANT, which by the 13. *Edw.* 1. c. 1. ought to be sealed with two seals, was sealed only with one seal, and therefore void as a statute, yet it was held that the conusee might sue upon it, as upon A BOND at Common Law. So, also, if a lessor infeoff the lessee for life, it shall enure as a deed of confirmation.

Afcue's case, Cro. Eliz. 319. Moor, 405.

Noy's Maxims, 41.

It

Cowp. 600.

It is a general rule, that if deeds cannot operate in one form, they shall operate in that which by law will effectuate the intention of the parties.

CXLII. "PERSONA CONJUNCTA ÆQUI PARATUR INTERESSE PROPRIO."

Lord Bacon,  
85.  
2. Brown C.  
C. 226.

The Law pays such respect to nature and conjunction of blood, that in many cases it compares and matches nearness of blood with considerations of profit and interest. If, therefore, a man covenants in consideration of blood to stand seised to the use of his brother, son, or near kinsman, a use is well raised by this covenant; but consanguinity forms no ground upon which to raise a personal contract; for a promise by a father to give his son such a sum of money in consideration of blood is *nudum pactum*, and no *assumpsit* lies upon it. *Sed quære*, for LORD THURLOW declared (a), that he could not undertake to say, that a promissory note given by a woman to a trustee as a provision for her child was *nudum pactum*: a parent may maintain and uphold his children in their law suits, without being guilty of the offence called *maintenance*; he may also justify an assault and battery in defence of the persons of his children.

(a) In the case of Seton v. Seton, Trin. Term, 1789. 2. Brown C.C. 610. Plow. 4. 25. Bacon, 86. 2. Inst. 564. Cro. Jac. 296. 1. Bl. Com. 450.

(b) Ld. Bacon, 86. See Co. Lit. 123. a. note 8. much curious learning upon his subject.

So, also, if a *minor* contract for the nursing of his *lawful child* (b), he cannot avoid it by the plea of *infancy*, any more than if the *contract* had been for aliments, erudition, or other necessaries for himself.

CXLIII. "PRÆTEXTU LICITI NON DEBET ADMITTI ILLICITUM."

Dyer, 35.  
Wing. 728.

If a lessee hath liberty to fell trees to repair the house, and he fells four oaks for that purpose, and fells them, and afterwards buys four other oaks as good, yet it is waste; for the cutting of them down and *selling them* was a tort. So if a man sell the distress which he hath taken and impounded, and afterwards, on finding his error, he buys them again and impounds them, yet their sale was a tort, and the repurchase and impounding of them afterwards will

will not purge it. So, also, if a man, seeing his neighbour's beasts in another man's ground, drives them out, yet the owner of the soil shall have an action of trespass against him; for he cannot pretend in excuse that the beasts were *damage feasant*. So, Dyer, 36. also, if a lessor is bound to a man in one hundred pounds, and the lessee cuts down timber, with the produce of which he pays the bond on account of the lessor, yet this shall not excuse him from the waste; for it is not lawful for a man to do a wrong, whatever may be the motive.

CXLIV. "QUILIBET POTEST RENUNCIARE JURI PRO SE INTRODUCTO." Wing. 2. Inst. 183.

Thus the statute 23. Hen. 6. c. 10. which directs sheriffs to take the bail of sufficient persons for the appearance of a prisoner on the return of the writ, is held not to restrain the sheriff from taking the bail of a single person, or from becoming himself answerable for the prisoner's appearance; for, as he is liable to be amerced on the non-appearance of the party, and as the statute was made for his benefit, he may run the risk of renouncing it. 10. Co. 101.

CXLV. "QUI PRIOR EST TEMPORE POTIOR EST JURE."

That priority in point of time establishes a superiority of right, is a maxim that takes place whenever one of two innocent persons must be a loser. Thus, where a person mortgages land, and afterward leases the mortgaged premises at a rack-rent, and gives the lessee possession under his term; yet the mortgagor, if he gave no assent to the demise, may recover the premises by ejectment, against the lessee of the mortgagor; for, having a good title, prior in point of time to that on which the title of the lessee is founded, his priority shall prevail. Co. Lit. 14. 347. Keech v. Hall, Dougl. 23.

So, also, if a Countess retains two chaplains, according to 21. Hen. 8. c. 13. and afterwards retains a third, this subsequent retainer cannot divest the capacity of dispensation which was previously vested upon Drurie's case, 4. Co. 89. C10. Eliz.



upon the prior retainers; for although a Countess may retain as many chaplains as she pleases, yet she cannot have more than two capable of dispensations by force of the statute; and reason requires that he who has longest served should be first preferred.

CXLVI. “ QUI SENTIT COMMODUM SENTIRE  
“ DEBET ET ONUS.”

*Et,*

“ QUI SENTIT ONUS SENTIRE DEBET ET  
COMMODUM.”

Jacob, 102.

Therefore, on the assignment of a lease, the lessee who had covenanted to repair may have an action on the covenant against the assignee for suffering the house to decay, because he that enjoys the profit must bear the burden and the charges. Thus, also, where persons enjoy benefit by making embankments on a river, the Law will oblige them to contribute to the repair.

5. Co. 110.

CXLVII. “ QUOD AB INITIO NON VALET, TRACTU  
TEMPORIS CONVALESCERE NON POTEST.”

The King v.  
Northfield,  
Dougl. 660.

See Noy's  
Maxims, 9.

Thus, the Marriage Act, 26. Geo. 2. c. 33. which ordains, “ that from and after 25th March 1754, “ all banns of matrimony shall be published in the “ parish-church, or in some public chapel, *in which* “ *public chapel banns of matrimony have been usually* “ *published*, of or belonging to the parish or chapelry “ wherein the persons to be married shall dwell; “ and that all marriages solemnized in any other “ place than a church or public chapel, unless by “ special licence, shall be *null and void*,” was held not to extend to marriages solemnized in any chapel built subsequent to the year 1754, and that the frequent usage since that time could not render such marriages valid; for to give operation to usage, it must have a legal commencement; because, *Quod ab initio non valet, tractu temporis non convalescit*; and the statute clearly meant chapels existing at the time it was made. And in consequence of this determination,

mination, the 21. *Geo. 3. c. 53.* was immediately passed, to render all marriages which *had been* celebrated in any parish-church or chapel erected and consecrated since 26. *Geo. 2. c. 33.* valid in Law.

So, also, in the great question respecting the legality of GENERAL WARRANTS, the Counsel for the Crown attempted to defend the practice of issuing them, upon the ground of long and continued usage. But the Court unanimously declared, that no degree of antiquity can give sanction to a usage bad in itself; “and the pretended usage of issuing “General Warrants,” added MR. JUSTICE YATES, “is so totally bad, that if it had been proved to “have prevailed even from the foundation of *Rome* “itself, it would not make them good.”

1. Bl. Rep.  
562.  
11. State Trials  
312.  
3. Burr. 1692.  
1742.  
2. Hawk. P.C.  
131. *in notis.*

CXLVIII. “QUI ADIMIT MEDIUM, DIRIMIT FINEM.”

Therefore, as an infant cannot make his law of non-summons, because, *Minor jurare non potest*, the Law, in this case, will not suffer him to be aggrieved by the default; for as he is deprived by law of the mean by which adults have an opportunity of excusing their default, the default itself shall not operate to his prejudice; *Lex nemini facit injuriam.*

Co. Lit. 172. b.

Thus, also, if a park-keeper cut down the trees, woods, and underwoods, in the park, it is a forfeiture of his office; for destroying *the vert* is a mean of destroying *the venison*, which, by an implied condition annexed by the Law to his acceptance of the office, he was bound to preserve.

Co. Lit. 233.

Thus, also, if a man erect a wood pile so as to stop up or hinder the light of his neighbour's house; or if he build a hog-kennel, or a manufactory for sulphur, so as to become a nuisance by rendering the air infectious or unwholesome, an action on the case will lie against him; for by these means he hinders and intercepts the peaceable dwelling of his neighbour, which is the principal end for which the house was at first erected; and, *Prohibetur nequis faciat in suo quod nocere possit in alieno*; and, *Sic utere*

9. Co. 58.  
Stra. 704.  
Salk. 357.  
1. Burr. 333.  
1. Hawk. P.C.  
*in notis.*

9. Co. 59. *tuo ut alienum non lēdas*, are established Maxims in Law.

CXLIX. “ QUOD TACITE INTELLIGITUR, DEESSE NON VIDETUR.”

10. Co. 59. Thus, if a man plead that such a grant was made by *John LATE bishop of Sarum*; the words “*late bishop*” imply and import that he was not bishop at the time it was pleaded. So in an ejectment of a lease of a rectory, where the declaration averred that the party *fuit et adhuc est seifitus*, &c. the Court held it good, though it omitted to state that the parson was alive; for that fact is implied in the words “*fuit et adhuc est.*” So, where lands are devised without words of limitation, and the lands are charged with a gross sum, the devisee by implication of law takes a fee; because the manifest intent of the testator being declared, and no technical form of words necessary to express it, the certainty that the testator must mean a bounty to his devisee, is sufficient to supply the want of a formal limitation.

Dyer, 304.

See Wingate's Max. 137.

Cowper, 841. Dougl. 492. 501.

CL. “ RECEDITUR A PLACITIS JURIS, POTIUS QUAM INJURIE ET DELICTA MANEANT IMPUNITA.”

Lord Bacon's Maxims, 73. There are many grounds and *positive* learnings of law, says LORD BACON, which are not Maxims and conclusions of reason, but are yet so strongly adopted, that the Law will not allow their validity to be disputed; but, *ex necessitate rei*, it will *dispense* with them for the time, rather than crimes and wrongs should go unpunished; *quia salus populi suprema Lex*, and *salus populi* is contained in the repressing of offences by punishment.

10. Co. 139.

These grounds may be rather called *placita juris* than *regule juris* (a).

Thus,

(a) These institutions, for which LORD BACON seems at a loss to find a *proper* name, appear, as contradistinguished from indisputable Maxims,

Thus, for instance, they are positive grounds of law, that a man shall not be considered as a principal offender, if he be *absent* at the time the offence is committed; and that an *accessary* cannot be proceeded against until the principal be tried: but if a man upon subtlety and malice set a madman by some device to kill another, and he does so, inasmuch as the madman is excused because he can have no will or malice, the law will consider the inciter as principal in the murder, though he be absent, rather than the crime should go unpunished. So, also, it is a ground of law, that an appeal of murder shall not go to the heir where the party murdered has a wife, nor to the younger brother where there is an elder brother: yet, if a wife murder her husband, or the son and heir murder his father, the appeal shall go in the first case to the heir, and in the second case to the younger brother.

BUT if the rule or ground of law be one of those higher sort of maxims that are called *regule rationales*, and not *positivæ*, then the law will rather endure a particular offence to escape without punishment, than suffer such a rule to be violated. Thus, where the 1. *Edw. 6. c. 12.* made stealing *horses* a capital offence, the Law would not break down the established maxim, That “*all penal statutes are to be construed literally,*” in order to reach an offender who had stolen *one horse* only; but left it to the Legislature to supply the defect. So, also, upon the same principle, if the loss of the *right hand* should be inflicted as a punishment, and it should happen that the offender hath had his right hand before cut off, the crime shall rather pass without punishment than the letter of the Law be extended.

*Maxims*, to be what are usually termed *General Rules*, which are always open to *exceptions*, as the exigency of particular cases may require for the ends of substantial

justice; and a rule is rather *confirmed* than *destroyed* by the *exception*, according to the established Maxim, *Exceptio probat regulam.*

CLI. " REMOTO IMPEDIMENTO EMERGIT  
ACTIO."

Co. Lit. 128.  
133.  
Cases in Crown  
Law, 396.

Thus, if outlawry or excommunication be pleaded in disability of the person of a plaintiff, and after such pleas pleaded the plaintiff obtain a pardon of the outlawry from the king, or letters of absolution from the excommunication of the bishop, the defendant shall answer to the action; for these impediments being removed, the plaintiff is restored to his law.

3. Co. 76 b.  
4. Co. 62.  
Cro. Jac. 688.  
Co. Lit. 299.  
Cro. Car. 242.

So, also, if there be tenant for life; remainder for life; reversion in fee; and the tenant for life commits waste by cutting down trees in the lifetime of the remainder-man for life, the reversioner in fee cannot have an action for waste, during the continuance of the *mean* estate: but if afterwards the remainder-man for life dies, or surrenders his estate to the reversioner, then the action by the reversioner lies; for the *mean* estate, which was the impediment to it, is removed.

CLII. " RES INTER ALIOS ACTA ALTERI  
NOCERE NON DEBET."

Co. Lit. 319.  
6. Co. 69.

Thus, if a man make a lease for life and then grant the reversion for life, and the lessee attorns; after which the lessor disseises the lessee for life, and makes a feoffment in fee, and the lessee re-enters; this shall leave a reversion in the grantee for life, and another reversion in the feoffee; and yet this is no attornment in law of the grantee for life, because he doth no act nor assent to any which might amount to an attornment in law, *Et res inter alios acta alteri nocere non debet.*

Bruerton's  
Case,  
6. Co. 1.

So, also, if a tenant holds by an entire service, as by the yearly payment of a horse or a hawk, if the lord purchase any part of the land, the whole service is extinguished; but if the tenant alien in parcels to several men, that shall give the lord, who is a stranger, an advantage and benefit, so that every  
one

one of the alienees shall pay a horse or a hawk.

So, also, if a widowed baroness retain a chaplain Acton's case, 4 Co. 118. pursuant to 21. Hen. 8. c. 13. and afterwards marry a peer of the realm; although this case is not provided for in the statute, yet such marriage shall not operate as a countermand of her retainer.

If an obligee make an obligor his executor, it operates as a release of the debt; but if the archbishop grant administration to an obligor of the intestate, this is no extinguishment of the debt; for the acts of the archbishop and the obligor shall not injure the interests of the deceased, who is in contemplation of law as a third person. Needham's case, 8. Co. 136.

CLIII. " RES JUDICATA PRO VERITATE ACCIPITUR."

Therefore in an action of debt on bond against an abbot, and the abbot acknowledges the action, and dies; the successor shall not avoid execution, though the bond was made without the assent of the convent, for he cannot falsify the recovery. Co. Lit. 107.

CLIV. " SATIUS EST PETERE FONTES QUAM SECTARI RIVULOS."

Abridgements, says LORD COKE, are of good and necessary use to serve as tables from which to find the cases in the books at large, or in the records, but not to ground any opinion upon; and he cites a case reported in the Year Book of Edward the Third, the determination of which is erroneously and differently recited in the several Abridgements of *Fitzherbert*, *Statham*, and *Brooke*; and therefore, says he, *Satius est petere fontes quam sectari rivulos.* 10. Co. 118. LORD MANSFIELD, also, in the case of *Smith v. Bromley*, remarks, that the case of *Tompkins v. Bennet* is so loosely reported by *Salkeld*, *Skinner*, and other Reporters, that no reliance is to be placed on any of them; and it is observed by SIR WILLIAM 45. Edw. 3. pl. 19, & 20. BLACKSTONE, that since the discontinuance of Dougl. 696 to 698. in notis. 1. Bl. Com. 717

public and official Reporters in the reign of Henry the Eighth, this task has been executed by many private and contemporary hands, who, sometimes through haste and inaccuracies, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination. The Judges therefore, in all cases of difficulty or doubt, observe this *Maxim*, and order the record itself to be inspected.

CLV. "TERRA TRANSIT CUM ONERE."

Lit. Sec. 374.  
Co. Lit. 231.  
5. Co. 16.

Therefore if an estate be made by indenture to a man for his life, with remainder to another in fee upon a certain condition, &c. if the tenant for life seals the indenture, and dies, and the remainder-man enters into the land by force of his remainder, he is tied to perform all the conditions contained in the indenture, in the same manner as the tenant for life was bound, although he never sealed the indenture; for as he entered and agreed to take the lands by force of the indenture, he is bound to perform the conditions, if he will have the land.

CLVI. "VERBA GENERALIA RESTRINGUNTUR AD HABILITATEM REI VEL PERSONÆ."

Bacon, 70.

It is a rule, That the king's grants shall not be taken or construed to a special intent; but it is not so with the grants of a common person, for they shall be extended as well to a foreign intent, as to a common intent; yet with this exception, that they shall never be taken to an impertinent or a repugnant intent: for all words, whether in deeds, statutes, or otherwise, if they are general and not express and precise, shall be restrained to the condition of *the person*, or the fitness of *the subject matter* to which they are applied.

Year Book,  
41. Edu. 3.  
8.

Thus if a grant be made of an annuity *pro consilio impenso et impendendo*, if the grantee be a physician,

cian, it shall be understood of his counsel in physick; and if he be a lawyer, of his counsel in law.

So, also, if a man grant "all my trees growing upon my land in Dale," the grantee shall not have fruit-trees growing in the garden or orchard of the grantor, if there be any other trees upon his ground. Year Book, 14. Hen. 8. pl. 2.

So, in the statute of wrecks, which ordains that the goods saved shall be preserved for a year and a day to the use of the owner, does not extend to fresh victuals or the like, which it is impossible to preserve for that length of time from perishing; for although general words may be taken to a rare and foreign intent, they cannot be taken to an unreasonable intent. Bacon, 70.

#### CLVII. "VOLENTI NON FIT INJURIA."

Therefore if the tenant in an assise of a house desires the plaintiff to dine with him in the house, which the plaintiff does accordingly, but doth not claim the house at that time, this is not such an entry or possession as will cause the action to abate; for being invited by the tenant, if he had been a stranger, he would not have been a trespasser. Co. Lit. 368. Plow. 92, 93.

No act of the ordinary can disappropriate a church; but if the parson *imparsonée*, who is the patron, presents to the bishop, it becomes disappropriated: for although this could not be done tortiously by any other person against the will of the patron, yet it may by his own act; for, *Volenti non fit injuria*. Hob. 152. Plowd. 501. 2. Leon. 80. 1. Bl. Com. 386.

*Serjeant SALKELD* reports Lord Chief Justice TREBY to have said, that where one of two obligors pays part of the money due upon a bond, which is afterwards avoided by the other obligor on the ground of usury, he who thus voluntarily paid the money cannot again recover it back, because he parted with it freely, and, *Volenti non fit injuria* (c): but LORD MANSFIELD, in observing upon the case, says, (d) that although he thinks the judgment may have been right, yet the Reporter has had (c) Tomkins v. Burnet, Salk. 20. (d) Smith v. Bromley, Douglas, 627.



had recourse to false reasons in support of it; for that the Maxim of *Volenti non fit injuria* will not apply to cases where a man, from mere necessity, pays more than the other can in justice demand; as where a bailiff takes *garnish-money* from his prisoner, the prisoner cannot be said to part with it willingly, and therefore he may recover it back.

Dyer, 292. CLVIII. "UTILE PER INUTILE NON VITIATUR."

The wise and careful policy of the Law will not permit any document or proceeding necessary to the ends of justice to be made void, if, by any possibility consistent with the rules of Law, it can be made good, and therefore, in its endeavours to find *perfection*, will reject all superabundant and useless matter as *surplusage*. Thus, if a verdict finds part of the issue only, and says nothing as to the residue, the whole will be bad; but if the jury give a verdict for the whole issue, and for something more, that which is more is *surplusage*, and shall not stay the judgment. Thus, also, an action of debt will lie upon a foreign judgment, in which the plaintiff need not shew the ground upon which the judgment was given; and therefore if he calls it *a record*, and concludes his declaration "*prout patet per recordum*," it shall be rejected, and the defendant prevented from traversing it by plea of "*nul tiel record (e)*;" for all allegations of facts impertinent to the cause shall be struck out as *surplusage (f)*. Thus, also, where an informer proceeding on a penal statute need not negative any of the exceptions in the statute, negatives some of them only, that part of the information may be ejected as *surplusage (g)*. Thus, also, where an indictment against an accessory in larceny charged *Francis Morris* with receiving the goods, he "the said *Thomas Morris*" well knowing they were stolen, it was determined, that the words "he the said *Thomas Morris*" might be rejected as *surplusage*; the indictment being sufficiently certain without them (*h*). So, also, where the count against the principal charged

Noy's Max. 23.  
Co. Lit. 227.

Year Book,  
32. Edw. 3.  
Pl. 25.  
Co. Lit. 282.

(e) Dougl. 1.  
and 4. in notis.

(f) Dougl. 667.

(g) 1. Term  
Rep. 320.

(h) Cases in  
C. L. 113.

charged the goods to be the *property* of *Stephen Sullivan*, and the count against the accessory charged them to be the *property and chattels* of *Stephen Sullivan*, it was adjudged that the words "*and chattels*" might be rejected; and in a subsequent case (i) it was determined that all insensible and superabundant words, which obstruct the legal and technical sense of an indictment, may be rejected; for that *Utile per inutile non vitiatur*.

(i) Cases in  
Crown Law,  
411.

### §. 6. *Certain particular Laws.*

THE SIXTH and last foundation of the *Lex non scripta*, or Common Law of England, consists of certain particular Laws adopted by Custom, and used only in certain Courts, of pretty general and extensive but peculiar jurisdiction, *viz.*

- I. *The Civil Law.*
- II. *The Canon Law.*
- III. *The Marine Law.*
- IV. *The Military Law.*
- V. *The Law of the Universities.*
- VI. *Equity.*
- VII. *The Forest and Game Laws.*

#### I. *The Civil Law (a.)*

THE CIVIL LAW, in the sense in which we use the term at present, signifies that body of jurisprudence which was originally collected by the ancient Romans from the Laws and Customs of Athens; and improved to so high a degree of perfection by the industry and learning of succeeding generations, during the course of a thousand years, that it survived the destruction even of the Empire it-

The Laws of  
ancient Rome.

(a) For the authenticity of the account here given of the rise, progress, and completion of the *Corpus juris civilis*, or body of the Civil Law,

we refer to Dr. Taylor's Elements of Civil Law, and to the Introduction of Dr. Burn's Ecclesiastical Law.

self, and has infused itself in some degree into the Laws of England.

The Laws by which Rome was governed in its infancy were of three kinds :

Customs and usages.

(a) Dio. Hal. 32.

FIRST, The manners and customs of the original inhabitants, or of those States which they left when they were first incorporated into this new settlement; for it is natural to suppose the colonies of old retained the manners and customs of their mother city; and *Strabo* expressly says, that *Rome* and *Alba* had in common τὰ ἱερὰ καὶ ἄλλα δίκαια πολιτικὰ (\*); and that, when the colony of *Arcadians* arrived in Italy under the conduct of *Evander*, they brought the discipline of their own country along with them (a). *Romulus*, originally from *Alba*; *Numa*, from the *Sabines*; and *Tarquin* the Elder, from *Etruria*, being of three distinct races or people, introduced so many distinct modes of religion and politics, which by time became established customs, or *mores patrii*: it is not, however, to be doubted, but that they were also very attentive to the best disciplined constitutions of which they could procure any intelligence; for the division of the people into *patricians* and *plebeians*, is evidently derived from their Athenian neighbours.

Sovereign decrees.

Bk. 1. Tit. 2.  
Lex 2. §. 1.  
Elem. of Civil Law, 6.

SECONDLY, The ancient laws of the people of Rome consisted of the arbitrary edicts or decrees of their sovereigns in such emergencies where their customs, or *mores patrii*, failed them. “ *Et quidem initio civitatis nostræ populus sine lege certâ sine jure certo primum agere instituit omniaque MANU a regibus gubernabantur,*” says THE DIGEST; for the word *manus*, when applied to government, imports that arbitrary kind of administration, says Dr. Taylor, which depends rather upon the will of one than the consent of many.

Public ordinances.

THIRDLY, The Roman State was governed by such laws as were enacted by general consent, and the public authority of the people collectively.

(\*) Bk. 5. p. 231. *sancta et alia jura civilia.*

The LEGES REGIÆ were enacted chiefly, as far as the primæval history of Rome can be depended upon, under the administration of *Romulus*, *Numa*, and *Servius Tullius*, each of whom are said to have respectively attended in their legislations to the *Jus Naturæ*, the *Jus Gentium*, and the *Jus Civile*. These *Leges Regiæ* were anciently collected into a body by *Papirius* a Roman lawyer, and from him called *Jus Civile Papirianum*. This collection was extant for some time, as appears by a comment upon it by *Grænius Flaccus*, who lived about the time of *Julius Cæsar*, and by a large fragment preserved by *Macrobius*; but when, by the abolition of kingly power, A. V. C. 244. the city of Rome was governed, for about the space of sixty years, as formerly, *incerto magis jure quàm per latam legem*, the *Leges Regiæ* lost their authority: the best and most rational of them, however, were observed as *mores patrii*; and where they did not reach, the consuls, who were kings in all but name and duration, supplied the defect, like *Romulus*, with their own edicts and decisions.

During this period of the Roman history there was a continual struggle for power between the *patricians* and *plebeians*; the question being, Whether the State was to be governed by a precise and determinate system of *written Laws*, or by the *Jus incertum*? in other words, the arbitrary decisions of the patricians. To compose these differences it was agreed, about the year 300, to send a deputation into Greece to inspect the laws and discipline of those States, and to get the best information they could towards compiling a system for the use of *Rome*. This search directed them particularly to *Athens*, as a school and model to any State that was concerned in drawing up a system of new laws, or had occasion to correct old ones. The delegates returned at the expiration of three years; and after much contention it was determined to dissolve the present system of government by *CONSULS*, and to create an office of *TEN MEN*, *consulari potestate sine provocazione*, who were to draw up a system

The Leges  
Regiæ

D. 50. 16. 144.  
3. Satur. 11.  
Censor. de Dii.  
Nat. c. 3.

Dig. 1. 22. 3.

system of laws from the report of the commissioners; and the body of laws thus formed furnishes another great source of the *Jurisprudentia Romana*, or Roman Law, *viz.*

The Law of  
the Twelve  
Tables.

THE LAW OF THE TWELVE TABLES, so called from their being engraven on twelve tables of brass; or, The LEGES DECEMVIRALES, as they are sometimes called, from the number of persons by whom they were framed. This new constitution was composed of the ancient *Leges Regiæ* under the notion of *mores patrii*, or approved customs, incorporated with the new system from the Grecian States, and submitted to the people of Rome in TEN heads, titles, or tables, for their approbation; and were found so well adapted to their political wishes, and the constitution of the State, that they might be said to *come from them* as well as to be *offered to them*. The DECEMVIRI were continued in their office partly by the intrigues of *Appius Claudius*, who was at the head of them, and partly by a suggestion that two Tables more were wanted, which accordingly were added in the year following; but the *Decemviri* became at length so tyrannical, that they were reproached by their fellow-citizens with the name of *The Ten Tarquins*; and this misconduct, together with a wicked attempt upon the daughter of a Roman citizen, occasioned their dissolution in the third year of their administration, when the government returned to its former system, and the consulate and other offices were resumed. The Laws of the Twelve Tables have been honoured with the highest testimonies by some of the best writers of antiquity; particularly *Livy* (b), *Tacitus* (c), *A. Gellius* (d), and *Cicero* (e); fragments of them have been collected from the old writers, and reduced with great accuracy under their original division; to which *Gotthofred*, in a work intitled *Quatuor Fontes Juris Civilis*, has added an excellent comment, which has been followed by *Gravina*, *Catrou*, *Rouille*, and all the subsequent commentators; whose works uniformly prove that this celebrated code has always been

(b) Bk. 3. p. 34.

(c) Bk. 3. An.

27.

(d) Ch. 20. p. 1.

(e) De Orat.

44.

been considered as the basis and foundation of the Roman Law.

The LEX ÆBUTIA however, which was made The Lex Æbutia. *De Judiciis Centum viralibus*, contributed to break in upon the obligation which the Law of the Twelve Tables intrinsically possessed; and

The LEX CORNELIA, *ex quâ Prætores ex edictis* The Lex Cornelia. *perpetuis jus dicere juberentur*, greatly diminished the authority of these Laws. They furnished, however, the platform upon which was erected another species of authority, called

The RESPONSA PRUDENTUM, or the Interpretations of Learned Lawyers, who accommodated the rules and principles prescribed by the Twelve Tables to the practice of the courts, and the exigency of the times. These interpretations or opinions, for they were little more at first, were denominated the *Jus non scriptum*, or unwritten law; but being the works of private men, no Judge was tied down by their decisions. *Augustus*, however, See post. 129. introduced a new practice, and selected a number of <sup>131.</sup> particular lawyers to explain the obscurity which the course of time and change of circumstance had introduced into the Laws of the Twelve Tables, and ordered that their opinions should be law in the Courts of Justice. These decisions appear to amount to what we call Precedents or Reports, *Res judicatæ*, *Receptum Jus*, *Jus post multas variationes receptum*, &c.; and as they passed for law principally by acquiescence, they appear to be somewhat similar to *customs*, and are therefore properly called *Jus quod sine scripto venit*; yet it is held to be, and is ranked as, *pars juris scripti*. The opinion which the people conceived of the abilities of these interpreters of the law, and their acquiescence in their determinations, furnished by their explanations a considerable addition to the body of the Roman Law; and discovers how much the system is made up of what neither the original tables, the laws of the land, or the edicts of the prætor knew any thing of. These interpretations were called more emphatically *Jus civile*, the genus of which it is a species.

The

**The Leges.**

See Taylor's  
Elements of  
Civil Law, 177.

The LEGES, or laws enacted by the whole body of the people, whether patricians or plebeians, formed another branch of the antient Roman jurisprudence. These laws became necessary whenever a new case happened, which was not provided for by former laws, and were called *Populiscitum*; for the people of Rome taken collectively were called *populus*: from which *plebs* differed as *species à genere*, or rather as *pars à toto*. The consuls upon these occasions caused the people to be assembled together in the *comitia*, and informing them what the case was, put it to the vote, and they decided according to the rules of equity as the matter appeared to them, and this decision was ever after, in like cases, observed as a law; for after the abolition of the regal government, the magistracy was lodged with the people, one principal branch whereof is the power of making laws.

**The Plebiscita.**

See Dion Halicarn.  
ix. 39. 49.

Livy.

The PLEBISCITA was that code or series of laws which were enacted by the common people or plebeian part of the community, after their secession or separation from the patrician order, which was completely effected about A. V. C. 282. by means of a factious Tribune *Publius Volero*. The two orders were in course of time again united, but with so great advantage to the plebeian party, that they not only retained the power of passing bills upon particular subjects, but procured a ratification of those laws which they had passed by a usurped authority. The reconciliation, however, was procured upon these terms, *ut patres auctores omnibus ejus anni comitiis fierent*; which, Gronovius observes, was a tacit acknowledgement of the people that their decrees would not be binding without the concurrence of THE SENATE: but certain it is, that many laws were passed by the people without this concurrence, and in many bills a clause was added to *compel* the acquiescence of the senate to what the people had decreed. Under these unfavourable circumstances the senate would frequently practise expedients to preserve the claim or shew of right by a vote in their council,

cil, that whatever the people should conclude should be esteemed firm and valid; and the preservation of a seeming power by this means, joined to that which was the proper department of the senate, and which the people never disputed, as the care of the exchequer, the public money, embassies, at length obtained to them what forms another branch of Roman Law called, The SENATUS CONSULTUM, or Decree of the Senate.

Another source of the Roman Law was THE PRÆTOR'S EDICTS, sometimes called, *ab honore judicis*, The Prætorian Edicts. JUS HONORARIUM, *quia auctores ejus honores, i. e. magistratus gerebant.* The office of prætor was erected A. V. C. 387, by a sort of reprisal on the commons, who had so far prevailed as to be represented by one consul. The patricians therefore, while the consuls were employed in the wars abroad, got the jurisdiction, the *forense manus* of the consul, transferred upon a new officer instituted for that purpose, and taken at first out of their own body, whom they called a Prætor. The power of the prætor was confined to civil causes only. The Prætorian Edicts were certain rules or forms published by the prætor at the beginning of his office, and signifying the method by which he bound himself to administer justice that year. This form was commonly exhibited in public upon a *tabula dealbata* or *gypsata*, in Greek *λίθωμα*, and was called ALBUM PRÆTORIS, or *Judicium*. These edicts lasted but for one year, the date of the magistrate's office; but many of them, for their singular equity and utility, would be confirmed by the succeeding prætor, and became, from their duration and consistency, the general law of the land. In the age of Cicero, these edicts were commented upon by the celebrated *Servius Sulpicius*, and were raised to such repute, that the study of the Civil Law was no longer begun from the study of THE TWELVE TABLES, but from THE PERPETUAL EDICTS.

Paries gypso  
illitus cui res  
civiles apte in-  
scribi possunt.

But it must not be understood as if no magistrate had his edict but the prætor. See Varro de L. L. The *Ædile* also had cognizance *de omnibus rebus promercalibus*, and had a concurrency



The Edicts of  
the Ediles.

concurrency with the prætor, who commonly remitted the more minute affairs to his inspection. These edicts of the *Ædiles* were much of the same nature with the *Leges Censoriæ*, viz. Precepts or Injunctions of Office. Some large remains of THE *ÆDILITIAN EDICTS* are preserved in the Digests by the means of *Salvius Julianus*, under the Emperor *Hadrian*, who incorporated them into his Perpetual Edict, and illustrated them by the commentaries of the Roman lawyers.

These were the component parts of the Roman Civil Law during the existence of the Republic; but when the great revolution happened which turned the Republic into a Monarchy, in the person of *Julius Cæsar*, and the government was transferred into the hands of the Emperors on the accession of *Augustus*, another branch of Law arose, called, The *Authoritas*, or *Responsa Prudentum*, of which we have already taken notice, till at last all was swallowed up in the will of the Emperor.

The Imperial  
Constitution.

The *Constitutio Principis*, or Imperial Constitution; or, as it is sometimes called, the Breath of the Emperor; put so final a period to the *Leges* and *Plebiscita*, at least to all effectual purposes, that no more is heard of them in the Roman history. To the abolition, however, of these Laws succeeded the second period of the *Senatus Consulta*; for, upon the suggestion and advice of the celebrated *Mæcenas* to *Augustus*, the will and pleasure of the Emperor was made known two ways, either *mediante senatu* or *sine senatu*. It must not, however, be imagined, that although by this stroke of policy the Emperor seemed to make court to the senate, that he left them to exercise the right of making *Senatus Consulta pro eorum arbitrio*. The method was to lay before them the pleasure of the prince, which was then ratified by the senate, and so became a law for the people. But this curious form was soon dropped; for when the power of the Emperors came to be well established, they found that though this intervention of the senate was popular enough, they could, however, do sufficiently well without it. Accordingly they overleaped

leaped the middle step, and, *inconsulto senatu*, the Emperor *Hadrian* began with THE EDICT at once.

The EDICT was divided into *Epistole* or Rescripts; *Decreta*, Sentences of Courts; and *Edicta* properly so called, from being mere voluntary constitutions. The first and second concerned the law at the instance of the parties. The third proceeded *ex mero motu Imperatoris*. The Epistles

By RESCRIPTS the Emperor gave answer *de jure controverso*, when he was applied to for his judgment and decision, both at home and from the provinces. These Rescripts form the greater part of what is called THE CODE, that work being little more than a collection of this kind of Imperial Law; which was sometimes dispensed with such signal partiality, that *Macrinus*, one of the Emperors, had a design to strip all his predecessors' Rescripts of their authority. The Rescripts

DECRETA were decrees made in judgment, and were either INTERLOCUTORY, *viz.* such as related to any point of incidental law; or DEFINITIVE, *viz.* such as determined upon the merits of the cause itself, and the whole question. *Paulus*, a learned lawyer, collected the Decrees of the Emperors, in six books; and the manner and method of these determinations is also well explained by *Jac. Gothofred*. The Decrees

EDICTS were mere voluntary constitutions, *quæ motus spontaneus ingesserit*, and directed to general use. To these Edicts may be subjoined THE MANDATES, which are distinguished only from them by being more confined, and directed to particular persons; and THE INTERPRETATIONS, which was a power belonging to the prince alone. Edicts and Interpretations

By these means, in process of time the Roman Law, like the Roman Empire (of which it is recorded, that *ab exiguis profecta initiis eo creverit, ut jam magnitudine laboret sua*), became so great and burdensome, or, as *Livy* expresses it, "*tam immensus aliarum super alias acervatarum legum cumulus*," that they were computed by *Eunapius*, who lived in the reign preceding *Justinian*, to be many camels' load. This put several upon forming a design to reduce the Bk. 3. c. 34.  
1. Bl. Com. 8.

The several  
codes of Ro-  
man Civil Law.

the Roman Law to a regular system; and among these persons appear the names of *Crassus*, *Pompey*, *Cæsar*, *Cicero*, and *Sulpicius*; but the great work was reserved for the Emperor *Justinian*: the means, however, of executing it were previously furnished by the following collection.

The famous PERPETUAL EDICT, which was a kind of system of Roman Law drawn up by *Julian* in the reign and by order of *Hadrian*, and digested into fifty books.

The GREGORIAN CODE, drawn up by *Gregorius*, a celebrated lawyer under *Constantius*.

The CODEX HERMOGENIANUS, drawn up under the same Emperor by *Hermogenes*, a lawyer, wherein were comprized all the Imperial Constitutions of *Claudius*, *Aurelius*, *Probus*, *Carus*, *Carinus*, and that vast number of Constitutions made by *Diocletian* and *Maximian*. But these two codes, wanting authority, were soon neglected, and gave place to

THE THEODOSIAN CODE, compiled under the direction of the Younger *Theodosius*, from whom it received the Imperial sanction in a Novel Constitution of the same Emperor; and is now extant in sixteen books, with a useful comment by *Gothofred*.

From the three last mentioned Codes, together with the Novel or supplementary Constitutions, *Justinian*, about the year 528, set about reforming the Law. For this purpose, in the year 530, he issued out his decree for reducing into a system the writings of the lawyers before his time, reserving only what was useful, and omitting the obsolete, unnecessary, and contradictory passages; and it was under his auspices that the present body of CIVIL LAW was compiled and furnished by *Trebonian* and other lawyers about the year 533. The *Codex Justinianus* consists of

The Digests.

1. The DIGESTS or PANDECTS, in fifty books, containing all the decisions collected from the questions and resolutions of the ancient Roman lawyers. The civilians hold the language of this book to be so pure, that the Roman language  
might

might be fairly deduced from it, were all the other Roman writers lost.

2. THE INSTITUTES, which contain the elements and first principles of the Roman law, in four books; written in an elegant, easy, and flowing style.

3. THE NEW CODE, or Collection of Imperial Constitutions. For the lapse of a whole century having rendered the *Theodosian Code* imperfect, and new questions arising, a new code was ordered to be composed, and the former declared to be no longer authority.

4. THE NOVELS, or New Constitutions, made by *Justinian* himself after the publication of the other books. These are sometimes called *The Authenticks*, to distinguish them from other works of a similar nature, of less authority.

These four works form the Body of Roman Law, or *Corpus Juris Civilis*, as published in the time of *Justinian*; which however fell soon into neglect and oblivion: but a copy of the Digests having been found at *Amalfi* in *Italy* by accident, and concurring with the policy of the Roman ecclesiasticks, suddenly gave new vogue and vigour to the authority of the civil law, introduced it into several nations, and occasioned that mighty inundation of voluminous comments, with which this system of law, more than any other, is now loaded.

The greatest part of *Britain* was governed wholly by the Civil Law for about three hundred and sixty years, from the reign of *Claudian* to that of *Honorius*; during which time, some of the most eminent Roman lawyers, as *Papinian*, *Paulus*, and *Ulpian*, sat in the seats of judgment in this nation; and it was not eradicated by the introduction of *Saxon*, *Danish*, and *Norman* Laws, on the declension of the Empire.

From the reign of *Stephen* to that of *Edward* the third, the Civil Law prevailed very much, and even the Judges and Professors of the Common Law had frequent recourse to it, when the Common Law was silent or defective; as plainly appears from the works of *Bracton*, *Thornton*, and *Fleta*, who have

transcribed one after another, in many places, the very words of *Justinian's Institutes*.

There are indeed some particular matters in which the Civil Law always has been, and still continues to be, the only law in *England* whereby they are to be decided; and the courts of justice which have cognizance of those matters, do proceed therein according to the rules and forms of the Civil Laws: as in matters Ecclesiastical, Maritime, Military, and the two Universities, of which we shall now proceed, **SECONDLY**, to enquire.

## II. *Of the Canon Law.*

Reeve's Hist.  
of English  
Law, vol. 1.  
p. 68.

THE CANON LAW first known in this country, was formed by permission and under authority of the Government, and seemed to be supported by arguments of expediency. The existence of a church, with the gradation and subordination of governors and governed, called for a set of regulations for the direction and order of its various functions; and under that notion, a body of canonical jurisprudence had been suffered to grow up for a long course of years.

1. Bl.Com.82.

(a) A.D. 1151.

The Canon Law is a body of Roman ecclesiastical law, relative to such matters as that church has or pretends to have the proper jurisdiction over. About fourteen years after the *Pandects of Justinian* had been found at *Amalfi* (a), a complete collection of Canon Law was made by *Gratian*, a Benedictine monk of *Bologna*, and published under the title of *Decretum*: it was made in imitation of the *Pandects*, and was a digest of the whole pontifical Canon Law, extracted from the Sayings of the Fathers, Canons of Councils, and, above all, from the *Decretal Epistles of Popes*; all tending to exalt the clerical state, and to exempt the clergy from secular subordination. These *Decretals* reached as low as the time of pope *Alexander* the third; and the subsequent papal decrees, to the pontificate of *Gregory* the ninth, were published in five books, intitled *Decretalia Gregorii Noni*. A sixth book was added by *Boniface* the eighth, called *Sextus Decretalium*.

*Decretalium*. To these have been since added, the *Clementine Constitutions*, the *Extravagantes Joannis*, and the *Extravagantes Communes*, forming altogether the *Corpus Juris Canonici*, or Body of the Roman Canon Law.

See the preface to Burn's Ecc Law, 8.

These laws were first introduced into *England* during the reign of king *Stephen*, A. D. 1149, by the industry of *Roger Vicarius*, who read public lectures upon their use and excellency in the university of *Oxford*; but this attempt raised a very serious alarm; and the king, apprehensive of the consequences to which these new doctrines might lead, is said to have forbidden, a few years afterwards, the reading of books of the Canon Law. Notwithstanding this prohibition, however, the study of the Civil and Canon Laws was universally promoted by the clergy; and by their zeal and contrivances, encouraged by the venal assistance of succeeding popes, the doctrines contained in these laws were for a time received. But it is now settled, that with respect to any intrinsic obligation, they have no force or authority whatsoever in *England*, and are only binding so far as they have been permitted, by immemorial usage, to prevail in some particular courts, as has been already mentioned; and in some particular cases, as *marriages, wills, legacies, intestates effects, tithes, ecclesiastical dues, spoliation, and dilapidation*, all which will be taken notice of in the subsequent part of this work which treats of COURTS OF JUSTICE.

Reeve's Hist. Eng. Law. vol. 1. 70.

Exclusive however of these pontifical collections, which during the times of popery were admitted as authentic in this island, as well as in other parts of Christendom; there is also a kind of NATIONAL CANON LAW, composed of *Legatine* and *Provincial* Constitutions, and adapted only to the exigencies of the established church and kingdom.

1. Bl. Com. 82. Pref. to Burn's E. L. 10.

The LEGATINE CONSTITUTIONS were made and published in national synods or councils, held by authority within this realm during the mission of the cardinals *Otho* and *Othobon*, legates from pope *Gregory* the ninth, and pope *Clement* the fourth, in the reign of *Henry* the third: and there-

fore they extend equally to the provinces both of *Canterbury* and *York*.

The **PROVINCIAL CONSTITUTIONS** were made in convocation, in the times of the several archbishops, from *Stephen Langton* to *Henry Chicheley*. These Constitutions were collected and adorned with the learned gloss of *Linwood*, official of the court of *Canterbury*, and afterwards bishop of *St. David's*, during the reign of king *Henry* the fifth; and although they were originally made only for the province of *Canterbury*, yet they were afterwards adopted and received, in the succeeding reign, by the province of *York*. There are also other Constitutions made by different prelates, both before and after these times; but the Constitutions above specified, having been thus publicly introduced, are principally regarded as the Body of Canon Law.

By the statutes of 25. *Hen. 8.* c. 19. 27. *Hen. 8.* c. 15. 35. *Hen. 8.* c. 16. 3. & 4. *Edw. 6.* c. 11. repealed by 1. & 2. *Phil. & Mary*, c. 8. revived and confirmed as to 25. *Hen. 8.* c. 19. by the 1. *Eliz.* c. 1. it was enacted, that a review should be had of the Canon Law, " PROVIDED that such  
 " canons, constitutions, ordinances, and synodals  
 " provincial, which are already made, and will  
 " not be contrariant or repugnant to the laws,  
 " statutes and customs of this realm, nor to the  
 " damage or hurt of the king's prerogative royal,  
 " shall now still be used and executed as they  
 " were afore the making of this act, till such  
 " time as they be viewed, searched, or otherwise  
 " ordered and determined." And as no such review has been perfected, the Canon Law of *England* at present depends upon the authority of this act of parliament.

The first enquiry, therefore, must be, What is the Canon Law upon any particular point? and then, by considering how far the same was received here before the statute, and comparing it with the Common Law, subsequent acts of parliament, and the king's prerogative, the genuine law of the church may be collected.

During

During the reign of *James the first* (a), certain (a) A.D. 1603. canons were made in convocation of the province of *Canterbury*, which were ratified by the king for himself, his heirs and successors, and about two years afterwards were adopted by the province of *York*; but were never confirmed in parliament. Upon this subject much dispute has been made, as to the power of convocation to make Canon Laws by the royal assent and approbation only. But in *Mich. Term*, 10. *Geo. 2.* in the case of *Middleton v. Croft* (b), it was solemnly adjudged upon the (b) *Stra.* 1057. principles of law and the constitution (c), that in (c) *2. Atk.* 650. cases where they are not merely declaratory of the (c) *1. Bl. Com.* 83. ancient Canon Law, but are introductory of new regulations, they do not bind *the laity* (d); but (d) *Ibid.* whether and how far the said canons are obligatory upon *the clergy* themselves, did not come in question: it seemeth however to be generally understood, that they are binding in that respect (e). (e) *Pref. to Burn's E. L.* 20.

Under this head we may mention the *Thirty-nine Articles of Religion*, which were agreed upon in the convocation in the year 1562, and the *Rubrick* of the *Book of Common Prayer*, both of which have been confirmed by act of parliament; and therefore form part of the general law of the land.

### III. *The Maritime Law.*

THE MARITIME LAW, as its name imports, is framed to regulate and redress all transactions and injuries arising upon THE HIGH SEAS, out of the reach and protection of the Municipal Law. This species of jurisprudence is also founded upon the principles and maxims of the Civil Law, the *Rhodian Laws*, the *Laws of Oleron*, and, by certain peculiar municipal constitutions appropriated to certain cities, towns, and countries bordering on the sea. *Godolphin Adm. Juris.* 40. *Co. Lit.* 11. b. 260. b.

The extent of the maritime dominion of *England* seems to consist of two parts, the *profitable* and the *honorary*. The *profitable* regards our own coasts only, to a certain distance from the shore, in the sight whereof foreigners were not usually suffered to catch fish. The *honorary* is that of respect to



the *British* flag, which we claim from all nations, and still support.

The boundaries we have established for this purpose are the *British* Channel on the south, extending to the shores of *France*, and to those of *Spain*, as far as *Cape Finisterre*; from thence by an imaginary line west, twenty-three degrees of longitude from *London*, to the latitude of sixty degrees north, which last is called the *Western Ocean of Britain*; from thence by another imaginary line in that parallel of latitude, to the middle point of the land *Van Staten*, on the coast of *Norway*, which is the northern boundary; and from that point it extends along the shores of *Norway*, *Denmark*, *Germany*, and the *Netherlands*, to the *British* Channel again; which last boundary comprehends what is called the *Eastern Ocean of Britain*. — These are the original limits acquired at the time of king *Alfred's* beating the *Danes* out of these seas; and from thenceforth the kings of *England* took on themselves the more peculiar guard and sovereignty of the seas, protecting the traders of all nations from the insults of pirates; and to answer the expence of keeping fleets at sea, and for protection, all nations who sailed into these seas paid a tribute in proportion to the burthen of their ships; but this tribute is now confined to the ceremony of lowering the flag.

Exclusive of this honorary part, the dominion of the sea intitles the lawful possessors to the six following prerogatives:

1. The royalty of granting the liberty of fishing for pearl, coral, and amber, and other precious commodities.
2. To grant licence to fish for sturgeon, pilchard, salmon, herring, and all other sorts of fish.
3. To impose tribute on all ships or vessels fishing within the limits of the *British* seas.
4. The regular execution of justice for all crimes committed within the said limits.
5. To grant or refuse a free passage to foreign ships of war through those seas, in the same manner as troops over-land

The

The maritime government and jurisdiction is by the king, as supreme, vested in the person of the lord high admiral of *England*, who immediately under him has the chief command at sea, and the direction of the marine affairs at land, having several officers under him; some at sea and others ashore; some in military and others in civil capacities; some judicial, and others ministerial. Those that are chief in the judicial capacity, are in the law distinguished by the title of *magisteriani*, or judges of maritime controversies; whereof one being the principal or *judex ad quem*, in all maritime cases of appeal from inferior courts of admiralty, is known by the style of *Supremæ Curie Admiralitatis Angliæ* *Judex*; within whose cognizance in right of the jurisdiction, according to the sea laws, and to the laws and customs of the admiralty of *England*, are comprehended all affairs relating in any manner to navigation. Doug'l. 106.  
109.

But the Maritime Law is confined to causes arising wholly upon the sea, and not within the precincts of any county; for the statute 13. *Rich. 2. c. 5.* and 15. *Rich. 2. c. 3.* declares that the court of the admiral hath no manner of cognizance of any contract, or of any other thing done within the body of any county, either by land or by water; nor of any wreck of the sea, for that must be cast on land before it becomes a wreck. But it is otherwise of things *flotsam*, *jetsam*, and *ligan*; for over them the admiral hath jurisdiction, as they are in and upon the sea. If part of any contract or other cause of action doth arise upon the sea, and part upon the land, the common law excluded the maritime law, for, part belonging properly to one cognizance and part to another, the common or general law takes place of the particular. Therefore, though pure maritime acquisitions which are caused and become due on the high seas, as seamen's wages, are one proper object of the admiralty jurisdiction, even though the contract for them be made upon land; yet in general, if there be a contract made in *England* to be executed upon the seas, as a charter-party, or a covenant that a ship shall sail to

See the case of *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 ship-board 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. Nor can the admiralty court hold plea of any contract under seal. But we shall endeavour to point out the several matters which are within this jurisdiction, when we speak of the COURT OF ADMIRALTY.

Menetone v. Gibbons,  
3. Term Rep.  
267.

Hob. 12.

Hob. 212.

#### IV. *The Military Law.*

See Sir Edw.  
Coke's 4th  
Inst. 123.

Ayde on  
Courts Mar-  
tial.

THE MILITARY LAW was declared by the statute of 13. *Rich. 2. c. 2.* "to have cognizance of contracts touching deeds of arms and of war out of the realm, and also of things which touch war within the realm, which cannot be determined or discussed by the Common Law; together with other usages and customs to the same matters appertaining."

The clause in this statute which relates to contracts is now useless; for, by a fiction of law, it is permitted to alledge in the pleading, that a contract made at any place abroad, was made at some place in *England*: as if a contract be made at *Gibraltar*, the plaintiff may suppose it to be made at *Northampton*; for the locality, or place of making it, is of no consequence with regard to the validity of the contract.

Under the words, "*other usages and customs,*" this law affords relief to such of the nobility and gentry as think themselves aggrieved in matters of honour, and keeps up distinction of degrees and quality.

The extent of the Military Law as affording redress to injured honour is greatly circumscribed, by confining it to such injuries as escape the notice of the Common Law; such, for instance, as calling a man a *coward*, or giving him *the lie*; for which, as they are productive of no immediate damage to his person or property, no action will lie in the courts at *Westminster*. It hath indeed been determined,

mined, that no action will lie for words in the military court. This law, therefore, can at most order reparation in point of honour; as to compel the defendant *mendacium sibi ipse imponere*, or to take the lie that he has given upon himself, or to make such other submission as the laws of honour may require.

The redressing of incroachments and usurpations in matters of heraldry and coat armour, is an object of this law. The marshalling of coat-armour, which was formerly the pride and study of the best families of the kingdom, is now greatly disregarded; and has fallen into the hands of certain officers called *beralds*, who consider it only as a matter of *lucre*, and not of justice.

The statute of mutiny and desertion authorises his majesty to form articles of war and constitute courts martial, with power to try any crime by such articles, and inflict such penalties as the articles direct.

#### V. *The Law of the Universities.*

THE TWO UNIVERSITIES OF OXFORD AND CAM- 4. Inst. 227.  
BRIDGE enjoy the sole jurisdiction, in exclusion of the king's courts, over all civil actions and suits where a scholar or privileged person is one of the parties, excepting in such cases where the right of freehold is concerned; and then, by the University Charter, they are at liberty to try and determine, either according to the Common Law of the land, or according to their own local customs, at their discretion; which has generally led them to carry on their process in a course much conformed to the *civil law*. These privileges were granted, that the students might not be distracted from their studies by legal process from distant courts, and other forensic avocations.

#### VI. *Equity.*

GROTIUS defines *Equity* to be "the construction of De Equitate.  
" that, wherein the law, by reason of its univer-  
" fality, is deficient." For since in laws, all cases 1. Bl.Com. 61.  
cannot

cannot be foreseen or expressed, it is necessary that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances which, had they been foreseen, the legislator himself would have expressed. And these are the cases, which, according to *Grotius*, “*lex non exactè definit, sed arbitrio boni viri permittit.*”

Equity then depending essentially upon the particular circumstances of each individual case, there can be no established rules and fixed precepts laid down, without destroying its very essence, and reducing it to positive law.

The objects of the courts of Equity are, to detect latent frauds and concealments, which the process of the courts of Law is not adapted to reach; to enforce the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a court of Law; to deliver from such dangers as are owing to misfortune and oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive, or Common Law.

Equity in its true and genuine meaning is the soul and spirit of all law: *positive law* is construed, and *rational law* is made by it. In *this*, Equity is synonymous to justice: in *that*, to the true sense and sound interpretation of the rule. The term of a court of *Equity*, and a court of *Law*, are apt to confound and mislead us; as if the one judged without equity, and the other was not bound by any law: whereas every definition or illustration to be met with, which draws a line between the two jurisdictions, by setting Law and Equity in opposition to each other, will be found erroneous.

## VII. *Forest and Game Law.*

Reeve's Hist.  
Eng. Law.  
1. vol. p. 206.

THE FOREST LAWS were first introduced by *William* the Conqueror, to protect his favourite diversion of hunting; and he not only assigned certain tracts of land, the property of his subjects,

to

to be converted into forests, and dispeopled and made waste whole districts of cultivated country, but, to secure the full enjoyment of it, he caused regulations to be framed, calculated to restrain and punish with severity every minute invasion of this new institution.

The œconomy of the Forest occasioned a number of grievous penalties: offences respecting vert and venison were punished with barbarous mutilation; and other delinquencies with fine and imprisonment. A regular series of COURTS was erected (a), to be held at stated periods; in one (a) See post. of which the Judges obtained the distinguished ch. title of *Justices in Eyre*.

By these laws the right of pursuing and taking all beasts of *chace* or *venery*, and such other animals as were accounted game, were held to belong to the king, or to such only as were authorized by him, upon the feudal principle that the king was the ultimate proprietor of all the land in the kingdom, and might therefore enter thereon, and *chase* and *take* such creatures at his pleasure; and on a maxim of the Common Law, that all animals *feræ naturæ* are *bona vacantia*, and so belong to the king by his prerogative. The cruel and insupportable hardships which these Forest Laws created to the subject, occasioned many zealous endeavours for their reformation; and in the ninth year of *Henry the third*, the *Carta de Foresta* was granted in parliament, by which many of the royal forests were disafforested, or stripped of their oppressive privileges; and regulations made in the regimen of such as remained.

In the thirty-third year of *Edward the first*, the *Ordinatio Forestæ* passed, which enacted, that all trespasses *de viride et venatione*, should be presented by the foresters in whose bailiwick they were committed at the next *swainmote*, before the *foresters*, *verderors*, *regarders*, *agisters*, and other ministers of the forest; and there be enquired of by a jury, the presentment of which must be sealed by the presenters; and at every *swainmote* the Justice of the forest was to enquire of surcharges, and remove the

the offenders from their office in the forest; to appoint other ministers in case of removal or death, and, in the presence of the king's treasurer, to impose fines without waiting for *the eyre*.

Other grievances, also, in the manner of executing the Forest Laws were removed by the 7. *Rich. 2. c. 3. & 4.* and many subsequent statutes. But while these restrictions were imposed on the *old Forest Law*, which was local, and calculated to protect the king's diversions only, a sort of *new Forest Law* began to shew itself, which, since the enlargement it has received in later times, is endured with as little acquiescence as the old; being calculated to preserve the breed of animals, and to promote the pleasures of the great and opulent, by restricting the lower orders of society in favour of lords and landholders, and extending this privilege exclusively to every spot of ground in the kingdom (*a*). For this purpose it is enacted by 13. *Rich. 2. c. 13.* which was the first stone in the present fabric of *Game Laws*, that no artificer, labourer, or other layman, nor any priest or other clerk, not being *qualified* as the act directs, shall keep any grey-hound or other dog to hunt, or use any ferrets, keys, nets, or other engine to take or destroy deer, hares, conies, or other *gentleman's game*.

2. Bl. Com.  
416, 417.  
4. Bl. Com.  
416.

From this short history of the ancient Forest Laws, it appears, that no man is at present entitled to encroach on the royal prerogative; by the killing of game, either upon his own or another man's soil, unless he either actually or impliedly, by prescription, possesses a grant from the crown for that purpose; or is properly qualified to exercise this privilege under the authority of the legislature. And this brings us to the second object of this section, *viz.* the consideration

#### *Of the Game Laws.*

Although the Forest Laws are now mitigated, and by degrees grown entirely obsolete, yet from this root has sprung a bastard slip, known by the

name of the GAME LAW, now arrived to and wanting in its highest vigour, both founded on the same unreasonable notions of permanent property in wild creatures. The qualifications for killing game, as they are usually called, or more properly, the exemptions from the penalties inflicted by the statute law, are,

FIRST, " Having lands and tenements, or some other estate of inheritance, in his own or his wife's right, of the clear yearly value of 100 l. *per annum*, or for term of life." 22. & 23. Car. 2. c. 25.

Upon this clause it has been determined, that a person having an estate of 103 l. a year, who had mortgaged part of it of the value of 14 l. a year for 400 l. which part being copyhold, he had surrendered the same to the mortgagee, who was admitted tenant; the mortgager, continuing in possession, and paying the interest regularly, is a person duly qualified to kill game; for it is not necessary that he should have the legal estate. Wetheral v. Hall, Mich. 22. Geo. 3. B. R. M. S.

An ecclesiastical living, which a man holds in right of his church, is a life-estate within this act, although it may happen to be determined sooner, as by resignation, deprivation, or by accepting another living incompatible. 2. Burn's Justice, 309.

SECONDLY, " Or having lease or leases of 99 years, or for any longer term, of the clear yearly value of 150 l."

THIRDLY, " Being the son and heir apparent of an Esquire, or other person of higher degree." 2. Inst. 668.

It is unsettled what constitutes a real Esquire, for it is not an estate, however large, that confers this rank upon its owner. *Camden*, who was himself a herald, reckons four sorts:—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. 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. To these may be added the esquires of knights of the bath, each of whom constitutes   
three



three at his installation; and all foreign, nay *Irish* peers; for not only these, but the eldest sons of peers of *Great Britain*, though frequently titular lords, are only esquires in the law, and must be so named in all legal proceedings.

In the order of precedence next below knights and their sons, and above esquires, are ranked colonels, serjeants at law, and doctors in the three learned professions.

1. Term Rep. 44. But it has been determined that a diploma from *St. Andrews* in *Scotland*, appointing a person doctor of physic, will not give him a qualification within this statute.

R. v. Utley, 1. Term Rep. 44. It has also been determined that the words, "*other person of higher degree*," do not relate to the esquire himself, but mean an esquire, or *the son* of any other person of higher degree.

FOURTHLY, Being owner or keeper of a forest, park, chace, or warren.

1. Term Rep. 252. By 25. *Geo.* 3. c. 50. every person using any instrument for the killing of game, not acting as a game-keeper, shall take out a certificate.

By 28. *Geo.* 2. c. 12. no person, however qualified to *kill*, may make merchandise by selling or exposing to sale any game, on pain of like forfeiture as if he had no qualification.

And by 5. *Ann.* c. 14. "If any person not qualified shall keep or use any dogs or other engines to kill and destroy the game, and shall be thereof convicted on the oath of one credible witness, before one justice, he shall forfeit 5l. one half to the informer, and half to the poor, to be levied by distress; or for want thereof, the offender to be sent to the house of correction for three months, for the first offence; and for every other offence, four months. And all dogs, guns, &c. may be taken from any person not qualified."

On this statute the following determinations have been made:

Loft. 179.

1. A qualified person may take out with him persons who are not qualified, to beat the bushes, and see a hare killed.

2. Justices,

2. Justices, in describing the offence in their conviction, may follow the words of the statute; and are not confined to the legal form requisite in indictments at Common Law. Ld. Ray. 581.

3. The justice must state it in the conviction as the result of his judgment upon the evidence, that the party convicted was not qualified; and not leave it as the evidence of the witness. Stra. 66.

4. The conviction must set out, that the person convicted had not the particular qualification mentioned in the statute, as to estate, degree, &c. Ld. Ray. 1415.

5. The qualifications mentioned in the statute must all be negatively set out. 1. Burr. 148.

6. The statute is in the disjunctive, "keep or use," so that the bare keeping a *lurcher* is an offence. So also the bare keeping a *gun* is within the act, provided it be *used* for killing game. Stra. 496.  
Stra. 1098.  
2. Term Rep. 18.

7. Walking about with an intent to kill game, is evidence of using the instrument for that purpose. 1. Scff. Caf. 88.

8. The using a *hound* to destroy game is not within the act; for that species of dog is not mentioned in it, and the words "*other engines*," follow the word *nets*. Stra. 1126.

9. The conviction therefore must expressly state what kind of dog was kept or used. Comyns, 576.

10. A conviction on 5. Ann. c. 14. which does not state that the witness was sworn and examined in the presence of the defendant is bad; for it is not sufficient that the deposition is read over to him: the evidence, however, need not negative every specific qualification under 22. & 23. Car. 2. c. 25. 1. Term Rep. 125.

11. But if the defendant appear and plead, and the evidence be given on the same day, the Court will intend the evidence was given in the defendant's presence. 2. Term Rep. 18.

12. A justice may convict an offender on his own confession, although the statute directs it to be on the oath of a credible witness. Stra. 546.

13. An informer is not a credible witness. Ld. Ray. 1545.

14. An offender is only liable to one penalty, although he kills ever so many hares, &c. on the same day. 10. Mod. 26.  
Com. 274.

15. If

Shower, 339.

15. If a man stands in one parish and shoots into another, the offence is committed in the parish where the offender stands, and not where the game is killed or shot at.

Stra. 567.

1. Bac. 110.

Stra. 1184.

Ld. Ray. 151.

16. Goods taken by distress, under a conviction, cannot be replevied.

17. Rabbits killed in a private warren are not within this act.

HAVING considered the Game Laws so far as they relate to persons unqualified, we shall endeavour to shew in what manner the Legislature has interposed for the particular preservation of *deer, hares, conies, hazaks, swans, partridges, pheasants*, and other species of the winged creation; concluding with some general observations on the law respecting *fox hunting*.

Parks.

1. DEER. By 3. *Edw.* 1. c. 20. trespassers in parks shall make great and large amends, have three years imprisonment, and fine at discretion, and find sureties not to do the like trespass again, &c.

2. Inft. 199.

A nominal park, erected without warrant, is not within the penalties of this act, but it must be a real park; to constitute which, three things are required:—1st, A liberty, either by grant or prescription: 2dly, Inclosure by pale, wall, or hedge: and, 3dly, Beasts, savages of the park: and it only extends to cases where the offender chases in the park, or endeavours to kill some of the game thereof.

Parks.

By 21 *Edw.* 1. ft. 2. entitled *De Malefactoribus in Parcibus*, foresters and parkers are excused if they shall chance to kill any trespassers intending to do damages, or who will not yield themselves after hue and cry.

Hunting deer.

By 1. *Hen.* 7. c. 7. unlawful hunting in any forest or park by night, or with painted faces, is repressed.

Buying and selling.

By 1. *Jac.* 1. c. 27. every person who shall sell, or buy to sell again, any deer, shall forfeit 40s. half to him that will sue, and half to the poor, on conviction at the assizes or sessions, or before two justices out of sessions.

By 5. *Geo. 1. c. 28.* if any person shall enter <sup>Wounding deer.</sup> into any park, paddock, or other inclosed ground, where deer are usually kept, and wilfully wound or kill any red or fallow deer there, he shall be transported for seven years.

By 9. *Geo. 1. c. 22.* commonly called THE BLACK <sup>Killing deer in the night armed and disguised.</sup> ACT, if any persons armed with offensive weapons, and having their faces blacked or otherwise disguised, shall appear in any forest, chase, park, paddock, or grounds inclosed with any wall, pale, or other fence, wherein any deer have been or shall be usually kept; or shall unlawfully and wilfully hunt, wound, kill, destroy, or steal, any red or fallow deer:—or if any persons (whether armed and disguised or not) shall unlawfully and wilfully hunt, wound, kill, destroy or steal any red or fallow deer, fed or kept in any places, in any of the king's forests or chases, which are inclosed with rails or pales; or in any park, paddock or grounds inclosed, where deer have been usually kept; or shall forcibly rescue any offender, or procure another to join in any of the said offences; he shall be guilty of felony without clergy.

By 28. *Geo. 2. c. 19.* burning or destroying furze, <sup>Destroying coverts.</sup> goss, or fern, in forests or chases kept for the preservation of deer or game there, is liable to a penalty of not more than 5l. nor less than 40s.

By 16. *Geo. 3. c. 30.* to course, hunt, or take in <sup>Hunting and killing deer, &c.</sup> any snare, or to kill, wound, or destroy, or to shoot at, or otherwise to attempt to kill, wound, or destroy; or to take away any red or fallow deer in any forest, chase, purlieu, or ancient walk, whether inclosed or not; or in any inclosed park, paddock, wood, or other inclosed ground, where deer are usually kept, renders the offender liable to several pecuniary penalties.

And it has been determined, that this statute <sup>Cases in Crown Law, 253. 415.</sup> repeals so much of the Black Act as relates to the offence therein described with respect to deer.

2. HARES. By 14. & 15. *Hen. 8. c. 10.* no person, <sup>Tracing hares in the snow.</sup> of what estate, degree, or condition he be, shall trace, destroy, and kill any hare in the snow, upon pain of forfeiting for every hare so killed the sum of 6s. 8d.

- Hare pikes.** By 1. *Jac.* 1. c. 27. every person who shall trace or course any hares in the snow, or destroy them with snares, shall be committed to gaol for three months, unless he pay to the poor 20s. for every hare; or after one month from his commitment, become bound in two sureties, 20l. a piece, not to offend in like manner again.
- Snaring hares.** By 22. & 23. *Car.* 2. c. 25. s. 6. if any person shall be found setting snares, he shall pay damages to the party injured, at the discretion of the magistrate, and forfeit not exceeding 10s. to the poor of such parish as the justice shall appoint.
- Killing hares in the night.** By 9. *Ann.* c. 25. if any person shall take or kill any hare in the night-time, he shall forfeit 5l. half to the informer and half to the poor, to be levied by distress; and for want thereof, to be sent to the house of correction for three months for the first offence, and for every other offence four months.
- Killing hares out of the season, or on Sundays or Christmas-day.** By 13. *Geo.* 3. c. 80. if any person shall knowingly and wilfully kill take or destroy, or use any gun, dog, snare, net, or other engine, with intent to kill take or destroy any hare in the night, between seven at night and six in the morning, from 12th October to 12th February; and between nine at night and four in the morning, from 12th February to 12th October; or in the day-time upon a Sunday, or Christmas-day; he shall forfeit for the first offence, not exceeding 20l. nor less than 10l. for the second, not exceeding 30l. nor less than 20l. and on a third offence, the justice may commit the offender to the common gaol or house of correction, until the next general quarter sessions, unless he give bail, with two sureties, to appear and be tried by indictment. And if upon such indictment the offender be convicted, he shall forfeit 50l. or be imprisoned not less than six, nor more than twelve months.
- Shooting hares.** By 1. *Jac.* 1. c. 27. s. 2. every person who shall shoot at kill or destroy any hare, with any gun or bow, shall forfeit twenty shillings.
- Buying and selling hares.** By 1. *Jac.* 1. c. 27. s. 4. whoever shall buy, or buy to sell again, any hare, shall forfeit 10s. for every hare.

By

By 9. *Geo. I. c. 22.* THE BLACK ACT before-mentioned, if any person *armed and disguised* shall appear in any warren or place where hares are usually kept, or unlawfully rob any such warren; or, whether armed and disguised or not, shall rescue any person in custody for either of the said offences; or procure any to join with him in any such unlawful act; he shall be guilty of felony without benefit of clergy.

Taking hares  
in warrens.

3. CONIES. By 3. *Jac. I. c. 13.* if any person shall, in the night-time, enter into any grounds inclosed and used for keeping of conies, and hunt, drive out, take or kill any conies, he shall be imprisoned three months, and pay to the party grieved treble damages and costs; and find sureties for his good abearing for seven years, or continue in prison till he does. But this shall not extend to any grounds to be inclosed and used for conies after the making of the act, without the king's licence.

Hunting conies  
by night, in  
warren inclosed.

By 22. & 23. *Car. 2. c. 25. s. 4.* if any person shall at any time enter wrongfully into any warren or ground lawfully used or kept for the breeding or keeping of conies, whether it be inclosed or not, and there take, chase or kill any conies, he shall yield treble damages, be imprisoned three months, and find sureties for his good abearing.

Killing conies  
in places in-  
closed, or un-  
inclosed.

By 5. *Geo. 3. c. 14. s. 6.* if any person shall enter in the night-time into any warren or grounds lawfully used or kept for the breeding or keeping of conies, although the same be not inclosed, and shall then and there wilfully and wrongfully take or kill, in the night-time, any coney, he shall be transported for seven years; or suffer such other lesser punishment by whipping, fine and imprisonment, as the Court shall inflict.

If by night,  
further penalty  
of transporta-  
tion.

But conies may be taken in the day-time on the sea or river banks in the county of *Lincoln*, so far as the tide shall extend, or within one furlong of the said banks, without making satisfaction for the damage, except the same shall exceed one shilling.

## G A M E L A W S.

By 1. *Hen. 1. c. 22.* if any person, being armed and disguised, shall appear in any warren or place where conies are usually kept, or shall rob such conies, &c. they shall be guilty of felony without benefit of clergy.

By 22. & 23. *Car. 2. c. 25. f. 5.* no person shall take or kill in the night-time any conies upon the borders of warrens or other grounds, lawfully used for the breeding or keeping of conies, on pain of damages to the party grieved, and 10s. to the poor.

The statute saith, upon the *borders of warrens*, but if they are out of the warren no person hath a property therein; and a man may justify killing them if they eat up his corn.

So a person that hath a right of common may kill conies when they are out of the warren, and destroy the common; but he cannot have an action on the case against the lord.

But if a lord hath a right to put conies upon the common, and by excess in the number surcharge the common, and by the number of burrows made by the conies prevent a commoner's cattle from depasturing on the common, an action on the case is the proper remedy; the tenant, however, may not of his own accord fill up the burrows, and remove the nuisance.

By 22. & 23. *Car. 2. c. 25. f. 6.* if any person shall be found setting snares for taking of conies, he shall forfeit 10s. &c.

By 3. *Jac. 1. c. 13. f. 1.* if any person not having lands or hereditaments of 40l. a year, or not worth in goods 200l. shall use any gun or bow to kill conies, or shall keep any ferrets, or coney dogs (except he have ground inclosed for keeping of conies, the increasing of which shall amount to 40s. a year, to be let; and except warreners in their warrens); in such case, any person having 100l. a year, may seize the same to his own use.

4. **HAWKS.** By 11. *Hen. 7. c. 17.* no man shall bear any hawk of the breed of *England*, called a *nevise*, *gys-bazek*, *tassel*, *laner*, *laneret*, or *falcon*, on pain of forfeiting the hawk to the king. And if he

1. Hen. 1. c. 22.  
2. Hen. 1. c. 22.  
3. Hen. 1. c. 22.

4. Jac. 1. c. 13.

5. Hen. 7. c. 17.

Setting snares.

Keeping conies.

What hawks a man shall bear.

he bring any of them over sea, he shall bring a certificate thereof from the officer of the port, on the like pain. And the person that bringeth any such hawk to the king, shall have a reasonable reward, or the hawk, for his labour.

By 34. *Edw.* 3. c. 22. every person who findeth a hawk that is lost, shall take it to the sheriff, who shall make proclamation that he hath it in his custody; and if challenged in four months, the owner, paying the costs, shall have it again; otherwise the sheriff shall have it; making gree with the finder if he be a simple man; but if a gentleman, the sheriff shall deliver him the hawk. Persons finding a hawk.

By 37. *Edw.* 3. c. 19. stealing a hawk is made felony; but, says *Sir Edward Coke*, he shall have the benefit of clergy. Stealing hawks. 3. Inf. 98.

By 5. *Eliz.* c. 21. f. 3. to take away hawks or their eggs out of the woods or ground of any person, makes the offender liable to three months imprisonment, and treble damages, with surety for his good abearing for seven years. Taking hawks or their eggs out of woods.

But by 11. *Hen.* 7. c. 17. to take any falcon, goshawk, tassel, laner or laneret, in their warren, wood, or other place, or to drive them from the places where they are accustomed to breed, or to cause them to go to other coverts to breed, or to slay or hurt them, incurs a penalty of ten pounds. Disturbing the breed of hawks.

By 23. *Eliz.* c. 10. if any manner of person shall hawk in another man's corn after it is eared, and before it is shocked, he shall forfeit 40 s. Hawking in corn.

5. SWANS. By 22. *Edw.* 4. c. 6. no person, other than the king's son, unless he have a freehold of five marks a year, shall have any marks or game of swans, on pain of forfeiting the swans; half to the king, and half to the person who shall seize them. Qualification to keep swans.

It is felony to take any swans that are lawfully marked, although they be at large; and so it is as to swans unmarked, if they be domestical or tame; that is, kept in a moat or pond near to the dwelling-house, or so long as they keep within a man's manor, or within his private rivers, or even if they happen to escape, and are pursued Dallison, 156.



and brought back again; but if swans *unmarked* are at their natural liberty, then the property of them is lost, and felony cannot be committed by taking them. And yet such unmarked and wild swans may be seized by the king's officers to his use, by his prerogative. The king also may grant them, and by consequence another may prescribe to have them within a certain precinct or place.

By 1. *Jac.* 1. c. 27. s. 2. every person who shall take the eggs of any swans out of the nest, or willingly spoil them in the nest, shall be committed to gaol three months, unless he pay to the churchwarden, for the use of the poor, twenty shillings for every egg; or after one month after his commitment, become bound by recognizance with two sureties in 20l. a-piece, not to offend in like manner again.

But by 11. *Hen.* 7. c. 17. no person shall take, or cause to be taken, on his own ground or any other man's, the eggs of any swan, on pain of imprisonment for a year and a day, and fine at the king's will.

Taking them  
in another  
man's ground.

6. PARTRIDGES AND PHEASANTS are birds of warren; and by 11. *Hen.* 7. c. 17. no person, of what condition he be, shall take or cause to be taken any *pheasants* or *partridges* by nets, snares, or other engines, out of his own warren upon the freehold of any other person, without the special licence of the owner of the same, on pain of ten pounds.

Taking them  
with dogs,  
nets or en-  
gines, or their  
eggs.

By 1. *Jac.* 1. c. 27. s. 2. every person who shall shoot at, kill or destroy any *pheasant* or *partridge* with any gun or bow, or shall take kill or destroy them with setting dogs or nets, or with any manner of nets, snares, engines or instruments whatsoever, or shall take their eggs out of their nest, shall be imprisoned three months, or pay twenty shillings for every partridge, pheasant, or egg, to the use of the poor; or after one month's imprisonment, be bound in 20l. not to offend again.

By 7. *Jac.* 1. c. 11. every person who shall take kill or destroy any pheasant or partridge with setting dogs, nets, or otherwise, shall forfeit 20s. for every pheasant or partridge.

By

By 1. *Jac.* 1. c. 27. f. 4. every person who shall sell, or buy to sell again, any partridge or pheasant (except they be reared or brought up in houses, or brought from beyond sea), shall forfeit for every partridge 10s. and for every pheasant 20s. half to him that will sue and half to the poor. Selling or buying.

By 23. *Eliz.* c. 10. if any person shall take kill or destroy any pheasants or partridges in the night-time, he shall forfeit for every pheasant 20s. and for every partridge 10s. half to him that shall sue and half to the lord of the manor, unless such lord shall licence or procure the said taking or killing; in which case the said half shall go to the poor, &c. Taking in the night, or on a Sunday, or Christmas-day.

By 9. *Ann.* c. 25. if any person whatsoever shall take or kill any pheasant or partridge in the night-time, he shall forfeit 5l. half to the informer and half to the poor, by distress; for want of distress, to be sent to the house of correction for three months, for the first offence; and for every other offence, four months.

By 13. *Geo.* 3. c. 80. if any person shall knowingly and wilfully kill take or destroy, or use any gun, dog, snare, net, or other engine, with intent to kill take or destroy any pheasant or partridge in the night, *viz.* between seven at night and six in the morning, from 12th October to 12th February; and between nine at night and four in the morning, from 12th February to 12th October; or in the day-time on a Sunday or Christmas-day; he shall forfeit for the first offence not exceeding 20l. nor less than 10l.; for the second offence, not exceeding 30l. nor less than 20l.; and for the third and every subsequent offence, 50l.

By 7. *Jac.* 1. c. 11. f. 2. every person whatsoever who shall hawk at destroy or kill any pheasant or partridge, with any kind of hawk, or dog by colour of hawking, between the first of July and the last of August, shall be committed for a month, or pay 40s. to the poor for every such hawking at any pheasant or partridge, and 20s. for every such pheasant or partridge which he, his hawk or dog, shall take or kill. At what times hawking at partridge and pheasants is prohibited.

The season  
for shooting  
partridges and  
pheasants.

By 2. *Geo.* 3. c. 19. no person shall upon any pretence whatsoever take, kill, carry, sell, buy, or have in his possession, or use any *partridge* between 12th February and 1st September, or any *pheasant* between 1st February and 1st October yearly, on pain of five pounds for every such fowl, with full costs. But this is not to extend to any pheasant taken in the season allowed by this act, and kept in any mew or breeding-place.

Who may  
erect a dove-  
cote.

*Cro. Eliz.* 548.  
*Cro. Jac.* 382.  
3. *Salk.* 248.

*Cro. Jac.* 490.

7. PIGEONS. A lord of a manor may build a dove-cote upon his own land, parcel of the manor; but a tenant of a manor cannot do it without the lord's licence: but any freeholder may build a dove-cote on his own ground; and it hath been adjudged, that erecting a dove-cote is not a common nuisance, nor presentable at the leet.

Killing  
pigeons with  
dogs, nets or  
engines.

By 1. *Jac.* 1. c. 27. f. 2. every person who shall shoot at kill or destroy any house dove or pigeon with any gun or bow, or shall take kill or destroy the same with setting dogs or nets, or with any manner of nets snares or engines, shall be committed to gaol for three months, unless he pay 20s. for every pigeon to the use of the poor.

By 2. *Geo.* 3. c. 29. if any person shall shoot at with intent to kill, or by any means kill, or take with a wilful intent to destroy, any house dove or pigeon, he shall forfeit 20s. and if not immediately paid, be committed for three months.

Pigeons tres-  
passing.  
*Cro. Jac.* 492.

If pigeons come upon a man's land, he may kill them; and the owner of the pigeons hath no remedy, except that which the statutes afford which make it penal to destroy them.

Pigeons to  
the heir.  
*Co. Lit.* 8.

Doves in a dove-house, young or old, shall go to the heir, and not to the executor.

Shooting  
water fowl.

8. WILD DUCKS, WILD GEESE, &c. By 25. *Hen.* 8. c. 11. no person from 31st March to 30th June yearly, shall take or destroy the eggs of any mallard, teal, or other water fowl, on pain of a year's imprisonment, and of paying one penny for each egg.

Not to be tak-  
en in the  
moulting sea-  
son.

By 25. *Hen.* 8. c. 11. no person between the last day of May and the last day of August yearly, shall

shall take any wild ducks, mallards, widgeons, teals, or wild geese, with nets or other engines, on pain of a year's imprisonment, and to forfeit 4d. for every fowl. But every person who has a freehold of 40s. a year, may hunt and take such wild fowl with their spaniels only, without using a net or other engine, except the long bow.

By 1. *Jac.* 1. c. 27. f. 2. every person who shall shoot at kill or destroy with any gun or bow any mallard, duck, teal, or widgeon, he shall be committed for three months, or pay 20s. for each fowl to the poor: or after one month after commitment, find sureties in 20l. not to offend again. Destroying their eggs.

By 9. *Ann.* c. 25. f. 4. and 10. *Geo.* 2. c. 32. if any person between 1st June and 1st October yearly, shall by hays, tunnels, or other nets, drive and take any wild duck, teal, widgeon, or any other water fowl, in any place of resort for wild fowl in the moulting season, he shall forfeit 5s. for every fowl, &c. &c. Moulting season.

9. **HEATH FOWL, GROUSE, and BUSTARDS.** Shooting.  
By 1. *Jac.* 1. c. 27. f. 2. every person who shall shoot at kill or destroy with any gun or bow any grouse, heath-cock, or moor game, shall be committed for three months, or pay 20s. for each, &c.

By 13. *Geo.* 3. c. 55. no person shall take, kill, destroy, carry, sell, buy, or have in his possession or use any heath fowl, commonly called *black game*, between 10th December and 20th August; nor any grouse, commonly called *red game*, between 10th December and 12th August; nor any *bustard* between 1st March and 1st September, in any year, on pain of not more than 20l. or less than 10l. for the first offence; and for every subsequent offence, not more than 30l. nor less than 20l. Within what times only to be killed.

By 9. *Ann.* c. 25. no moor, heath-game, or grouse, shall be killed in the night-time, on pain of 5l. &c. Killing in the night.

By 13. *Geo.* 3. c. 18. if any person shall knowingly and wilfully kill, take, or destroy, or use any gun, dog, snare, net, or other engine, with intent Or on a Sunday, or Christmas-day.

intent to kill, take, or destroy, any moor-game or heath-game, in the night, *viz.* between seven in the night and six in the morning, from 12th October to 12th February and between nine at night and four in the morning, from 12th February to 12th October; or in the day time on a Sunday or Christmas-day; he shall forfeit for the first offence, not more than 20*l.* nor less than 10*l.*; for the second, not more than 30*l.* nor less than 20*l.* and for every other offence 50*l.*

**Burning ling.** By 4. & 5. *Will.* 3. c. 23. f. 11. to burn between the 2d February and 24th June, any greg, ling, heath, furze, goss or fern (for the better preserving the red and black game), incurs imprisonment for any time not exceeding a month, nor less than ten days, in the house of correction, with whipping and hard labour.

**Shooting herons.** 10. HERONS. By 1. *Jac.* 1. c. 27. f. 2. to shoot at kill or destroy any heron, with gun or bow, incurs a penalty of 20*s.* for each heron, &c.

**None shall take them but by hawking.** By 19. *Hen.* 7. c. 11. no person without his own ground shall take, or cause to be taken, by means of any craft or engine, any heron, unless it be with hawking or with long bows, on pain of 6*s.* 8*d.*

**Young herons.** By 19. *Hen.* 7. c. 11. no person shall without his own ground take any young herons out of the nest, on pain of 10*s.* for every young heron.

**Hérons eggs.** By 25. *Hen.* 8. c. 11. if any person, from 31st March to 30th June, shall take or destroy the eggs of any heron, he shall be imprisoned for a year, and forfeit 8*d.* for each egg.

11. OTHER FOWL. By 25. *Hen.* 8. c. 11. no manner of persons, from the last day of March to the last day of June yearly, shall by day or night take or destroy any eggs of any kind of wild fowl, from or in any nest or place where they shall chance to be laid, by any kind of the same wild fowl, on pain of imprisonment for a year, and forfeiture of 20*d.* for every egg of a bustard, 8*d.* for every egg of a bittern or shoveld, and 1*d.* for every other wild fowl, except crows, ravens, boseards, and other fowl not used to be eaten.

12. FOXES,

12. FOXES, HARES AND BADGERS. The law warrants the hunting of *foxes*, *badgers*, and such noxious animals, for the public good; but a man cannot justify breaking the soil in order to dig them out of the earth. In the eleventh year of *James* the first, one *Gerish* brought an action of trespass against *Minns*, for breaking his soil. The defendant justified upon a report that a vermin called a *badger* was found there *ad damnum inhabitantium*, by reason whereof he uncoupled his hounds in the place *WHERE*, and hunted there, and found the badger, and chased him until he earthed him in the place *WHERE*, and thereupon digged the ground, and took the badger and killed him, and afterwards stopped up the earth again. The Court held, that this was no justification; for although the common law allows *the hunting* of such ravenous beasts of prey in another man's land, yet the law requires that such things be done in an ordinary and usual manner; therefore, there being an ordinary course, *viz.* hunting, the digging for him was unlawful. But in the case of *Gundry v. Teltham*, it was determined by LORD MANSFIELD and the whole Court of King's Bench, that a person may justify trespass in following a *fox* with hounds over the grounds of another, if he does no more than is necessary to kill the fox. It seems, however, that if a sportsman starts a *hare*, and kills it in the ground of a third person, he is liable to an action of trespass, although he thereby gains a property in the *hare*; for a *fox* is a *noxious animal*, which it is considered as beneficial to the community to destroy; but a *hare* is merely considered as a *wild animal*, the property of him who can first reduce it into possession.

Hunting  
foxes, &c.  
3. Bl. Com. 213.  
Cro. Jac. 327.  
2. Roll. Rep.  
558.  
2. Bulst. 60.  
2. Roll. Ab.  
558.  
Brownl. 224.  
Popham, 162.

Trinity Term.  
26. Geo. 3.  
1. Term Rep.  
334.

Ld. Ray. 240.

## CHAPTER THE FOURTH.

*The Statute Law.*

**H**AVING examined in the preceding chapter the *Lex non Scripta*, or THE COMMON LAW, with the grounds and foundation on which it is erected, together with the principles, maxims, general rules, and particular laws of which it is composed, we come next to consider of the *Lex Scripta*, or STATUTE LAW of the realm.

Ld. Hale's  
Hist. of the  
Common Law,  
p. 2.

4. Inst. 25.  
8. Co. 20.

Moor, 824.  
Plowd. 79.  
4. Inst. 25.

Elfinge on  
Parliaments.  
Barrington's  
Observations  
on the Statutes,  
p. 41.

Runninton  
on Lord Hale,  
p. 18.  
1. Bl. Com. 147.

1. Bl. Com. 148.

The reason of the Statute Laws or Acts of Parliament being stiled *Leges Scriptæ*, is, because they are originally reduced into writing before they are enacted, or receive any binding power; every such law being in the first instance formally drawn up in writing, and made as it were a tripartite indenture between the King, the Lords, and the Commons; for without the concurrent consent of all these three parts of the Legislature, no such law is or can be made; and if such a law *appears* only to have been made without this threefold concurrence, it is void.

Originally, what begun in the Commons was only termed a *petition* (for they had no power to ordain), and what begun in the Lords was stiled an *ordinance*. ACTUS PARLIAMENTI was an Act made by the Lords and Commons, and it became STATUTUM when it received the King's assent.

The original or first institution of Parliaments, is one of those matters which lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain. In *England* this General Council hath been held immemorially, under the several names of *michel-synoth*, or great council; *michel-gemote*, or great meeting; and more frequently *wittena-gemote*, or the meeting of wise men. The Parliament of *England* as it now stands, was marked out so long ago as the reign of king *John*, A. D. 1215. in the Great Charter granted

granted by that prince, wherein he promises to summon all archbishops, bishops, abbots, earls, and greater barons, personally, and all other tenants in chief under the crown, by the sheriffs and bailiffs, to meet in certain place with *forty days* notice, to assess aids and scutages when necessary: and this constitution has subsisted in fact, at least from the year 1266, 49. *Hen. 3.* there being still extant writs of that date to summon knights, citizens and burghesses to parliament.

1. The Parliament of *England*, as it is at present constituted, is regularly to be summoned by the king's writ or letter issued out of chancery, by the advice of his privy council, at least forty days before it begins to sit; and it is a branch of the royal prerogative, that no parliament can be convened by its own authority, or by the authority of any except the king's alone. It was enacted by the 16. *Car. 2. c. 1.* that the sitting and holding of parliament shall not be intermitted above three years at most; and by the 6. *Will. & Mary, c. 2.* this matter is reduced to greater certainty, by enacting that a new parliament shall be called within three years after the determination of the former.

Time and manner of assembling the parliament.

2. The constituent parts of a parliament are, the king's majesty, sitting there in his royal political capacity, and the three estates of the realm; the lords spiritual, the lords temporal (who sit together with the king in one house), and THE COMMONS, who sit by themselves in another.

The constituent parts of parliament.

4. Inst. 1. 6.

The king and these three estates, together, form the great corporation or body politic of the kingdom, of which THE KING is said to be *caput, principium, et finis*. For upon their coming together the king meets them, either in person or by representation; without which there can be no beginning of a parliament, and he alone has the power of dissolving them.

THE SPIRITUAL LORDS consist of two archbishops and twenty-four bishops.—THE LORDS TEMPORAL consist of all the peers of the realm (the bishops not being in strictness held to be such, but

Staundford's Pleas of the Crown, p. 158.



but merely lords of parliament), by whatever title of nobility distinguished, dukes, marquesses, earls, viscounts, or barons; of which dignity we shall speak more hereafter. Some of these sit by *descent*, as do all ancient peers; some by *creation*, as do all new-made ones; others since the Union with *Scotland* by *election*, which is the case of the sixteen peers who represent the body of the *Scotch* nobility. Their number is indefinite, and may be increased at will by the power of the crown. THE COMMONS consist of all such men of any property in the kingdom as have not seats in the house of lords; every one of which has a voice in parliament, either personally or by his representatives. The number of *English* representatives is 513, and of *Scotch* 45, in all 558.

The law and customs of parliament.  
4. Inf. 36.

3. The power and jurisdiction of parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding laws concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal.

Method of making laws.

4. For the dispatch of business, each house of parliament has its Speaker. The Speaker of the house of lords, whose office it is to preside there, and manage the formality of business, is THE LORD CHANCELLOR or keeper of the king's great seal, or any other appointed by the king's commission; and if none be so appointed, the house of lords, *it is said*, may elect. The Speaker of the house of commons is chosen by the house, but must be approved by the king. To bring a bill into the house, if the relief sought be of a private nature, it is first necessary to prefer a petition, which must  
be

be presented by a member. This petition, when founded on facts that may in their nature be disputed, is referred to a committee of members, who examine the matter alledged, and 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. The person directed to bring in the bill presents it in a competent time to the house, drawn out on paper, with a multitude of blanks or void spaces, where anything occurs that is dubious or necessary to be settled by the parliament itself; such, especially, as the precise date of times; the nature and quantity of penalties, or of any sums of money to be raised; being indeed only the skeleton of the bill. In the house of lords, if the bill begin there, it is (when of a private nature) referred to two of the Judges, to examine and report the state of the facts alledged, to see that all necessary parties consent, and to settle all points of technical propriety. This is read a first time, and at a convenient distance a second time; and after each reading THE SPEAKER opens to the house the substance of the bill, and puts the question, whether it shall proceed any further.

The introduction of the bill may be originally opposed, as the bill itself may at either of the readings; and if the opposition succeeds, the bill must be dropped for that session: as it must also if opposed with success in any of the subsequent stages. AFTER the second reading it 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 (another member being appointed chairman), and may sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new modelled.

modelled. After it has gone through the committee, the chairman reports it to the house with such amendments as the committee have made; and then the house reconsiders the whole bill again, and the question is repeatedly put upon every clause and amendment. When the house hath agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill is then ordered to be engrossed, or written in a strong gross hand, on one or more long rolls (or presses) of parchment sewed together. When this is finished, it is read a third time, and amendments are sometimes then 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. The Speaker then again opens the contents; and, holding it up in his hands, puts the question, Whether the bill shall pass? If this is agreed to, the title to it is then settled; which used to be a general one for all the acts in the session, 'till in the fifth year of *Henry* the eighth, distinct titles were introduced for each chapter. After this, one of the members is directed to carry it to the lords, and desire their concurrence; who, attended by several more, carries it to the bar of the house of peers, and there delivers it to their Speaker, who comes down from his woolfack to receive it. It passes through the same forms as in the other house (except engrossing, which is already done); and if rejected, no more notice is taken, but it passes *sub silentio*, to prevent unbecoming altercations. But if it is agreed to, the lords send a message by two masters in chancery (or sometimes two of the Judges), that they have agreed to the same; and the bill remains with the lords, if they have no amendment to it; but if any amendment is made, such amendments are sent down with the bill to receive the concurrence of the commons. If the commons disagree to the amendments, a conference usually follows between members deputed from each house; who for the most part settle and adjust the difference: but if both houses remain inflexible, the bill is dropped. If the  
commons

commons agree to the amendments, the bill is sent back to the lords by one of the members, with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis*, when the bill begins in the house of lords. But when an act of grace or pardon is passed, it is first signed by his majesty, and then read once only in each of the houses, without any new engrossing or amendment. And when both houses have done with any bill, it always is deposited in the house of peers, to wait the royal assent; except in the case of a bill of supply, which, after receiving the concurrence of the lords, is sent back to the house of commons. The royal assent may be given two ways:—1. In person; when the king comes to the house of peers in his royal robes, and, sending for the commons to the bar, the titles of all the bills that have passed both houses are read; and the king's answer is declared by the clerk of the parliament in Norman French: a badge, it must be owned (now the only one remaining), of conquest; and which one could wish to see fall into total oblivion, unless it be reserved as a solemn *memento*, to remind us that our liberties are mortal, having once been destroyed by a foreign force. If the king consents to a public bill, the clerk usually declares, "*Le roy le veut*, the king wills it so to be;" if to a private bill, "*Soit fait come il est desire*, be it as it is desired." If the king refuses his assent, it is in the gentle language of "*Le roy s'avisera*, the king will advise upon it." When a bill of supply is passed, it is carried up and presented to the king by the speaker of the house of commons; and the royal assent is thus expressed, "*Le roy remercie ses loyal subjects, accepte leur benevolence, et aussi le veut*, the king thanks his loyal subjects, accepts their benevolence, and wills it so to be." In case of an act of grace, which originally proceeds from the crown, and has the royal assent in the first stage of it, the clerk of the parliament thus pronounces the gratitude of the subject: "*Les prelates seigneurs et commons en ce present parlement assemblees, au nom de toutes vous autres subjects,*  
M "remercient

“ *remercient tres humblement votre majeste, et prient a*  
 “ *Dieu vous donor en faute bone vie et longue:* the  
 “ prelates, lords, and commons, in this present  
 “ parliament assembled, in all the names of our  
 “ other subjects, most humbly thank your majesty,  
 “ and pray to God to grant you in health and  
 “ wealth long to live.”—2. By the statute 33. *Henry*  
*VIII.* c. 21. the king may give his assent by  
 letters patent under his great seal, signed with his  
 hand, and notified in his absence to both houses  
 assembled together in the higher house; and when  
 the bill has received the royal assent in either of  
 these ways, it is then, and not before, a statute  
 or act of parliament. This statute or act is placed  
 among the records of the kingdom; there need-  
 ing no formal promulgation to give it the force of  
 a law, as was necessary by the civil law with regard  
 to the Emperors’ edicts; because every man in  
*England* is, in judgment of law, party to the  
 making of an act of parliament, being present  
 thereat by his representatives. However, a copy  
 thereof is usually printed from the king’s press,  
 for the information of the whole land. An act of  
 parliament thus made, is the exercise of the  
 highest authority that this kingdom acknowledges  
 upon earth. It hath power to bind every subject  
 in the land, and the dominions thereunto belong-  
 ing; nay, even the king himself, if particularly  
 named therein; and it cannot be altered, amend-  
 ed, dispensed with, suspended or repealed, but  
 in the same forms, and 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. It is true, it was formerly held,  
 that the king might in many cases dispense with  
 penal statutes; but now, by 1. *W. & M.* st. 2. c. 2.  
 it is declared that the suspending or dispensing  
 with laws by legal authority, without consent of  
 parliament, is illegal.

HAVING enquired into the authority by which  
 the statute law is made, and shewn the manner in  
 which acts of parliament are made, we shall now  
 take

take notice of their different kinds, and point out some general rules with regard to their construction.

Statutes are either *general* or *special*; that is, they are either *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. Although the words of a statute be particular, yet if the intent be general, it is a public statute (a); and on the contrary, if the intent be particular, it shall, notwithstanding the words are general, be deemed a private statute (b). A statute which concerns the king is a public statute; for every subject has an interest in the king, who is the head of the body politic (c). Thus, for instance, the 13. & 14. *Car.* 2. c. 12. RECITES, that divers mischiefs to the public had arisen for want of a proper regulation of the poor, and ENACTS, that a workhouse shall be erected in the county of *Middlesex*; and yet this has been determined to be a public act, for it concerns the community at large, that a stop should be put to such mischiefs, and the acts provide a remedy for such mischiefs in the county of *Middlesex*. So also the 13. *Eliz.* c. 10. to prevent spiritual persons from making leases for longer time than twenty-one years, or three lives, is a public act; it being a rule prescribed to the whole body of spiritual persons in the nation: but an act to enable the bishop of *Chester* to make a lease to *A.B.* for sixty years, is a private act. A statute, however, may be public in one part and private in another (d).

(a) 12. *Mod.* 249. 613. 10. *Co.* 57. *Plow.* 65. *Hob.* 227. *Sid.* 24. *Skin.* 429. *Ld. Raym.* 120. 390. 709. And see the case of *Samuel v. Evans*, 2. *Term*

*Rep.* 569. where it was at length determined, that the 23. *Hen.* 6. c. 9. relating to bail bonds, is a public act.

8. *Co.* 138.

(a) 10. *Co.* 102.

(b) *Plowd.* 204.

(c) 4. *Co.* 77. 8. *Co.* 28. 138. *Hob.* 227.

*Rex v. Paulin*, *Sid.* 209.

1. *Bl. Com.* 86.

4. Co. 76.  
 2. Roll. Ab.  
 466.  
 Cro. Jac. 112.  
 2. Mod. 57.  
 Plowd. 65.  
 Dyer, 119.

2. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons or private concerns. Thus, as before observed, a statute which concerns only a certain species of spiritual persons, as the bishops; or an individual of a certain species, as a particular bishop; is a private statute: and in many statutes, which would otherwise be deemed private acts, there is a clause by which they are declared to be public statutes.

STATUTES, also, are either *declaratory* of the Common Law, or *remedial* of some defects therein.

3. DECLARATORY STATUTES are, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the Common Law is.

4. REMEDIAL STATUTES are those which are made to supply such defects, and abridge such superfluities in the Common Law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned judges, or from any other cause whatsoever.

AND this being done, either by *enlarging* the Common Law where it is too narrow, or by *restraining* where it is too lax and luxuriant, hath occasioned another subordinate division of remedial acts of parliament; as

5. ENLARGING STATUTES. Thus, to instance in the case of treason, clipping the current coin of the kingdom was an offence not sufficiently guarded against by the Common Law; therefore it was thought expedient by 5. *Eliz.* c. 11. to make it high treason: so that this was an enlarging statute.

6. RESTRAINING STATUTES. Thus, at Common Law, all Spiritual Corporations might lease out their estates for any term of years, until they were prevented by the 13. *Eliz.* c. 10. This therefore was a restraining statute.

Other

Other denominations have also been given to statutes from the different manners in which they are penned; some of them being called AFFIRMATIVE STATUTES, and others NEGATIVE STATUTES.

So, also, wherever an act of parliament imposes a penalty or inflicts a punishment, that is called a PENAL STATUTE: and as a statute may be *public* as to one part, and *private* as to another; so, also, it may be *remedial* in one part, and *penal* in another.

The construction of acts of parliament is founded upon this general rule: That *Remedial Statutes* are to be expounded liberally, and *Penal Statutes* are to be construed strictly.

When the liberal construction is to prevail, the Judges, with whom alone the power of construing statutes resides, are to consider 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; and are so to construe the act as to suppress the mischief and advance the remedy.

The following seem to be the most general rules upon this subject:

1. An Affirmative Statute does not take away the Common Law, and the party may make his election, to proceed upon the statute, or at the Common Law.

2. A Negative Statute completely takes away the Common Law, so that it cannot afterwards be made use of upon the same subject.

3. Words and Phrases, the meaning of which in a statute has been ascertained, are, when used in a subsequent statute, to be understood in the same sense. Thus, where the 23. *Hen. 6.* says the sheriff *may* take bail, the Judges construed it to mean *shall* take bail; and therefore where a person was indicted for disobeying the 14. *Car. 2. c. 12.* which enacts that overseers *may* make a rate, and an exception was taken that the act did not require them to do it, the Court over-ruled the exception.



4. In the construction of one part of a statute, every other part ought to be taken into consideration; but the title of a statute is not to be regarded in construing it, because this is no part of the statute: the preamble, however, must be considered, for it is a key to open the minds of the makers as to the mischiefs which are intended to be remedied; but this rule must not be carried so far as to restrain the general words of the enacting clause to the particular words of the preamble; although strong words in the enacting part of a statute may extend it beyond the preamble.

5. A saving in a statute which is repugnant to the purview of it, is void; but the purview may be qualified and restrained by the saving.

6. If divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them; for all statutes *in pari materia* are to be construed as one law.

7. If a statute that repeals another is itself afterwards repealed, the first statute is hereby revived, without any formal words for that purpose.

8. Acts of parliament derogating from the power of subsequent parliaments, are not binding.

9. Acts of parliament that are impossible to be performed, are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void; but when the words of a statute are doubtful, *general usage* may be called in to explain them.

## CHAPTER THE FIFTH.

*The Places subject to the Laws of England.*

THE MUNICIPAL LAWS of *England* do not by the *Common Law* extend either to *Wales*, *Scotland*, *Ireland*, the *Isle of Man*, the *Islands of Jersey*, *Guernsey*, *Sark*, *Alderney*, and their appendages, or to the more distant dependencies on the mother country, but are confined to the territory of *England* only. Custom however in some instances, and the legislature in many others, have extended these laws in a greater or less degree to the several places which form the empire of GREAT BRITAIN.

1. ENGLAND comprehends not only *Wales* and *Berwick*, but also part of the main or high seas; for thereon the *Admiral* hath jurisdiction. This main sea begins at the low water mark; but between the high water mark and the low water mark, where the sea ebbs and flows, the *Common Law* and the *Admiral* hath *divisum imperium*; an alternate jurisdiction: one upon the water when it is full sea, the other upon the land when it is an ebb.

1. Bi. Com.  
Co. Lit. 260.  
Finch, 78.

*England* is divided into an ecclesiastical and temporal state.

THE ECCLESIASTICAL STATE is divided into two archbishopricks or provinces, *viz.* CANTERBURY and YORK. Each archbishop has within his province suffragan bishops of every diocese. The archbishop of *Canterbury* hath under him twenty-one bishops; seventeen of ancient foundation, and four more founded by king *Henry* the eighth out of the ruins of dissolved monasteries, *viz.* *Gloucester*, *Bristol*, *Peterborough*, and *Oxford* (a).

(a) And the remaining bishopricks within this province are of *Hereford*, *Worcester*, *Bath* and *Wells*, *Salisbury*, *Exeter*, *Chichester*, *Norwich*, *Saint David's*, *Lincoln*, *Rocheſter*, *Litchfield*, *Landaff*, and *St. Afaph*.

Co. Lit. 94.

The archbishop of *York* hath under him, within his province, four suffragans, *viz.* the bishop of the county palatine of *Chester*, the bishop of the county palatine of *Durham*, the bishop of *Carlisle*, and the bishop of the *Isle of Man*.

Every province is divided into two dioceses; every diocese into archdeaconries, whereof there are sixty in all; every archdeaconry into deaneries; and every deanery into parishes; but there are some places that are *extra parochial*.

A PROVINCE is the jurisdiction of an archbishop; A DIOCESE is the circuit of every bishop's jurisdiction; AN ARCHDEACONRY is the circuit of the archdeacon's jurisdiction, as a DEANERY is that of a rural dean; and A PARISH is that circuit of ground in which the souls under the care of one parson or vicar do inhabit.

THE TEMPORAL STATE is divided into Counties; those Counties into Hundreds; and the Hundreds into Tithings or Towns.

A COUNTY (*Comitatus à comitando*, from accompanying together, particularly at the assizes and sessions held for the county; or, as some say, *à comitando principem*), or SHIRE, is a certain circuit or part of the kingdom governed by an yearly officer called a *Sheriff*, or *Shire Reeve*, under the king; for a county cannot be without a sheriff. The king by his letters patent may make a county with its two courts, the *Town* and *County Court*; and that no part should be exempt from the authority of the sheriff, every parcel of land lies in some county. Every county is, as it were, an entire body by itself; so that, regularly, an inquest or jury shall not take notice of any thing done in another county. The number of counties in *England* and *Wales* have been different at different times: at present there are FORTY in *England* and TWELVE in *Wales*. Three of these counties, *Chester*, *Durham*, and *Lancaster*, are called Counties Palatine: the two former are such by prescription, or immemorial custom: the latter by creation. Counties Palatine are so called *à Palatio*, because the owners thereof, the Earl of *Chester*, the Bishop of *Durham*,  
and

the Duke of *Lancaster*, had in these counties *Jura Regalia* as fully as the King hath in his palace; Braſton, bk. 3. c. 8. f. 4.  
*Regalem potestatem in omnibus.* By 27. *Hen. 8. c. 2.* and 14. *Eliz. c. 6.* these powers of the owners of Counties Palatine were abridged, though still all writs are witnessed in their names, and all forfeitures for treason by the Common Law accrue to them. 4. Inst. 205.

Of these three counties, *Durham* is now the only one remaining in the hands of a subject; for *Chester* was united to the crown by *Henry* the third, and has ever since given title to the king's eldest son; and *Lancaster*, the property of *Bolingbroke*, son of *John of Gaunt*, was forfeited to the crown by the attainder of his descendant *Henry* the sixth, during the struggles between the Houses of *York* and *Lancaster*.

Some cities and towns corporate also are counties of themselves, as *London, York, Canterbury, Norwich, Worcester, &c.* 4. Inst. 211.

A HUNDRED was so called, because it was originally the jurisdiction of ten tithings, or an hundred families, dwelling in some neighbouring towns. Co. Lit. 168. 2. Inst. 71. 1. Vent. 403. 3. Mod. 199.

The people who live in a Hundred are called *Hundredors*; and these Hundreds continue to this day, to some purposes; but their jurisdiction is in general transferred to the County Court, except indeed those which were formerly annexed to the crown, and have been granted to great men in fee, and so remain in nature of a *franchise*, and have return of writs; and in these *franchises* or *liberties* the sheriff cannot meddle by his ordinary authority, but all grants made since the 14. *Edw. 3. c. 9.* of bailiwicks of Hundreds, except such as then were of estates in fee, are void. In some of the more northern counties, the Hundreds are called *Wapentakes, Rapes, Ridings*. There is a chief constable, and a bailiff of every Hundred, to execute the orders of the sheriff, justices, &c. 4. Inst. 267. 1. Vent. 399. 1. Bl. Com. 119.

A TOWN, *Villa* or *Vicus*, was a precinct antiently containing ten families, upon which account they are sometimes called Tithings. These Tithings are said to have had each of them originally a church and celebration of divine service, sacraments, and burials; though that seems to be rather 1. Bl. Com. 114. Co. Lit. 115.

rather an ecclesiastical than a civil institution. The word *Town*, or *Vill*, is indeed, by the alteration of times and language, now become a generical term, comprehending under it the several species of *Cities*, *Boroughs*, and *Common Towns*.

A CITY 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.

A BOROUGH is now understood to be a town, either corporate or not, that sendeth burgeses to parliament.

Co. Lit. 109.  
115.  
Finch, 80.  
2. Vent. 31.

There are also other towns, which are neither cities nor boroughs; some of which have the privileges of markets, and others not; but both are equally towns in law. To several of these towns there are small appendages belonging, called

HAMLETS, which are sometimes under the same administration as the town itself, and sometimes governed by separate officers; in which last cases they are, to some purposes in law, looked upon as distinct townships. Towns originally contained but one parish and one tithing; though many of them now, by the increase of inhabitants, are divided into several parishes and tithings; and sometimes where there is but one parish, there are two or more vills or tithings.

2. The PRINCIPALITY OF WALES was incorporated and united to the kingdom of *England* by 27. *Hen. 8. c. 26.* and all persons born within the said principality, are thereby admitted to have, enjoy, and inherit, all and singular the freedoms, liberties, rights, privileges, and laws of *England*, in as full a manner as other the king's subjects; and all lands, manors, tenements, rents, reversions, services, and other hereditaments within the said principality, or within any particular lordship, parcel thereof, shall be inheritable after the *English tenure*, and not after any *Welsh tenure*; and that the laws, ordinances, and statutes of the realm of *England* for ever, and none other laws, ordinances or statutes, shall be had, used, practised  
and

and exercised in *Wales*. This statute, which contains a great variety of regulations concerning this principality, too numerous even to abridge, is confirmed by the statute of 34. & 35. *Hen. 8.* c. 26. which ordains, that the said principality of *Wales* shall be divided into twelve shires; and in short reduces it into the same order in which it stands at this day, differing from the kingdom of *England* in only a few particulars, and these too in the nature of privileges (such as having Courts within itself, independent of the process of *Westminster-hall*), and some other immaterial peculiarities, hardly more than are to be found in many counties of *England* itself.

1. Bl. Com. 95.  
Cro. Car. 342.  
3. Bulst. 117.  
Dyer, 113.  
Plowd. 120.  
Savil, 12.

2. Roll. Rep. 29. Ld. Ray. 155. 233. 2. Burr. 850. 859. 4. Burr. 2458.  
Willf. 193. Douglafs, 6. 213. n.(10.) 175. n.(2.) 2. Term Rep. 12

3. SCOTLAND continued an entirely separate and distinct kingdom, notwithstanding the accession of king *James* to the throne of *England*, until the reign of queen *Anne*; in the fifth year of whose reign, Articles of Union were agreed on by commissioners appointed for that purpose by both kingdoms; which treaty the Legislature ratified by the statute 6. *Ann.* c. 8. These Articles are twenty-five in number.

The FIRST directs, that the two kingdoms shall upon the 1st *May* 1707, and for ever after, be united into one kingdom, by the name of GREAT BRITAIN; and that the ensigns armorial of each kingdom, the crosses of ST. GEORGE and ST. ANDREW, shall be conjoined in all flags, banners, standards, and ensigns, both by sea and land.

SECONDLY, that the succession to the monarchy of the United Kingdom of GREAT BRITAIN, after the death of queen *Anne*, shall be and continue to the princess *Sophia*, electress of *Hanover*, and the heirs of her body, being protestants (a).

THIRDLY, that the United Kingdom be represented by one and the same Parliament, to be styled THE PARLIAMENT OF GREAT BRITAIN.

(a) See the Act of Settlement, 12. & 13. Will. 3. c. 2.

FOURTHLY,

## THE PLACES SUBJECT TO

FOURTHLY, that all the subjects of the United Kingdom shall, from and after the Union, have full freedom and intercourse of navigation to and from any port or place within the said United Kingdom, and the dominions and plantations thereunto belonging; and that there be a communication of all other rights, privileges, and advantages, which do or may belong to the subjects of either kingdom, except where it is otherwise agreed.

FIFTHLY, that all ships and vessels belonging to *Scotland*, though foreign built, be deemed and pass as ships of the built of GREAT BRITAIN.

See 14. Geo. 2.  
c. 7.

SIXTHLY, that the United Kingdoms shall have the same allowances and drawbacks, and be under the same regulations with respect to trade.

Vide 5. Geo. 1.  
c. 20. and  
12. Geo. 1.  
c. 4. s. 6 2.

SEVENTHLY, that all parts of the United Kingdoms be liable to the same excises upon all excisable liquors.

The EIGHTH article regulates the importation of salt.

NINTHLY, When *England* raises 2,000,000l. by a land-tax, *Scotland* shall raise 48,000l.

The subsequent articles relate to vellums, window taxes, coals, culm and cinders, malt, &c.

By the SIXTEENTH Article, the coin shall be of the same standard and value throughout the United Kingdom as in *England*; and a Mint shall be continued in *Scotland*, under the same rule as the Mint in *England*.

By the SEVENTEENTH, the same weights and measures shall be used as are now established in *England*; and standards of weights and measures shall be kept by those burghs in *Scotland*, to whom the keeping of such standards do belong.

By the EIGHTEENTH, the laws concerning the regulation of trade, customs, and such excises to which *Scotland* is by virtue of this treaty to be liable, shall be the same in *Scotland* as in *England*; and that all other laws in use within *Scotland*, do  
after

after THE UNION, and notwithstanding thereof, remain in the same force as before (except such as are contrary to, and inconsistent with this treaty), but alterable by the Parliament of GREAT BRITAIN; with this difference betwixt the laws concerning *public right, policy, and civil government*, and those which concern *private right*—That the laws which concern public right, policy, and civil government, may be made the same throughout the whole United Kingdom; but that no alteration be made in laws which concern private right, except for evident utility, of the subjects within *Scotland*.

By the NINETEENTH Article, THE COURT OF SESSION, or *College of Justice*, shall after the Union, and notwithstanding thereof, remain in all time coming within *Scotland*, as it is now constituted by the laws of that kingdom, subject nevertheless to such regulations for the better administration of justice, as shall be made by the Parliament of GREAT BRITAIN.

This Article then goes on to direct, that none shall be appointed Lords of Session but Scotch Advocates of five years standing; and proceeds to regulate the other appointments of the several Courts.

The two subsequent Articles ordain, that the *heritable offices and royal burghs of Scotland* shall remain as before, notwithstanding the Union.

By the TWENTY-SECOND, of the Peers of *Scotland* at the time of the Union, *Sixteen* shall be the number to sit and vote in the House of Lords; and *Forty-five* the number of the representatives of *Scotland* in the House of Commons of the Parliament of *Great Britain*.

By the TWENTY-THIRD, the Sixteen Peers shall have all privileges of Parliament; and 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.

The



The TWENTY-FOURTH Article concludes the treaty, by regulating the manner in which the great seal of *England* shall be altered, the seal of *Scotland* used, the privy seal continued, and the REGALIA of *Scotland* and records of Parliament preserved.

By 5. *Ann.* c. 5. THE CHURCH OF SCOTLAND and the four universities of that kingdom are established for ever; and all succeeding sovereigns are to take an oath inviolably to maintain the same.

By 5. *Ann.* c. 6. the Act of Uniformity of 13. *Eliz.* c. 4. and 13. *Car.* 2. c. 10. except as the same had been altered by Parliament at that time, and all other Acts then in force for the preservation of the CHURCH OF ENGLAND, are declared perpetual; and it is stipulated, that every subsequent King and Queen shall take an oath inviolably to maintain the same within *England, Ireland, Wales,* and the town of *Berwick upon Tweed.*

And it is enacted, that these two Acts “shall for ever be observed, as fundamental and essential conditions of THE UNION.”

22. *Edw.* 4. c. 8.  
2. *Jac.* 1. c. 28.  
20. *Geo.* 2. c. 42.  
Hale's Hist. of  
C. L. 183.  
1. *Sid.* 382. 462.  
2. *Show.* 365.

*Cro.* *Jac.* 543.  
2. *Roll.* *Ab.*  
292.  
2. *Burr.* 834.  
See the  
11. *Geo.* 1. c. 4.

4. THE TOWN OF BERWICK UPON TWEED was originally part of the kingdom of *Scotland*; but it was ceded by *Edward Baliol* to king *Edward* the third, and is now clearly part of the realm of *England*, being represented by burgeses in the House of Commons, and bound by all Acts of the *British* Parliament, whether specially named or otherwise. It hath, however, some local peculiarities, derived from the ancient laws of *Scotland*. The king's writs, or processes of the courts of *Westminster*, do not usually run into *Berwick*, any more than the principality of *Wales*; but all prerogative writs, as those of *mandamus, prohibition, habeas corpus, certiorari, &c.* may issue to *Berwick*, as well as to every other of the dominions of the crown of *England*: and indictments and other local matters arising in the town of *Berwick*, may be tried by a jury of the county of *Northumberland*.

5. IRELAND

5. IRELAND is a realm distinct from ENGLAND, <sup>4. Inst. 349.</sup> but part of the dominions of the crown of GREAT <sup>Vaugh. 300.</sup> BRITAIN. The style of the King, until the 33d year of the reign of *Henry* the eighth, was no other than *Dominus Hiberniæ*, Lord of *Ireland*; <sup>1. Bl. Com. 99.</sup> but by the statute 35. *Hen.* 8. c. 3. the title of KING is assumed and recognized. The *Irish* were originally governed by what they called the *Brehon Law*, so stiled from the *Irish* name of Judges, who were called *Brehons*: but in the reign of *Edward* the third, this law was formally abolished, and the laws of *England* received and sworn to by the *Irish* nation. But although the Common Law was made the rule of justice, yet as *Ireland* was a distinct dominion, and had Parliaments of its own, no *English* statutes made subsequent to the 12th of king *John*, the time when the *English* laws were first introduced, were held to extend to *Ireland*, unless it were specially named or included under general words, such as "within any of the King's dominions." But the *Irish* nation being excluded from the benefit of *English* statutes, were deprived of many good and profitable laws made for the improvement of the Common Law; and it was therefore enacted by the *Irish* Parliament, 11. *Eliz.* c. 38. that all Acts of Parliament before made in *England*, should be of force within the realm of *Ireland*.

By the *English* statute 6. *Geo.* 1. c. 5. it is RE-CITED, that the House of Lords in *Ireland* had of late, against law, assumed to themselves a power and jurisdiction to examine, correct, and amend, the judgments and decrees of the Courts of Justice in *Ireland*; and therefore, for the better securing of the dependency of *Ireland* upon the crown of *Great Britain*, IT IS ENACTED, That the said kingdom of *Ireland* hath been, is, and of right ought to be, subordinate unto and dependent upon the imperial crown of *Great Britain*, as being inseparably united and annexed thereunto; and that the King's Majesty, by and with the advice of the Lords spiritual and temporal, and Commons of  
Great

*Great Britain* in Parliament assembled, had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the kingdom and people of *Ireland*. AND THAT the House of Lords of *Ireland* have not, nor of right ought to have, any jurisdiction to judge of, affirm, or reverse any judgment, sentence, or decree, given or made in any court within the said kingdom. AND THAT all proceedings before the said House of Lords, upon any such judgment, sentence, or decree, shall be null and void.

But by the 22. *Geo.* 3. c. 53. the several matters and things contained in the above statute are repealed. And by the 23. *Geo.* 3. c. 28. IT IS RECITED, that doubts had arisen whether the said repeal was sufficient to secure to the people of *Ireland* the rights claimed by them, to be bound only by laws enacted by his Majesty and the Parliament of that kingdom, in all cases whatever, and to have all actions and suits at law or in equity, which may be instituted in that kingdom, decided in his Majesty's courts therein finally and without appeal from thence: and therefore, for removing all doubts, IT IS ENACTED, That the said right claimed by the people of *Ireland*, to be bound only by laws enacted by his Majesty and the Parliament of that kingdom, in all cases whatever, and to have all actions and suits at law or in equity, which may be instituted in that kingdom, decided in his Majesty's courts therein finally and without appeal from thence, shall be, and is declared to be, established and ascertained for ever; and shall at no time hereafter be questioned or questionable.— AND FURTHER, that no writ of error or appeal shall be received or adjudged, or any other proceeding be had by or in any of his Majesty's courts in this kingdom, in any action or suit at law or in equity, instituted in any of his Majesty's courts in the kingdom of *Ireland*; and all such writs, appeals, or proceedings, are declared null and void.

THE ISLE OF MAN is a distinct territory from 1. Bl. Com. 105. *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 antiently governed by its own Lord, who was called THE KING of the Island, and had a crown of gold, but he was subject to the King of *England*. Callis on Sewers, 20. 4. Inst. 283. 7. Co. 21. In the eighteenth year of *Edward* the first, it was granted to *Walter de Huntercomb*, and afterwards by *Edward* the second to *T. Gaveston*, and then to *H. de Bellomonte*. In the year 1393, *William Lord Scrope* purchased it of *Lord Montacute*, and in the first year of *Henry* the fourth forfeited it for high-treason. The King, three years afterward, granted the Isle of Man, and all the Isles belonging thereto, to *Henry Earl of Northumberland*, by whose attainder it came again to the King; who regranted it to *Sir John Stanley* for life, with remainder to him and his heirs (a). *Sir John Stanley* was the grandfather of *Henry*, lord chamberlain to *Henry* the sixth, and by him created *Lord Stanley*. *Henry Lord Stanley* was grandfather to *Thomas*, created by *Henry* the seventh *Earl of Derby*, to him and the heirs males of his body. Upon a doubt which arose in the reign of *Queen Elizabeth* concerning the validity of the original patent, the Island was seized into the *Queen's* hands, and afterwards various grants were made of it by *James* the first; all which being expired or surrendered, it was granted a-fresh in 7. *Jac.* 1. to *William Earl of Derby*, and the heirs males of his body, with remainder to his heirs general; which grant was the next year confirmed by Act of Parliament, with restraint of the power of alienation by the said Earl and his issue male. In the year 1735, *James Earl of Derby*, the last of the male line of *Earl William*, devised the Isle of Man to *Sir Edward Stanley*, who afterwards succeeded to the title of *Earl of Derby*; but this alienation being void by the restraint of the Act of Parliament, the Isle of Man descended to *James Duke of Athol*, as right heir of *James Lord Stanley* (b), being his great-grandson, by *Charlotte* his third daughter.

By the statute 5. *Geo.* 3. c. 26. upon the payment of 70,000*l.* to *John Duke of Athol*, and *Charlotte Duchess of Athol*, his wife, *Baroness Strange*, to be laid out and employed in the manner there mentioned, the Island, Castle, Pele, and Lordship of Man, and all the islands and lordships to the said Island of Man appertaining, together with the royalties, regalities, franchises, liberties, and sea-ports to the same belonging, and all other the hereditaments and premises comprised in the several grants, and every and any of them, shall be, and they are hereby unalienably vested in the crown. PROVIDED, that nothing in this Act shall be construed to vest in his Majesty, his heirs or successors, the patronage of the bishoprick of the said Island of *Man*, or of the bishoprick of *Sodor*, or of the bishoprick of *Sodor and Man*, or the right of advowson, patronage, presentation, &c. of or to any ecclesiastical benefices whatsoever; or the landed property of the *Athol* family, their manerial rights and emoluments (a).

4. *Inst.* 286.

*Id Ray.* 1438.

JERSEY. This island was originally parcel of the Duchy of *Normandy*, and with that united to the realm of *England* by *Henry* the first, after the conquest of *Robert* his brother; and although *Normandy* was afterwards lost by king *John*, and that loss confirmed by *Henry* the third, yet the island of *Jersey* continued part of the dominion, though not originally parcel of the realm of *England*. *Jersey* is governed by its own laws and customs, and the King's writ does not run there; and therefore the Royal Court there cannot transmit a cause to the King for difficulty, but must proceed to judgment.

(a) Some supposed mistakes having taken place respecting the sale of the Island under this Act, his Grace the present *Duke of Athol* is now endeavouring to rescind the sale.—See 5. *Geo.* 3.

c. 30. 5. *Geo.* 3. c. 39. 5. *Geo.* 3. c. 43. 6. *Geo.* 3. c. 50. 7. *Geo.* 3. c. 45. 11. *Geo.* 3. c. 52. 12. *Geo.* 3. c. 58. for regulations respecting trade to the Isle of Man.

GUERNSEY

GUERNSEY was also united with *Normandy* to the crown of *England* during the reign of *Henry* the first, and is governed, like *Jersey*, by its own laws, which are in general founded upon the customs of *Normandy*. 4. Com. Dig. 264.

SARK, ALDERNEY, and their appendages were also parcel of the Duchy of *Normandy*, and were united to the crown of *England* by the first Princes of the *Norman* line. 1. Bl. Com. 107.

THE ISLE OF WIGHT is part of the county of *Hampshire*, and governed by the laws of *England*. Callis, 11.  
4. Inst. 287.  
4. Com. Dig. 265.

THE PLANTATIONS also, or Colonies established by the Mother Country, belong to the crown and kingdom, and are part of their dominion; the inhabitants there are within the King's allegiance, and subject to the laws of *England*. Ca. Parl. 31.  
4. Com. Dig. 265.

But with respect to the *British* Plantations in *America*, it is recited by the 22. *Geo.* 3. c. 46. " that it is essential to the interest, welfare, " and prosperity of *Great Britain*, and of the " Colonies and Plantations of *New Hampshire*, " *Massachusetts Bay*, *Rhode Island*, *Connecticut*, *New York*, *New Jersey*, *Pennsylvania*, the Three Lower " Counties on *Delaware*, *Maryland*, *Virginia*, " *North Carolina*, *South Carolina*, and *Georgia*, in " *North America*, that peace, intercourse, trade, " and commerce, should be restored between " them: Wherefore, and for a full manifestation " of the earnest wish and desire of his Majesty and " his Parliament to put an end to the calamities " of war, be it enacted by the King's most excellent Majesty, by and with the advice and " consent of the Lords spiritual and temporal, " and Commons, in this present parliament " assembled, and by authority of the same, that " it shall and may be lawful for his Majesty to " treat, consult of, and conclude, with any " Commissioner or Commissioners, named or to " be named by the said Colonies or Plantations, " or any of them respectively, or with any body

“ or bodies corporate or politic, or any Assembly  
 “ or Assemblies, or description of men, or any  
 “ person or persons whatsoever, a peace or a truce  
 “ with the said Colonies or Plantations, or any of  
 “ them, or any part or parts thereof; any law,  
 “ act or acts of parliament, matter, or thing, to  
 “ the contrary in any wise notwithstanding.

“ And, in order to obviate any impediment,  
 “ obstacle, or delay, to the carrying the inten-  
 “ tion of his Majesty and his Parliament into  
 “ effect, which might arise from any act or acts  
 “ of parliament affecting or relating to the said  
 “ Colonies or Plantations, be it further enacted  
 “ by the authority aforesaid, that, for the con-  
 “ cluding and establishing of a peace or truce  
 “ with the said Colonies or Plantations, or any  
 “ of them, his Majesty shall have full power and  
 “ authority, by virtue of this act, by his letters  
 “ patent, under the great seal of *Great Britain*,  
 “ to repeal, annul, and make void, or to suspend,  
 “ for any time or times, the operation and effect  
 “ of any act or acts of parliament which relate  
 “ to the said Colonies or Plantations, or any of  
 “ them, so far as the same do relate to them,  
 “ or any of them, or any part or parts thereof,  
 “ or any clause, provision, or matter therein  
 “ contained, so far as such clauses, provisions,  
 “ or matters relate to the said Colonies or Plan-  
 “ tations, or any of them, or any part or parts  
 “ thereof.”

As to any foreign dominions which may  
 belong to the person of the King, by heredi-  
 tary descent, by purchase, or other acquisition,  
 as the territory of *Hanover*, and his Majesty's  
 other property in *Germany*; as these do not in  
 any wise appertain to the crown of these king-  
 doms, they are entirely unconnected with the  
 Laws of *England*, and do not communicate with  
 this realm in any respect whatsoever.

## CHAPTER THE SIXTH.

*The Objects of the Laws of England.*

THE objects of the Laws of *England* being, as we have already observed, the preservation of men's *persons* and *properties* from *civil injuries* and *criminal violence*, we shall divide this Chapter into four Sections, under which we shall respectively treat of, 1st, persons; 2d, property; 3d, civil injuries; and 4thly, crimes and misdemeanours.

I. *Of Persons in their natural Capacities.*

PERSONS are to be considered in their *natural*, and in their relative or *civil capacities*. A person in its civil capacity is every man or woman; in which the law takes notice of its *life, sex, age, health, liberty, and reputation*.

1. LIFE begins when an infant stirreth in the 3. Inst. 50. womb.

The birth is usually at the end of nine solar months after conception, reckoning thirty days to the month: therefore, if a child be born within nine months, or rather within forty weeks after the death of the husband of its mother, it is held to be *legitimate*: but there is no exact time fixed by law, beyond which if the child be born, the law determines it to be *illegitimate*, but it shall be found by a jury on proper evidence. An infant *en ventre sa mere* may be supposed to be born to many purposes. A surrender to such an infant is good; so is a devise, or a guardianship, under the statute 12. Car. 2. c. 24. and by 10. & 11. Will. 3. c. 16. posthumous children are enabled to take estates, as if born in their father's life-

Cro. Jac. 541.

Co. Lit. 123.

129. a. note

(2.) &amp; 244. a.

1. Will. 340.

2. Atk. 117.



time, though there be no estate limited to trustees after the decease of the father, to preserve contingent remainders.

- Co. Lit. 8. 29. 2. SEX is *male* or *female*; for an hermaphrodite, which is both male and female, shall be accounted in Law as of that sex which most prevails. The word MAN includes both man and woman; and a Co. Lit. 243. VIRGIN is included under the denomination of woman.

3. The AGE of male or female is twenty-one years; and it is not material at what hour of the day the birth takes place, for the law does not Lit. 104. admit any fraction of a day. Odd hours also, J. d. Ray. 480. 1096. in legal computation, are rejected.

- A MAN hath divers ages to several purposes. At *twelve*, he ought to take the oath of allegiance; at *fourteen*, he may consent to marriage, choose his guardian, is supposed to be at years of discretion, and if so, in fact, may make a will of his personal Co. Lit. 78. 135. estate; at *seventeen*, may act as executor; and at Gilb. Rep. 74. *twenty-one*, may alien his lands, goods, and chattels.

- A WOMAN had formerly seven ages to several purposes, but now that law is altered. At *nine* years of age, she may have dowry; at *twelve*, she may consent to marriage; at *fourteen*, she is supposed to be at years of discretion, may choose a guardian, and make a will of her personal estate; at *seventeen*, she may act as executrix; and at *one-and-twenty* may alienate her land. Gilb. Rep. 74. 1. Vez. 303. 461.

- Before the age of twenty-one, Man or Woman is called an *infant* or *minor*; and before such age, any deed or other writing made by them may be avoided; in matters of *fact*, either within 3. Atk. 712. age or at full age; but if they be matters of Co. Lit. 171. b. record, as statutes, fines, &c. they must be avoided Cro Eliz. 569. 853. during minority: but if an infant appear by an attorney, and a recovery be had against him, he shall avoid it by writ of error after his full age, notwithstanding he agreed not to bring a writ of error. Although an infant cannot alien any land, goods, or chattels, yet he may bind himself

himself to pay for necessaries, as meat, drink, physic, apparel, instruction for himself wife children and family; but if he enter into a bond with a *penalty* for the payment of any of these necessaries, the bond shall not bind him: and if he borrows money to buy, or pay a debt for necessaries, and applies it accordingly, he is not liable *at law*, because he might have wasted it; but he is liable *in equity*, and the lender of the money stands in the place of the creditor for necessaries: or if, after coming of age, he devise lands in trust for the payment of his debts; a debt for necessaries, though contracted during his minority, is within the trust.

An infant defendant is liable to costs, but not an infant plaintiff; for any one may commence a suit in his name as *next friend*, or, as it is called in the Law French, *prochein ami*.—An infant is bound by all conditions, charges, and penalties in an original conveyance, whether he comes to the estate by grant or descent, except that of doubling the rent for non-payment.—The Law gives an infant capacity to purchase or contract, without consent of any other; for it is intended for his benefit, and the vendee is absolutely bound by this contract: but the infant at his full age may either agree to and perfect it, or, without any cause alledged, waive or disagree to the same: and so may his heirs after him, if he has not confirmed it.

For the effect of infamy as *vide post.*  
to the commission of crimes,

4. HEALTH. Under this head are included those injuries to which both the *body* and the *mind* are liable. Injuries to the body may be committed by selling bad provisions or wine; or by exercising a noisome trade, which infects the air; or by the neglect or unskilful management of a physician, surgeon, or apothecary.—The law also regards health or diseases of the body, when it allows *excuses* or excuses upon the account of sickness and danger of travelling.—HEALTH with respect to the mind, includes the consideration of, 1st, *idiotcy*; 2d, *madness*; 3d, *lunacy*; 4th, *intoxication*.—

AN IDIOT is a natural fool, or one of unsound mind and memory from his nativity: for if he hath any spark of reason, the Law in its humanity will hope that time may restore him to his perfect understanding, and therefore will not account him an idiot or natural fool: but if he hath no signs of sanity, the custody of him and his lands are given to the King by the 17. *Edw. 2. c. 9.* the statute *de Prærogativa Regis*, as the general conservator of his people, in order to prevent the idiot from wasting his estate, and reducing himself and his heirs to poverty and distress. But whether a man is an idiot or not, must be tried by a jury of twelve men. Idiots, and all persons of *non-sane* memory, are totally disabled either to convey or purchase except *sub modo* only, for their conveyances and purchases are *voidable*, tho' not actually *void (a)*. — A MADMAN is he who loses his understanding by grief, sickness, or other accident. — A LUNATIC, or *non compos mentis*, is properly one who has lucid intervals; sometimes enjoying his senses, and sometimes not; and that frequently depending upon the changes of the moon. But under the general name of *non compos mentis* are comprised, not only lunatics but madmen, or persons under frenzies, or who lose their intellects by disease; those that *grow* deaf, dumb, and blind, not being *born* so; or such, in short, as are adjudged by the Court of Chancery incapable of conducting their own affairs. To these also, as well as idiots, the King is guardian; but as the Law always imagines these accidental misfortunes may be removed, the Crown constitutes a trustee to protect their property. — Lastly, a DRUNKARD is he who by his own vicious act deprives himself of memory and understanding for a time. This kind of *non*

Fitzherbert's  
Natura Bre-  
vium, 232.  
17. Edw. 2 c. 9.  
1. Bl. Com. 303.

See 11. Geo. 3.  
c. 20.

Co. Lit. 246.  
1. Bl. Com.  
304.

(a) 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: but a man who is born deaf, dumb, and blind, is looked upon by the Law as in the same state with an idiot; he being supposed incapable

of any understanding, as wanting all those senses which furnish the human mind with ideas.— 1. Bl. Com. 304.—See also ante, page 64, 65, and p. 93. MAXIM, *Nemo admittendus est inhabilitare seipsum.*

*compos*

*compos mentis* shall give no privilege or benefit, but what hurt he doth his drunkennels shall aggravate.

By the statute 17. *Geo. 2. c. 5.* lunatics or mad-<sup>1. Hawk. P. C.</sup> men may be apprehended by warrant of two <sup>P. 2.</sup> justices, locked up, and chained if necessary, and passed to their legal settlement; but this act has been held not to extend to such persons whose friends are able to provide for them, by application to the Court of Chancery.

5. LIBERTY. The personal liberty of the subject, consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. By MAGNA CHARTA, no freeman shall be taken and imprisoned but by the lawful judgment of his *equals*, or by the law of the land. By THE PETITION OF RIGHTS, no freeman shall be imprisoned or detained without cause shewn,<sup>3. Car. 1. c. 2.</sup> to which he may make answer according to law. By 16. *Car. 1. c. 10.* if any person be restrained of his liberty, by order or decree of any illegal Court, or by command of the King's Majesty in person, or by warrant of the Council-Board, he shall, upon demand of his Counsel, have a writ of *habeas corpus* to bring his body before the Court of King's Bench or Common Pleas, who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by THE HABEAS CORPUS ACT, a prisoner may have a *habeas corpus* from any Judge in the vacation, returnable *immediately* (unless committed for treason or felony, plainly and specially expressed in the warrant); and upon his being brought up, *such* Judge shall discharge him upon bail (if the offence beailable), to appear at the next ensuing court where the offence is cognizable: and all persons committed for treason or felony who shall petition in open court, the first week of the Term, or the first day of the Sessions after such commitment, to be brought to trial,  
and

and who shall not be indicted some time in such Term or Session, shall, upon motion the last day of the Term or Session, be let out *upon bail*, unless it appear upon oath, that the King's witnesses could not be produced that Term or Session; and if such person, upon such prayer, shall not be indicted and tried the second Term or Session after commitment, they shall be discharged. And lest this act should be evaded by demanding unreasonable bail or sureties for the prisoner's appearance, it is declared by 1. *Will. & Mary*, ft. 2. c. 2. that *excessive bail* shall not be required.—The confinement of the person in any

2. *Inst.* 589.

Co. Lit. 124.  
9. Co. 56.  
2. Roll. Ab.  
166.

is an imprisonment: so that keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment. The law favours liberty, and gives an action of trespass for false imprisonment, to recover damages; which, on serious occasions, is in general very high and exemplary. The King cannot send any subject of *England*, against his will (*a*), to serve him out of *England*, not even unto *Ireland* as Lord Lieutenant there, for that would be *banishment*, which none but the *Legislature* can inflict; except in the singular instance of pressing sailors, upon urgent necessity, in the time of war (*b*). But 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 (*c*); for this also may be necessary for the public service, and safeguard of the commonwealth (*d*). The Law, indeed, so much discourages unlawful confinement, that if a man is under *duress of imprisonment* until he seals a bond, or the like, he may alledge this *duress*, and avoid the extorted bond. To make imprisonment lawful, it must be either by *process* from the courts of judicature, or by

(*b*) See Broad-  
foot's Case,  
Foster's Crown  
Law.

(*c*) F. N. B. 85.

(*d*) 1. Bl. Com.  
137.

(*a*) By 31. Car. 2 c. 2. no subject of this realm, who is an inhabitant of *England*, *Wales*, or *Ferwick*, shall be sent prisoner into *Scotland*, *Ireland*, *Jersey*, *Guernsey*, or places beyond the seas (where they cannot have the protection and benefit of the Common Law), but that all such imprisonments are illegal. c.

*warrant*

*warrant* from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of commitment, in order to be examined into, if necessary, upon a *habeas corpus*; for if there be no cause expressed, the gaoler is not bound to detain the prisoner. 2. Inst. 482.

6. REPUTATION. The reputation of a person also is under the protection of the Law: for persons in their natural capacities, absolutely and simply considered, have an interest in their good name. Injuries affecting a man's reputation or good name, are, 1st, by malicious, scandalous, and slanderous words, tending to his damage and derogation; 2d, by printing and writing LIBELS against him; and 3dly, by preferring malicious indictments or prosecutions against him; the remedies for which will be severally considered in the subsequent parts of this work. Wood's Institutes, p. 19. 3. Bl. Com. 123. to 127.

## II. Of Persons in their relative Capacities.

A PERSON in its relative or civil capacity is either *the King* or a *subject*. Subjects are either of the *clergy* or *laity*; of the *nobility* or *commonalty*; and some among the nobility or commonalty are of the *military* or *maritime* state. Persons also, in their civil capacities, may be considered as *public officers*, and *incorporated bodies*; and lastly, in the relative characters of *master* and *servant*, *husband* and *wife*, *parent* and *child*, *guardian* and *ward*. Wood's Inst. 19. 1. Bl. Com.

THE KING is the head of the commonwealth immediately under God, and the only supreme governor; and it matters not to which sex the crown descends; but the person entitled to it, whether male or female, is immediately vested with all the ensigns, rights, and prerogatives of sovereign power. The King may be considered with regard to his title, his family, his 4. Inst. 342.

his councils, his duties, his prerogative, and his revenue.

I. THE KING'S TITLE is *hereditary*, or descendible to the next heir, on the death or demise of the last proprietor; and as to the particular mode of inheritance, it in general corresponds with the feudal path of descent, chalked out by the Common Law, in the succession to landed estates; yet with one or two material exceptions. Like them, the crown will descend lineally to the issue of the reigning monarch; as in them the preference of males to females, and the right of primogeniture among the males, are strictly adhered to. Like them, on failure of the male line, it descends to the issue female: but it descends to the eldest daughter only and her issue; and not, as in common inheritances, to all the daughters at once. The doctrine, also, of representation prevails in the descent of the crown, as it doth in other inheritances; whereby the lineal descendants of any person deceased stand in the same place as their ancestors, if living, would have done. And lastly, on failure of lineal descendants, the crown goes to the next collateral relation of the late King, provided they are lineally descended from the blood royal; that is, from that royal stock which originally acquired the crown. But herein there is no objection (as in the case of common descents) to the succession of a brother, an uncle, or other collateral relation of the half blood. The doctrine of hereditary right, however, does by no means imply an indefeasible right to the throne; for it is unquestionably in the breast of the supreme legislative authority of this kingdom, the King and both Houses of Parliament, to defeat this hereditary right, and by particular intails, limitations, and provisions, to exclude the immediate heir, and to vest the inheritance in any one else; but, however the crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it. Hence, in our Law,  
the

the King is said never to die in his political capacity; though, in common with other men, he is subject to mortality in his natural; because, immediately upon his natural death, the King survives in his successor: for the right of the crown vests *eo instanti* upon his heir; either the *heres natus*, if the course of descent remains unimpeached; or the *heres factus*, if the inheritance be under any particular settlement: so that there can be no *interregnum*; but the sovereignty is fully invested in the successor by the descent of the crown.

2. THE KING'S FAMILY. The first and most considerable branch of the Royal Family is THE QUEEN.—The Queen of *England* is either Queen *Regent*, Queen *Consort*, or Queen *Dowager*.

A QUEEN REGENT is she who holds the crown in her own right as sovereign; and such a one has the same power, prerogatives, rights, dignities, and duties, as if she had been a King.

A QUEEN CONSORT is the wife of the reigning King; and she, by virtue of her marriage, is participant of divers prerogatives above other women. She is a public person, exempt and distinct from the King, and may purchase lands, convey them, make leases, grant copyholds, and do other acts of ownership, without the concurrence of her lord; which no other married woman can do. She is capable of taking a grant from the King. She hath separate courts and officers distinct from the King's, not only in matters of ceremony, but of law. She may sue and be sued alone, without joining her husband. She may have a separate property in goods as well as land; and has a right to dispose of them by will. The Queen pays no toll, nor is liable to any amercement in any court. She is intitled to an ancient perquisite called Queen Gold, *Aurum Reginae*; and to some others of the like kind; but in general, unless where the Law has expressly declared her exempted, she is upon the same footing with other subjects.

Co. Lit. 133.  
Finch, 185.  
1. Bl. Com. 220.

A QUEEN



A QUEEN DOWAGER is the widow of the King, and as such enjoys most of the privileges of his Queen Consort.

The second branch of the Royal Family is THE PRINCE OF WALES, or heir apparent to the crown. He is made *Prince of Wales* and *Earl of Chester* by special creation; but, being the King's eldest son, he is by inheritance *Duke of Cornwall*, without any new creation.

By THE ACT OF SETTLEMENT, 12. & 13. Will. 3. c. 2. the Princess *Sophia*, Electress and Duchess Dowager of *Hanover*, the daughter of *Elizabeth* Queen of *Bohemia*, daughter of *James* the first, is declared to be next in succession, in the protestant line, to the imperial crown of these kingdoms, after the death of his Majesty King *William* and the Princess *Anne* of *Denmark*, and in default of their issue respectively: so that the common stock, or ancestor, from whence the present Royal Family must be derived, is the *Princess Sophia*.

1. Bl. Com. 225.  
4. Inst. 362.  
Lords Journ.  
24. Ap. 1763.  
& 10 Jan.  
765. and  
18. Feb. 1772.

By the 31. Hen. 8. c. 10. no person except the King's children shall sit at the side of the cloth of state in the Parliament Chamber; and the King's son, brother, uncle, nephew, or brother's or sister's son, shall have precedency over the officers of state and nobles therein named. Under the word *Children*, the King's grand-children are included. The education and care of all the King's grand-children, while minors, together with the approbation of their marriages when grown up, belong of right to the King, even during their father's life; and this care and approbation extend also to the presumptive heir of the crown.—By 6. Hen. 6. c. 4. the marriage of a Queen Dowager without the consent of the King is prohibited. And by 12. Geo. 3. c. 11. no descendant of King *George* the second, other than the issue of princesses married into foreign families, is capable of contracting matrimony without the previous consent of the King, signified under THE GREAT SEAL; and any marriage contracted without such consent is void, provided that such of the descendants as are above the age  
of

of twenty-five may, after a twelvemonth's notice given to the King's Privy Council, contract and solemnize marriage without the consent of the crown, unless both Houses of Parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage; and all persons solemnizing, assisting, or being present at such prohibited marriage, shall incur the penalties of *præmunire*.

3. THE KING'S COUNCILS consist of the *Court of Parliament*, the *Peers of the Realm*, the *Judges of the Courts of Law*, and the *Privy Council*.

THE PARLIAMENT, as to its constituent parts, we have already described; and shall therefore only mention, that it is among the prerogatives of Majesty to consult with this august assembly; for it is called in writs and judicial proceedings, *Commune Concilium Regni Angliæ*.

THE PEERS of the Realm are by their birth hereditary counsellors of the crown, and may be called together by the King to impart their advice in all matters of importance to the realm, either in time of Parliament, or, which hath been their principal use, when there is no Parliament in being.

The Judges are the King's counsellors in matters of law; and by the statute 13. *Edw. 3. c. 4.* they are expressly required to *counsel the King in his business*. There are various instances of the exercise of this prerogative; as in *Sir John Fenwick's case*; and in the reign of *George the first*, when it was made a question, Whether the education and marriage of the *Prince of Wales's* children belonged to the King or their father? and still more recently in the case of *Admiral Byng*, in the reign of *George the second*.

THE PRIVY COUNCIL is the principal council belonging to the King. This, says Lord Coke, is a most noble, honourable, and reverend assembly in the King's court or palace, with whom the King doth sit at his pleasure. These counsellors, like

See Cotton's  
Abridg. 9, 10.  
2. Bac. Abr.  
583.  
Co.Lit. 110. a.

1. Bl. Com.  
227.

Co. Lit. 110. a.  
304. a.

Fortescue Rep.  
386. 389.  
3. Rush. App.  
212. And see  
Mr. Har-  
grave's note  
Co. Lit. 112. b.

1. Bl. Com. 229.  
4. Inst. 53.

like good sentinels and watchmen, consult of and for the public good, and the honour, defence, safety, and profit of the realm, *à consulendo, secundum excellentiam*. The Privy Council is called THE COUNCIL TABLE. The number of them is at the King's will; but of ancient times there were twelve or thereabouts. Afterwards it increased to so large a number, that it was found inconvenient for secrecy and dispatch; and therefore King *Charles* the second limited it to thirty: but since that time the number has been much augmented, and now continues indefinite. They are made by the King's nomination, without either patent or grant; and on taking the necessary oaths, they become immediately privy counsellors during the life of the King that chuses them, but subject to removal at his discretion. Any natural-born subject may be a privy counsellor; but by 12. & 13. *Will. 3. c. 2.* no person born out of the dominions of the crown of *England*, unless born of *English* parents, even though naturalized by Parliament, shall be capable of being of the Privy Council. The duty of a privy counsellor is, to advise the King according to his best cunning and discretion, for the honour of the King and good of the public, without partiality through affection, love, meed, doubt, or dread; to keep the King's councils secret; to avoid corruption; to help and strengthen the execution of what shall be resolved; to withstand all persons who would attempt the contrary; and to observe, keep, and do all that a good and true counsellor ought to do to his sovereign lord. The power of the Privy Council extends to enquire into all offences against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law; but their jurisdiction herein is only to *enquire*, and not to *punish*; and persons committed by them are entitled to their *habeas corpus*. The Privy Council are a court of appeal in plantation or admiralty causes, which arise out of the jurisdiction of the kingdom; and have cognizance of matters of lunacy and idiotcy.

4. *Inst. 51.*

3. *Peere Wms. 108.*

By

By 3. *Hen.* 7. c. 14. it is felony in any of the *servants* of the King's household to conspire or imagine to take away the life of a privy counsellor. And by 9. *Anne*, c. 16. if *any person* shall unlawfully attempt to kill, or shall unlawfully assault and strike or wound any privy counsellor in the execution of his office, it is felony without the benefit of clergy.—Also, by 6. *Anne*, c. 7. the Privy Council shall continue for six months after the demise of the Crown, unless sooner determined by the successor; but the King, during his life, may dissolve it, or discharge any particular member whenever he thinks proper.

4. THE KING'S DUTIES. The principal duty of the King is to govern his people according to law; for by 12. & 13. *Will.* 3. c. 2. the laws of *England* are the birth-right of the people; and all the Kings and Queens that shall ascend the throne of this realm, ought to administer the government of the same according to the said laws. By the coronation oath also, which by 1. *Will & Mary*, c. 6. is to be administered to every King and Queen, by one of the Archbishops or Bishops of the Realm, in the presence of all the people, the Sovereign doth solemnly promise to govern according to the statutes in Parliament agreed on, and the laws and customs of the Realm; to cause law and justice in mercy to be executed in all his judgments; to maintain the laws of God, the profession of the Gospel, and the Protestant reformed Religion. And this oath is Foster. considered a fundamental, original, and express contract between the King and his people.

5. THE KING'S PREROGATIVE. By the word PREROGATIVE we usually understand that special pre-eminence which the King hath over and above all other persons, and out of the ordinary course of the Common Law, in right of his regal dignity. Prerogatives are either *direct* or *incidental*.

The *direct* are such positive substantial parts of the royal character and authority, as are rooted in and spring from the King's political person, considered merely in itself without reference to any other extrinsic circumstance; as the right of sending ambassadors, of creating peers, of making war or peace. The *incidental* are such as always bear a relation to something else distinct from the King's person; and are indeed only exceptions in favour of the Crown to those general rules that are established for the rest of the community; such as, that no costs shall be recovered against the King; that the King can never be a joint-tenant; and that his debt shall be preferred before a debt to any of his subjects. The substantive or *direct* prerogatives are such as respect the King's royal character, his royal authority, and his royal income. The law ascribes to the King the attribute of *Sovereignty*; and he is said to have imperial dignity, as the head of the realm, in matters both civil and ecclesiastical, owing no kind of subjection to any other potentate upon earth. No suit or action, therefore, can be brought against the King, even in civil matters; because no court can have jurisdiction over him. But the law hath not left the subject without remedy; for as to *private injuries*, if any person has a just demand upon the King, he may petition him in his court of Chancery, where his Chancellor will administer right as a matter of grace, though not upon compulsion; and as to *public oppression*, as the King cannot misuse his power without the advice of evil counsellors, and the assistance of wicked ministers, the constitution has provided, by means of indictments and parliamentary impeachments, that no man shall dare to assist the Crown in contradiction to the law of the land. Therefore, although it is a maxim that *the King can do no wrong*, yet his ministers and counsellors may be punished. The King, also, is not only incapable of *doing wrong*, but of *thinking wrong*; for, in his political character, the law will

not suppose that any folly or weakness can exist, or that he can ever mean to do an improper thing; and therefore, if the Crown should be induced to grant any franchise or privilege to a subject, contrary to reason, or in anywise prejudicial to the commonwealth or to a private person, the law declares that the King was deceived in his grant, and will render such grant void.—The law also determines, that the King cannot be guilty of negligence or *laches*, and therefore no delay will bar his right. *Nullum tempus occurrit Regi*, for the law intends that the King is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects. In the King, also, can be no stain or corruption of blood; for if the next Heir to the Crown were attainted of treason and felony, and afterwards the Crown should descend to him, this would purge the attainder *ipso facto*. The King cannot, in judgment of law, ever be a minor, or under age; and therefore his royal grants and assents to Acts of Parliament are good, though he has not, in his natural capacity, attained the legal age of twenty-one. The King never dies; for the law ascribes to him, in his political capacity, an absolute immortality: and therefore, although *Henry*, *Edward*, or *George* may die, yet the King survives them all; for immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir; who is *eo instanti* King to all intents and purposes. The King is the sole magistrate of the nation; all others acting by commission from and in due subordination to him. The King may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon what offences he pleases. With regard to foreign concerns, the King is the delegate or representative of his people; and what is done by the royal authority with regard to foreign powers, is the act of the whole nation. Considered,

Co. Lit. 90.

Finch. L. 82.

Co. Lit. 43.

therefore, as the representative of his people, the King has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home. It is also the King's prerogative to make treaties, leagues, and alliances with foreign states and princes; of declaring war and peace; of issuing letters of marque and reprisal, of granting safe-conducts, without which, by the law of nations, no member of one society has a right to intrude into another. The King is considered as the *Generalissimo*, or the first in military command within the kingdom; and in this capacity has the sole power of raising and regulating fleets and armies; of erecting and manning and governing all forts and other places of strength within the realm; so that no subject can build a castle, or house of strength embattled, or other fortress defensible, without his licence. He has also the prerogative of appointing ports and havens, or such places only for persons and merchandize to pass into and out of the realm as he in his wisdom sees proper; but he cannot narrow or confine their limits when once established. The direction of beacons, light-houses and sea-marks, is also a branch of the royal prerogative; and the King hath the exclusive power, by commission under his great seal, to cause them to be erected in fit and convenient places, as well upon the land of the subject as upon the demesnes of the crown; which power is usually vested by letters patent in the Lord High Admiral. By 12. *Car.* 2, c. 4. and 29. *Geo.* 3, c. 16. the King may prohibit the exportation of arms or ammunition out of the kingdom, under severe penalties. He may also, whenever he sees proper, confine his subjects to stay within the realm, or recall them when beyond the seas. The King is the fountain of justice, and general conservator of the peace of the kingdom, and has alone the right of erecting courts of judicature; but he cannot administer justice personally, for he has delegated that power exclusively to his Judges. Criminal proceedings

See 1. *Eliz.*  
c. 11.  
13. & 14. *Car.* 2.  
c. 11. f. 14.  
1. *Bl. Com.* 264.

4. *Inft.* 136.  
8. *Eliz.* c. 13.

proceedings or prosecution for offences, are either against the King's peace or his crown and dignity, and he is, therefore, always nominally the prosecutor. The King is likewise the fountain of honour, of office, and of privilege, and this in a different sense from that in which he is styled the fountain of justice; for here he is really the parent of them; and therefore all degrees of nobility, of knighthood, and other titles, are received by immediate grant from the Crown, either expressed in writing by writs or letters patent, as in the creation of peers and baronets; or by corporeal investiture, as in the creation of a simple knight. From the same principle also arises the prerogative of erecting and disposing of offices; for honours and offices are in their nature convertible and synonymous. Upon a like reason, the King has also the prerogative of conferring privileges on private persons; such as granting place or precedence to any of his subjects; or such as converting *aliens*, or persons born out of his dominions, into *denizens*: such, also, is the prerogative of erecting corporations, whereby a number of private persons are united and knit together, and enjoy many liberties, powers, and immunities, in their politic capacity, which they were utterly incapable of in their natural. Another light in which the laws of *England* consider the King, is as the *arbiter of domestic commerce*; and he is therefore invested with the prerogative of establishing publick marts or places of buying and selling; such as markets and fairs, with the tolls thereunto belonging; for these can only be set up by virtue of the King's grant, or by long and immemorial usage and prescription, which prescriptions serve as grants; of regulating weights and measures; and of giving authenticity to his coin, or making it current as a universal medium of traffic. Lastly, the King is considered as the head and supreme governor of the national church; and in virtue of this authority, he convenes, prorogues, re-



strains, regulates, and dissolves, all ecclesiastical synods or convocations. From this prerogative also arises the King's right of nomination to vacant bishopricks, and certain other ecclesiastical preferments. As the head of the Church likewise, the King is the *dernier resort* in all ecclesiastical causes; an appeal lying ultimately to him in Chancery from the sentence of every Ecclesiastical Judge.

6. THE KING'S REVENUE is either *ordinary* or *extraordinary*. The ordinary revenue arises from, 1. The custody of bishopricks. 2. Corodies. 3. Tithes. 4. First-fruits. 5. Crown lands. 6. Military tenures. 7. Wine licences. 8. Forest lands. 9. Courts of Justice. 10. Royal fish. 11. Shipwrecks. 12. Mines. 13. Treasure trove. 14. Waifs. 15. Estrays. 16. Confiscations and Deodands. 17. Escheats. 18. Idiots and lunatics.

1. The custody of the temporalities of bishops, by which are meant all the lay revenues, lands and tenements (in which is included his barony), which belong to an archbishop's or bishop's fee; and these, upon the vacancy of a bishoprick, are immediately the right of the King, as a consequence of his prerogative in church matters, with power of taking to himself all the intermediate profits, without any account to the successor; and with the right of presenting (which the Crown very frequently exercises) to such benefices or other preferments as fall within the time of vacation.— But this revenue, which was formerly very considerable, is now, by a customary indulgence, almost reduced to nothing: for at present, as soon as the new bishop is consecrated and confirmed, he usually receives the restitution of his temporalities, entire and untouched, from the King.

2. CORODIES is a privilege arising out of every bishoprick, which authorises the King to send one of his chaplains to be maintained by the bishop, or to have a pension allowed him

him till the bishop promotes him to a benefice ; but this is now fallen into total difufe : it is, however, ftill due of common right, and no pre-  
 fcription will difcharge it.

Note on  
 F. N. B. 230.

3. THE KING alfo is entitled to all TITHES arifing in extra-parochial places.

4. FIRST-FRUITS and tenths of all fpiritual preferments in the kingdom ; but by the 2. Ann. c. 11. all the revenues of firft-fruits and tenths is vefted in trustees for ever, to form a perpetual fund for the augmentation of poor livings.

See alfo  
 5. Ann. c. 24.  
 6. Ann. c. 27.  
 1. Geo. I. c. 10.  
 3 Geo. I. c. 10.

5. THE next branch of the King's ordinary revenue confifts in the rents and profits of the DEMESNE LANDS of the CROWN, which were either the fhare referved to the Crown at the original diftribution of landed property, or fuch as came to it afterwards by forfeitures or other means, and which were anciently very large and extenfive ; comprifing divers manors, honors, and lordfhips : at prefent they are contracted within a very narrow compafs, having been almoft entirely granted away to private fubjects.

See 1. Ann.  
 ft. 1. c. 7. for  
 the reftreints  
 now impofed  
 on alienation  
 of crown  
 lands.

6. MILITARY TENURES, previous to their abolition by the ftatute of 12. Car. 2. c. 24. were productive of a very confiderable revenue, arifing from fines, which were paid on every death or marriage of the tenant, or alienation of the eftate ; but thefe, together with the advantages of *purveyance* and *pre-emption*, were refigned at the Reftoration by *Charles* the fecond, and in lieu thereof the Parliament fettled on him, his heirs and fucceffors for ever, the hereditary excife of fifteen-pence *per* barrel on all beer and ale fold in the kingdom, and a proportionable fum for other fpirituous liquors.

7. WINE LICENCES, or the profits arifing from permiffion granted to fell wine by retail  
 O 4 throughout

throughout *England*, were first settled on the Crown by 12. *Car.* 2. c. 25.; but this revenue was abolished by 30. *Geo.* 2. c. 19. and an annual sum of upwards of 7000*l.* *per annum*, issuing out of the new stamp duties imposed on wine licences, were settled on the Crown in its stead.

8. THE KING is also entitled to the profits arising from his FORESTS; which are waste grounds belonging to the King, replenished with all manner of beasts of chase or venary; and these profits consist principally in amerciaments or fines, levied for offences against the forest laws (a). But few if any courts of this kind, for levying amerciaments, have been held since the reign of *Charles* the first.

(a) *Vide ante.*

9. THE profits arising from the King's ordinary COURTS OF JUSTICE are also a branch of his ordinary revenue, and consist not only in fines imposed upon offenders, forfeitures of recognizances, and amerciaments levied upon defaulters, but also in certain fees due to the Crown in a variety of legal matters; as for setting the great seal to charters, original writs, permitting fines to bar intails; but these have been almost all granted out to private persons, or else appropriated to particular uses. All future grants of them, however, by 1. *Ann.* st. 2. c. 7. are to endure for no longer time than the prince's life who grants them.

10. ROYAL FISH, which are whale and sturgeon, when either thrown ashore or caught near the coast, are the property of the King, by the statute 17. *Edw.* 2. c. 11. *De Prærogativa Regis.*

11. SHIPWRECKS also are declared to be the King's property; but this revenue of wrecks is frequently granted out to lords of manors as a royal franchise.

12. MINES of gold and silver also are a branch of the royal revenue, originating from the King's prerogative of coinage, in order to supply him with materials. But by the statutes 1. *Will. & Mary*, c. 30. and 5. *Will. & Mary*, c. 6. no mines of copper, tin, iron, or lead, shall be looked upon as royal mines, notwithstanding gold or silver may be extracted from them in any quantities; but the King, or persons claiming royal mines under his authority, may have the ore (other than tin ore in the counties of *Devon* and *Cornwall*), paying for the same a stated price.

See 27. *Edw.* 3. c. 13.  
12. *Ann.* c. 18.  
4. *Geo.* 1. c. 12.

13. TREASURE TROVE, also, which is any money, coin, gold, silver, plate, or bullion, found hidden in the earth, or other private place, the owner thereof being unknown, belong to the King; but if he that hid it, be known or afterwards found out, the owner and not the King is entitled to it. 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.

3. *Inst.* 132.

14. WAIFS also, which are *bona waiviata*, or goods stolen and waived, or thrown away by the thief in his flight, are given to the King, as a punishment upon the owner for not himself pursuing the felon, and taking away his goods from him.

*Britton*, c. 17.  
*Cro. Eliz.* 694.

15. ESTRAYS, or such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them, are given to the King, as the general owner and lord paramount of the soil, in recompence for the damage they may have done therein; and they now most commonly belong to the lord of the manor, by special grant from the Crown. Any beast may be an estray that is by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses; but dogs, cats, and animals *feræ naturæ*, as bears or wolves, cannot be

7. *Co.* 17.

be considered as estrays. Swans also may be estrays, but not any other fowl; whence they are said to be royal fowl.

16. THE FORFEITURE of lands and goods for offences; and DEODANDS, or whatever personal chattel is the immediate cause of the death of any reasonable creature, are also the property of the King.

17. ESCHEATS of lands which happen upon the defect of heirs to succeed to the inheritance, form also parts of the King's ordinary revenue.

For the definition of idiot and lunatic, *vide ante*.

18. THE custody of IDIOTS and LUNATICS. The custody of an idiot and his lands is given to the King, both by the Common Law, as the general conservator of his people, and by the statute 17. *Edw.* 2. c. 9. in order to prevent the idiot from wasting his estate, and reducing himself and heirs to poverty and distress. The statute directs, that the King shall have *ward* of the lands of natural fools, taking the profits without waste or destruction, and shall find them necessaries; and after the death of such idiots, he shall render the estate to the heirs. The King is also the guardian of lunatics, as well as idiots, but to a very different purpose. For the law always imagines that the misfortune of lunacy may be removed; and therefore only constitutes the Crown a trustee to protect their property, and account to them for all profits received, if they recover, or after their decease to their representatives.

See the statute 17. *Edw.* 2. c. 10.

But these revenues, which constituted the proper patrimony of the Crown, being got into the hands of private subjects, it became necessary that private contributions should supply the public service; and these contributions or parliamentary grants, which are usually called by the names of aids, subsidies, and supplies, form THE EXTRAORDINARY REVENUES of the Crown, and consist in—1. The land tax. 2. The malt tax. 3. The

3. The customs. 4. The excise duties. 5. The salt duties. 6. The postage of letters. 7. The stamp duties. 8. The duty on houses and windows. 9. Coach licences. 10. The duty on offices and pensions. 11. Duties on servants.

1. THE LAND TAX, in its modern shape, has superseded the ancient mode of rating property by tenths, fifteenths, subsidies, hydages, scutages, or talliages. The method of raising it is, by charging a particular sum *annually* upon each county, according to a valuation of estates given in at the accession of King *William* in the year 1692; and this sum is assessed and raised upon individuals (their personal estates, as well as real, being liable thereto) by commissioners appointed in the Act, being the principal landholders in the county, and their officers.

3. Burn's Justice, 36. to 55.

2. THE MALT TAX is a sum of 750,000*l.* raised *every year* by Parliament, by a duty of 6*d.* in the bushel on malt, and a proportionable sum on certain liquors, such as cyder and perry, which might otherwise prevent the consumption of malt. This is under the management of the Commissioners of Excise, and is indeed itself no other than an annual excise.

3. THE CUSTOMS are perpetual taxes payable upon merchandize exported and imported.

4. THE EXCISE DUTY is an inland imposition, paid sometimes upon the consumption of the commodity, and frequently upon the retail sale.

Burn's Justice, tit. "Excise."

5. THE SALT DUTY, which is another distinct branch of his Majesty's extraordinary revenue, consists in an excise of 3*s.* 4*d.* *per* bushel imposed upon all salt; the collection of which, by 1. *Ann.* c. 21. is put under the management of Commissioners, and by the 26. *Geo.* 2. c. 3. is declared to be perpetual.

See 22. *Geo.* 3. c. 39. and 26. *Geo.* 3. c. 90.

6. THE

12. Car. 2. c. 35.  
9. Ann. c. 10.  
6. Geo. 1. c. 21.  
26. Geo. 2. c. 12.  
5. Geo. 3. c. 25.  
7. Geo. 3. c. 50.  
But see  
24. Geo. 3.  
stat. 2. c. 37.

6. THE POST DUTY is a revenue arising from the carriage of all letters, which by several statutes is confined exclusively to the Crown.

7. THE STAMP DUTIES arise from taxes imposed upon all parchment and paper whereon any legal proceedings, or private instruments of almost any nature, are written; and also upon licences for retailing wines of all denominations; upon all almanacks, news-papers, advertisements, cards, dice, and pamphlets containing less than six sheets of paper. These imposts are various, according to the nature of the thing stamped, rising gradually from a penny to ten pounds.

8. THE DUTY UPON HOUSES AND WINDOWS was first established in *England* by 13. & 14. Car. 2. c. 10. whereby an hereditary revenue of 2s. for every hearth, in all houses paying to church and poor, was granted to the King for ever. But this tax has been advanced by several acts of parliament, and a tax also imposed upon all windows if they exceed six in such a house; and power is given to surveyors appointed by the Crown, to inspect the *outside* of houses, and also to pass through any house, two days in the year, into any court or yard, to inspect the windows there.

See the  
26. Geo. 3. c. 72.  
9. Ann. c. 23.  
See 2. Burn's  
Justice, 465.

9. THE DUTIES ON HACKNEY COACHES AND CHAIRS is another branch of the extraordinary perpetual revenue, arising from licences to hackney coaches and chairs in *London* and the parts adjacent. There are now a thousand licenced coaches, and four hundred chairs.

10. ANOTHER branch of the King's extraordinary revenue is the duty imposed by 31. Geo. 2. c. 22. ON OFFICES AND PENSIONS; consisting in the payment of 1s. in the pound (over and above all other duties), out of all salaries, fees, and perquisites of offices and pensions payable by the  
Crown,

Crown, and placed under the direction of the Commissioners of the Land Tax.

11. THE last branch of the King's extraordinary perpetual revenue is, a duty of 21s. *per annum* for every MALE SERVANT retained or employed in the several capacities specially mentioned in the act, and which almost amount to a universality, except such as are employed in husbandry, trade, and manufactures. This was imposed by 17. *Geo.* 3. c. 39. and 19. *Geo.* 3. c. 59.; and by 25. *Geo.* 3. c. 43. is under the management of the Commissioners for the Affairs of Taxes.

The neat produce of these several branches of the revenue are appropriated first, and principally, to the payment of the NATIONAL DEBT. The national debt arises by borrowing such sums of money as Government may require for the current service of the State; laying taxes on the subject sufficient to pay the interest of the sums so borrowed, and converting the principal debt into a new species of property, transferable from one man to another, at any time, and in any quantity. To pay the interests of the national debt, the extraordinary revenues just now enumerated, excepting the land and malt tax, are in the first place mortgaged and made perpetual, but redeemable by Parliament on paying off the capital. The respective produces of the several taxes were originally separate and distinct FUNDS; being securities for the sums advanced on each several tax, and for them only. But it became necessary, in order to avoid confusion, as they multiplied yearly, to reduce the number of these separate funds by mixing and blending them together: so that there are now only three capital funds of any account, *viz.* THE AGGREGATE FUND, and THE GENERAL FUND; so called from such union and addition; and THE SOUTH SEA FUND; being the produce of the taxes appropriated to pay the interest of such part of the national debt as was advanced by that Company and



its annuitants; whereby the separate funds, which were thus united, are become mutual securities for each other; and the whole produce of them, thus aggregated, liable to pay such interest or annuities as were formerly charged upon each distinct fund: the faith of the Legislature being moreover engaged to supply any casual deficiencies.

The customs, excises, and other taxes, however, which are to support those funds, depending on contingencies, upon exports, imports, and consumptions, must necessarily be of a very uncertain amount; but they have always been considerably more than was sufficient to answer the charge upon them. The *surplusses*, therefore, of the three great national funds, the *Aggregate*, *General*, and *South Sea* funds, over and above the interest charged upon them, are directed by 3. *Geo.* 1. c. 7. to be carried together, and to attend the disposition of Parliament, and are usually denominated THE SINKING FUND, because originally destined to lower and sink the national debt. To this have been since added many other *intire duties*, granted in subsequent years, and the annual interest on the sums borrowed on their respective credits is charged on and payable out of the produce of the Sinking Fund (*a*). Before any part of the Aggregate Fund (the *surplusses* whereof are one of the chief ingredients that form the Sinking Fund), can be applied to diminish the principal of the national debt; it stands mortgaged by Parliament to raise an annual sum for the maintenance of the King's household, and THE CIVIL LIST. For this purpose, the produce of certain branches of the excise and customs, the post duty, the duty on wine licences, the revenues of the remaining crown lands, the profits arising from courts of justice (which articles include a

(*a*) By 26. *Geo.* 3. c. 31. a sufficient sum shall be set apart every quarter out of the Sinking Fund, to pay all interests charged upon it, and afterwards the further sum of 250,000l. shall be set apart, and applied in reducing the national debt.

the hereditary revenues of the Crown), and also a clear annuity of 120,000*l.* in money, were settled on the King for life, conditioned, that if they did not amount annually to 800,000*l.* the Parliament would make up the deficiency, But his present Majesty having signified his consent, that his own hereditary revenues might be so disposed of as might best conduce to the utility and satisfaction of the public, and having accepted the sum of 800,000*l.* *per annum* for the support of his civil list, the said hereditary and other revenues are now carried into and made a part of the Aggregate Fund; and the Aggregate Fund is charged with the payment of the whole annuity to the Crown of 800,000*l.* *per annum*. The expences defrayed by the civil list are, those which in any shape relate to civil government, as the expences of the household, all salaries to officers of state, to the Judges, and every of the servants; the appointments to foreign ambassadors, the maintenance of the Queen and the Royal Family, the King's private expences, or *privy purse*; and other very numerous outgoings, as *secret service money*, pensions, and other bounties; which sometimes have so far exceeded the revenues appointed for that purpose, that application has been made to Parliament to discharge the debts contracted on the civil list.

Having finished our account of the person and attributes of the King in his relative capacity, we proceed next to enquire into the relation of his subjects or people, whether aliens, denizens or natives; and shall then proceed to the other relations, as marked out in the second section of this chapter.

**SUBJECTS.** The most obvious division of the people is into *aliens* and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of *England*, that is, within the allegiance of the King: and *aliens* are such as are born out of it. Allegiance is the tie or *ligamen* which binds the subject to the King, in  
return

1. Hale, 63.

23. Wil. 3. c. 6.

1. Geo. 1. c. 13.

6. Geo. 3. c. 53.

1. Geo. 1. c. 13.

6. Geo. 3. c. 53.

7. Co. 7.

2. Per. Wms.

124.

return for that protection which the King affords the subject. The ancient oath of allegiance contained a promise “to be true and faithful to the King and his heirs, and truth and faith to bear of life and limb, and terrene honour, and not to know or hear of any ill or damage intended him, without defending him therefrom.” But at the Revolution, the terms of this oath were altered; the subject only promising, “that he will be faithful, and bear true allegiance to the King;” without mentioning “his heirs,” or specifying in the least wherein that allegiance consists. The oath of supremacy is principally calculated as a renunciation of the Pope’s pretended authority; and the oath of abjuration very amply supplies the loose and general texture of the oath of allegiance. This oath must be taken by all persons in any office, trust, or employment; and may be tendered by two justices of the peace to any person whom they shall suspect of disaffection. And the oath of allegiance may be tendered to all persons above the age of twelve years, whether *natives, denizens, or aliens*, either in the court leet, or in the sheriff’s tourn. But besides these express engagements, the law also holds, that there is an implied, original, and virtual allegiance owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form. Allegiance, both express and implied, is distinguished into two species, the one *natural*, the other *local*. Natural allegiance is such as is due from all men born within the King’s dominions, immediately upon their birth; for immediately upon their birth, they are under the King’s protection; and this allegiance cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance; nor by any thing but the united concurrence of the legislature. An *Englishman* who removes to *France* or to *China*, owes the same allegiance to the King of *England* there, as at home, and twenty years hence as well as now;

now; for it is a principle of Universal Law, that the natural-born subject of one prince cannot, by any act of his own, put off or discharge his natural allegiance.—Local allegiance is such as is due from an *alien* or a stranger for so long time as he continues within the King's dominion and protection; for it ceases the instant such stranger transfers himself from this kingdom to another. 7. Co. 6.

By the law of nations, no member of one society has a right to intrude into another; the admission of strangers, therefore, entirely depends on the will of the State. But great tenderness is shewn by our laws, not only to foreigners driven on the coast by necessity, or by any cause that deserves pity or compassion, but with regard also to the admission of strangers who come spontaneously; for, so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the King's protection, though liable to be sent home whenever the King sees occasion. But no subject of a nation at war with us can, by the law of nations, come into the realm; nor can travel upon the high seas, or send his goods and merchandize from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct; which, by divers ancient statutes, must be granted under the King's seal, and inrolled in Chancery. But passports under the King's sign manual, or licenses from his ambassadors abroad, are now more usually obtained, and are allowed to be of equal validity.

**ALIENS**, as contradistinguished from natural-born subjects, are such as are not born within the dominions of the crown of *England*, or within the allegiance of the King. But from this rule of the Common Law must be excepted, the children of the Kings of *England*, in whatsoever parts they be born; the children of the King's ambassadors

P born

(a) 7. Rep. 18. born abroad (a); for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent, so his children are held to be born (by a kind of *postliminium*) under the King of *England's* allegiance, represented by his father the ambassador. To encourage also foreign commerce, it is enacted by 25. *Edw.* 3. ft. 2. "that all children born without the ligeance  
 " of the King, whose fathers and mothers at the  
 " time of their birth shall owe allegiance to the  
 " King, shall be the same as subjects born  
 " within the dominions of the crown, if the  
 " mothers of such children do pass the sea by the  
 " license and will of their husbands."—And it seems not to be material whether the parents of such children be married abroad or in *England*; or whether the mother be an alien or not; provided the father be a merchant, and resided out of the King's dominions for the purpose of merchandising (b).

(b) Cro. Car.  
601.  
Mar. 91.  
Jenk. Cent. 3.

By 7. *Ann.* c. 5. the children of all natural-born subjects born out of the dominions of the crown, shall be deemed natural-born subjects of this kingdom.—And this Act is, by 4. *Geo.* 2. c. 21. explained to mean all such children whose fathers are natural-born subjects at the time of the birth of such children, except their fathers were attainted or banished beyond sea for high-treason, or were then in the service of a prince at enmity with *Great Britain*.

By 12. & 13. *Will.* 3. c. 2. s. 3. and 25. *Geo.* 2. ft. 2. c. 39. natural subjects may inherit and make their title by ancestors born beyond sea.

By 13. *Geo.* 3. c. 21. all persons born out of the allegiance of the crown of *Great Britain*, whose fathers by 7. *Ann.* c. 5. and 4. *Geo.* 2. c. 21. are entitled to the rights of natural-born subjects, shall be considered as natural-born subjects.

By the policy of the *English* constitution, aliens lie under several disabilities, and are denied in many instances the benefit of our laws: they cannot

(c) Co. Lit. 3. purchase lands except for the King's use (c); they  
2. Comm. 249. are incapable of taking by descent or inheriting (d);  
(d) Co. Lit. 28. they  
17. *Edw.* 2. ft. 1. c. 12. 2. Comm. 274. 293.

they cannot take benefices without the King's licence (*a*); they cannot enjoy a place of trust, or take a grant of lands from the crown (*b*); they cannot maintain a real action (*c*); there are also some obsolete statutes of *Henry VIII.* prohibiting alien artificers to work for themselves in this kingdom, but it is generally held, that they were virtually repealed by 5 *Eliz.* c. 7. (*d*), and they are here, as in most other countries, allowed to merchandize; which privilege is confirmed to them by *Magna Charta*, and divers other acts of parliament (*e*): and the spirit of modern jurisprudence rather contracts than extends the disabilities of aliens, because the shutting them out tends to the loss of the people, which, laboriously employed, are the true riches of the country (*f*); they are therefore allowed to maintain personal actions, for this privilege is essentially necessary to their character as merchants (*g*). An alien merchant may, upon a statute, extend lands; and upon office, the King shall not have them; and upon ouster he shall have an assize; for the main end and design of both the statute staple and merchant was, to promote and encourage trade, by providing a sure and speedy remedy for merchants-strangers as well as natives to recover their debts at the day assigned for payment (*h*). So an alien-merchant may take a lease of a house for his habitation, for years only; though formerly leases of any dwelling-house or shop made to an alien-artificer or handicraft-man, were void by 32. *Hen.* 8. c. 16. s. 13. But he cannot take a lease for years of land, meadow, &c. not being necessary for his trade and traffic (*i*); for if an alien trade, he must have an abode among us.

A DENIZEN is an alien born, but who has obtained, *ex donatione Regis*, letters patent to make him an *English* subject. A denizen is a kind of middle state between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien

(a) 3. Rich. 2. c. 3.  
7. Rich. 2. c. 12.  
1. Hen. 5. c. 7.  
(b) 11. & 12. Will. 3. c. 2.  
25. Geo. 2. c. 4.  
(c) Co. Lit. 129.  
and 25. Dyer, 2.  
(d) 1. Com. 372.  
Hutton, 132.

(e) 2. Ed. 3. c. 9.  
9. Edw. 3. c. 1.  
(f) P<sup>r</sup> Hale, C. J.  
Ventris, 427.

(g) Co. Lit. 129.  
And. 25.  
Dyer, 2.

(h) 11. Edw. 3.  
Rot. 87.  
Dyer, 2. in  
margine.

(i) Co. Lit. 2. b.  
7. Co. 17.  
Dyer, 2.

7. Co. 25.  
11. Co. 67.  
Co. Lit. 8.  
Vaugh. 285.  
22. Hen. 8. c. 8.  
12. Will. 3. c. 2.

may not, but cannot take by inheritance; for his parent, through whom he must claim, had no inheritable blood; and therefore could convey none to the son. The issue of a denizen born before denization, cannot inherit to him; but his issue born after may. A denizen is not excused from paying the aliens duty; neither can he 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 from the crown.

NATURALIZATION cannot be performed but by *Act of Parliament*, for by this an alien is put exactly in the same state as if he had been born in the King's ligeance, except only that he is incapable, as well as a *denizen*, of being a member of the privy council, member of parliament, &c.; and no bill of naturalization can be received in either house of parliament without such disabling clause in it. Neither can any person be naturalized, or restored in blood, unless he hath received *the sacrament* within one month previous to the introduction of the bill, and unless he also takes the oaths of allegiance and supremacy in the presence of the parliament.

12. Will. 3. c. 2.  
1. Geo. 1. c. 4.  
7. Ja. 1. c. 2.

These are the principal distinctions between *aliens*, *denizens*, and *natives*: but it may be proper to mention, that by 13. Geo. 2. c. 3. every foreign seaman who, in time of war, serves two years on board an *English* ship, is *ipso facto* naturalized (*a*).

4. The next consideration of persons in their relative capacities is, according to the order of our distribution (*b*), the *clergy* and *laity*.

(*b*) See ante, p. 184.

(*a*) See also 13. Geo. 2. c. 7. *American Colonies*, under the circumstances therein described, were naturalized to all intents and purposes, as if they had been born in this kingdom.

THE CLERGY comprehends all persons in holy orders, and in ecclesiastical offices. A clergyman cannot be compelled to serve on a jury, nor to appear at a court leet, or view of frank-pledge; but if a layman is summoned on a jury, and before trial takes orders, he shall notwithstanding appear and be sworn. A clergyman cannot be chosen to any temporal office, as bailiff, reeve, constable, or the like; and, during his own continual attendance on the sacred function, he is privileged from arrests in civil suits. In cases of felony also, a clerk in orders shall have the benefit of clergy more than once, without being branded in the hand. But clergymen are incapable of sitting in the House of Commons; and by 21. *Hen.* 8. c. 13. are not allowed to take any lands or tenements to farm, upon pain of 10 l. a month, and forfeiture of the lease; nor shall they engage in any manner of trade, or sell any merchandize, under forfeiture of the treble value.

1. Bl. Com. 377.

F. N. B. 160.

2. Inst. 4.

4. Leon. 190.

Finch, 88.

50. Edw. 3. c. 5.

1. Rich. 2. c. 16.

2. Inst. 637.

4. Hen. 7. c. 13.

1. E. w. 6 c. 12.

Com Journals,

13 October

1553. and

8. Feb. 1620.

and 17. Jan.

1661.

AN ARCHBISHOP is the chief of the clergy in a whole province, and has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause. He has also his own diocess, wherein he exercises *episcopal* jurisdiction, as in his province he exercises *archiepiscopal*. As archbishop, he calls the bishops into convocation by virtue of the King's writ; receives appeals from inferior jurisdictions within his province; becomes guardian of the *spiritualities* of the vacant sees within his province; is intitled to present by lapse to all ecclesiastical livings in the disposal of his diocesan bishops, if not filled in six months; has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain; and it is the privilege, by custom, of the archbishop of *Canterbury* to crown the Kings and Queens of this kingdom. He hath also a power, by 25. *Hen.* 8. c. 21. of granting dispensations; which is the foundation of his granting special



licenses to marry at any place or time; to hold two livings, and the like.

A BISHOP hath power and authority, beside his sacred functions, to inspect the manners of the people and clergy, and to reform them by ecclesiastical censures; for which purpose he has several courts under him, which are holden by his CHANCELLOR, and may visit at pleasure every part of his diocess. It is also the business of a bishop to institute and to direct induction to all livings in his diocess. An archbishop, or bishop, is elected by the chapter of his cathedral church by virtue of a license from the crown; and the form of granting a license to elect, is the original of the *conge d'elire*. By the 25. *Hen. 8. c. 20.* it is enacted, That at every avoidance of a bishoprick, the King may send the dean and chapter his *usual license* to proceed to election; which is always accompanied with a *letter missive* from the King, containing the name of the person whom he would have them elect; and if *they* delay election above twelve days, the nomination shall devolve to the King, who may, by letters patent, appoint such person as he pleases. This election or nomination, if it be of *a bishop*, must be signified by the King's letters patent to the archbishop of the province; if it be of an *archbishop*, to the other archbishop and two bishops; or to four bishops; requiring them to confirm, invest, and consecrate the person so elected: after which, the *bishop-elect* shall sue to the King for his *temporalities*, shall make oath to the King and none other, and shall take restitution of his *secular possessions* out of the King's hands only.—Archbishopricks and bishopricks may become void by death, deprivation for any very gross and notorious crime, and also by resignation. All resignations must be made to some superior, and therefore the bishop must resign to his metropolitan; but the archbishop can resign to none but the King himself.

A DEAN

A DEAN AND CHAPTER are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see. All ancient deans are elected by the chapter by *conge d' elire* from the King, and letters missive of recommendation, in the same manner as bishops: but in those chapters that were founded by Henry VIII. out of the spoils of the dissolved monasteries, the deanery is donative, and the installation merely by the King's letters patent. The chapter, consisting of *canons* or *prebendaries*, are sometimes appointed by the King, sometimes by the bishops, and sometimes elected by each other.—Deaneries and prebends may become void like a bishoprick by death, deprivation, or resignation.—And if any spiritual person be made a bishop, all the preferments of which he was before possessed are void; and the King may present to them in right of his prerogative: however, they are not void by the *election*, but only by *consecration*.

3. Co. 75.  
Co. Lit. 103.  
3co.

Gibson, 173.

1. Bl. Co 383.

Co. Lit. 103.

Salk. 137.

AN ARCHDEACON hath an ecclesiastical jurisdiction immediately subordinate to the bishop throughout the whole of his diocese, or in some particular part of it. He is usually appointed by the bishop himself, and hath a kind of episcopal authority, independent of the bishop.

1. Burn's Eccl.  
Law, 68.

THE RURAL DEANS are very ancient officers of the church, but almost grown out of use, though their deaneries still subsist, as an ecclesiastical division of the diocese or archdeaconry.

Kenner, 633.  
Gib. Cod. 972.

A PARSON, *persona ecclesie*, is one that hath full possession of all the rights of a parochial church. He is called parson, *persona*, because by his person, the church, which is an invisible body, is represented, and he is in himself *a body corporate*, in order to defend and protect the church by a perpetual succession. He is sometimes called the RECTOR or governor of the church, but the appellation of PARSON is the most legal, beneficial,

Co. Lit. 300.

ficial, and honourable title that a parish-priest can enjoy ; for he only is said *vicem seu personam ecclesie gerere*. A parson has, during his life, the freehold in himself of the parsonage-house, the glebe, the tithes, and other dues. But these are sometimes *appropriated*, that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living, whom the law esteems equally capable of providing for the service of the church as any single clergyman. This *appropriation* may be severed, and the church become *disappropriate* two ways.—FIRST, If the patron or appropriator presents a clerk who is instituted and inducted to the parsonage ; for the incumbent so instituted and inducted is to all intents and purposes complete parson ; and the appropriation, being once severed, can never be re-united again, unless by a repetition of the same solemnities.—AND when the clerk, so presented, is distinct from the *vicar*, the rectory, thus vested in him, becomes what is called a *secure* ; because he hath no *cure of souls*, having a *vicar* under him, to whom that cure is committed.—SECONDLY, If the corporation which has the appropriation is dissolved, the parsonage becomes *disappropriate* at Common Law ; because the perpetuity of person is gone, which is necessary to support the appropriation.

Co. Lit. 46.

2. Burn. Eccl. Law, 347.

A VICAR, therefore, is a person who has generally an appropriator over him, intitled to the best part of the profits, to whom he is in effect perpetual curate, with a standing salary : though in some places the *vicarage* has been considerably augmented by a large share of the great tithes ; and by 29. Car. 2. c. 8. such augmentations, which were only temporary, are now rendered perpetual.

The method of becoming a *parson* or a *vicar* is much the same. Holy orders, presentation, institution and induction, are necessary to both. By the Common Law a *deacon* of any age might be instituted and inducted to a parsonage or vicarage ;

age; but by 13. *Eliz.* c. 12. no person under twenty-three years of age, and in deacon's orders, shall be presented to any benefice with cure: and by 13. & 14. *Car.* 2. c. 4. no person is capable of being admitted to any benefice, unless he hath been first ordained a *priest*; and then he is, in the language of the law, a *clerk in orders*. Any clerk may be presented to a parsonage or vicarage, that is, the *patron* may offer him to the *bishop* to be instituted; but the bishop may refuse him if he is excommunicated and remains in contempt forty days (*a*); or if he be unfit (*b*). If the bishop has no objections, the clerk so admitted is next to be instituted by him, which is a kind of investiture of the spiritual part of the benefice; for by the institution, the care of the souls of the parish is committed to the charge of the clerk. When a vicar is instituted, he (beside the usual form) takes, if required by the bishop, an oath of perpetual residence; for the maxim of law is, that *Vicarius non habet vicarium*. When the ordinary is also the *patron*, and confers the living, the presentation and institution are one and the same act, and are called a *collation* to a benefice. By *institution* or *collation* the church is full, so that there can be no fresh presentation till another vacancy, at least in the case of a common patron; but the church is not full against the King till *induction*. Upon institution also, the clerk may enter on the parsonage-house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction.—Induction is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like; and is a form required by law, with intent to give all the parishioners due notice to whom their tithes are to be paid. This, therefore, is the investiture of the temporal part of the benefice, as institution is of the spiritual; and

1. Burn, 103.

(a) 2. Roll.

Abr. 355.

(b) Glanv. 13.  
c. 20.

and when a clerk is thus *presented, instituted, and inducted*, he is then and not before in full and complete possession, and is called in law, *persona impersonata*, or *parson imparsonée*.—A parson or vicar may cease to be so,—1st, By death.—2d, By cession in taking another benefice; for by 21. *Hen. 8. c. 13.* if any one having a benefice of 8l. *per annum* or upwards in the King's books, accepts any other, the first shall be adjudged void, unless he obtain a *dispensation*.—3dly, By consecration, which is when a clerk is promoted to a bishoprick, except he obtains a *commendam*.—4th, By his resignation, accepted by the ordinary.—5th, By deprivation, either by canonical censures, or for some malefeance, as simony (*a*); maintaining doctrines in derogation to the King's supremacy, the thirty-nine articles (*b*), or the book of common prayer (*c*); for neglecting to read the liturgy, or take the abjuration oath (*d*); for using any other form of prayer than the liturgy (*e*); for absenting himself sixty days in one year from a popish benefice presented by the university (*f*): in all which and similar cases, the benefice is *ipso facto* void, without any formal sentence of deprivation (*g*).

(a) 31. *Eliz. c. 6.*  
12. *Ann. c. 12.*  
(b) 1. *Eliz. c. 1. & 2.*  
(c) 13. *Eliz. c. 12.*  
(d) 13. *Eliz. c. 12.*  
14. *Car. 2. c. 4.*  
1. *Geo. 1. c. 6.*  
(e) 1. *Eliz. c. 2.*  
(f) 1. *Will. & Mary. c. 26.*  
(g) 6. *Rep. 30.*

A CURATE is the lowest degree in the church, being in the same state that a vicar was formerly, an officiating temporary minister, instead of a proper incumbent; though there are what are called *perpetual curacies*, where all the tithes are appropriated, and no vicarage endowed.

See 28. *Hen. 8. c. 11.*  
12. *Ann. c. 12.*

CHURCHWARDENS are the guardians or keepers of the church, and representatives of the body of the parish: They are sometimes appointed by the *minister*, and sometimes by *the parish*; and sometimes by both together, as custom directs. They are a kind of corporation, and are enabled by that name to have a property in goods and chattels, and to bring actions for the use and profit of the parish. They may be removed, and then called to account by action at Common Law.

Law. Their office is, to repair the church, and to make rates and levies for that purpose. They are also joined to the Overseers in the maintenance of the poor. They may levy a shilling on such as do not repair to church, pursuant to 1. *Eliz.* c. 2. and are empowered to keep persons orderly while they are there.

1. *Lev.* 106.  
Dr. Burn.

PARISH CLERKS and SEXTONS are also regarded by the Common Law as persons who have freeholds in their offices; and therefore, though they may be *punished*, they cannot be *deprived* by ecclesiastical censures. The parish clerk is generally appointed by the incumbent, but by custom may be chosen by the inhabitants; and if such custom appear, the court of King's Bench will grant a *mandamus* to the archdeacon to swear him in.

2. *Roll. Abr.*  
234.

*Cro. Car.* 589.

THE LAITY, as contradistinguished from THE CLERGY, may be divided into three distinct states, *viz.* the *civil*, the *military*, and the *maritime*. THE CIVIL STATE includes all orders of men, from the highest nobleman to the meanest peasant, not included under the description of the clergy, or of the military or maritime states; and it may sometimes include individuals of the other three orders; since a nobleman, a knight, a gentleman, or a peasant, may become either a divine, a soldier, or a seaman. THE CIVIL STATE consists of *the nobility* and *the commonalty*. The degrees of nobility now in use are, *dukes*, *marquisses*, *earls*, *viscounts*, and *barons*.

Vide ante,  
page 187.  
4. *Inst.* 363.

A DUKE, as a mere title of nobility, is inferior in point of *antiquity* to many others, yet is superior to all in point of rank, being the first title of dignity after the Royal Family.

A MARQUIS, *Marchio*, is the next degree of nobility. His office formerly was to guard the frontiers and limits of the kingdom, which were called *marches*, from the *Teutonic* word *marche*, a limit;

limit; as in particular were the marches of *Wales* and *Scotland*, while they continued to be enemies countries. The persons who had command there were called Lord Marchers or Marqueffes.

AN EARL is a title of nobility fo ancient, that its original cannot be clearly traced out. Among the *Saxons* they were called *euldormen*, eldermen, fignifying the fame as *senior* or *fe-ator* among the *Romans*; and alfo *fehireman*, becaufe they had each of them the civil government of a feveral divifion or fhire. After the *No. man* Conqueft, they were for fome time called *Counts* or *Countees*, from the *French*. It is now become a mere title, they having nothing to do with the government of the county. In writs and commiffions, and other formal instruments, the King, when he mentions any peer of the degree of *an Earl*, ufually ftyles him “trufly and well-beloved *coufin*;” an appellation as ancient as the reign of *Henry* the fourth.

2. Inft. 5.

A VISCOUNT, or *Vice Comes*, is an arbitrary title of honour, which never had any fhadow of office belonging to it. The firft inftance of the title was in the reign of *Henry* the fixth, who created *John Beaumont* a peer by the name of *Viscount Beaumont*.

2. Inft. 5, 6.

A BARON is the moft general and univerfal title of nobility; for originally every one of the peers of fuperior rank had alfo a barony annexed to his other titles. But it hath fometimes happened, that when an ancient baron hath been raifed to a new degree of peerage, in the courfe of a few generations the two titles have defcended differently; one perhaps to the male defcendants, the other to the heirs general; whereby the earldom, or other fuperior title, has fubfifted without a barony: and there are alfo modern inftances where *earls* and *viscounts* have been created, without annexing a barony to their other honours: fo that now the rule doth not univerfally hold, that  
all

all *peers* are *barons*. The most probable opinion of the origin of baronies is, that they were the same with our present lords of manors.

The right of peerage seems to have been originally territorial; that is, annexed to lands, honours, castles, manors, and the like; the proprietors and possessors of which were (in right of their 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* still sit in the House of Lords, in right of succession to certain ancient baronies annexed, or supposed to be annexed to their episcopal lands. But afterwards, when alienations grew to be frequent, the dignity of peerage was confined to Glanvil, Bk. 7. c. 1. 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.

PEERS are now created by *writ* or by *patent*; for those who claim by prescription, must suppose either a writ or patent made to their ancestors. The creation by WRIT, or the *King's letter*, is a summons 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 or degree of peerage. The creation by writ is the more ancient way; but a man is not ennobled thereby, unless he actually takes his seat in the House of Lords. The most Whitlock, c. 114. usual 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 Co. Lit. 16. makes use of it, yet it is frequent to call up the eldest son of a peer to the House of Lords by writ of summons, in the name of his father's barony; because in that case there is no danger of his children's losing the nobility, in case he never takes his seat; for they will succeed to their grandfather.



grandfather. Creation by writ has also one advantage over that by patent; for a person created by writ holds the dignity to him and *his heirs*, without any words to that purport in the writ; but in letters patent, there must be words to direct the inheritance, else the dignity only enures to the grantee for life. For a man or woman may be created noble for their own lives, and the dignity not descend to their heirs at all, or descend only to some particular heirs: as where a peerage is limited to a man, and the heirs male of his body by *Elizabeth* his present wife, and not to such heirs by any former or future wife. A nobleman shall be tried by his *peers*; but this does not extend to *bishops*, who, though they are lords of parliament, and sit there by virtue of the baronies which they hold *jure ecclesie*, yet are not ennobled in blood, and consequently not *peers* with the nobility. By 20. *Hen. 6. c. 9.* peeresses, either in their own right or by marriage, shall be tried before the same judicature as peers of the realm. If a woman noble in her own right marries a commoner, she still remains noble, and shall be tried by her peers; but if she be only noble by marriage, then by a second marriage with a commoner she loses her dignity; for as by marriage it was gained, by marriage also it is lost. Yet if a duchess dowager marries a baron, she continues a duchess still; for all the nobility are  *pares*, and therefore it is no degradation. A peer or peeress cannot be arrested in civil cases. A peer sitting in judgment gives not his verdict upon *oath* like an ordinary jurymen, but upon his *honour*. Bills in chancery also he answers upon his honour. But when he is examined as a witness in either civil or criminal cases, he must be sworn. A peer cannot lose his nobility but by death or attainder.

Co. Lit. 9. 16.

3. Inst. 30.

1. Vent. 298.

2. Inst. 49.

THE COMMONALTY, like the nobility, are divided into several degrees. The first name in dignity after the nobility is,

A. D. 1344.  
Selden, 2. 5. 41.

A KNIGHT of the order of *St. George*, or of the *Garter*, first instituted by *Edward* the third.

A KNIGHT

A KNIGHT *Banneret*, who, if he has been created by the King in person, in the field, under the royal banner in time of open war, ranks by 5. *Rich.* 2. c. 4. and 14. *Rich.* 2. c. 11. next after barons, and before the sons of viscounts; but otherwise he ranks after the next in order. <sup>4. Inst. 6. Selden.</sup>

BARONETS, which title is a dignity of inheritance, created by letters patent, and usually descendible to the issue male. It was first instituted by King *James* the first, A. D. 1611.—Next follow

KNIGHTS *of the Bath*; an order instituted by *Henry* the fourth, and revived by *George* the first. They are so called from the ceremony of bathing the night before their creation.—The last of these inferior nobility are,

KNIGHTS *Bachelors*, the most ancient, though the lowest, order of knighthood among us.—THESE, says *Sir Edward Coke*, are all the names of dignity in the kingdom, ESQUIRES and GENTLEMEN being only names of worship. <sup>2. Inst. 667.</sup>

ESQUIRES, according to *Camden*, are of four sorts:—1. The eldest sons of knights, and their eldest sons in perpetual succession.—2. The younger sons of peers, and their eldest sons in like perpetual succession.—3. Esquires created by the King's letters patent or other investiture, and their eldest sons.—4. Esquires by virtue of their offices, as justices of the peace, and others who bear any office under the crown. To these may be added, the Esquires of Knights of the Bath, each of whom constitutes three at his installation; and all foreign, nay *Irish* peers; for not only these, but the eldest sons of peers of *Great Britain*, though frequently titular lords, are only Esquires in law; and must be so named in all legal proceedings.

GENTLEMAN is a denomination given to those who study the laws of the realm, who study in the universities, who profess the liberal sciences, and, in short, who can live idly and without manual labour, <sup>2. Inst. 667. 3. Inst. 30.</sup>

labour, and will bear the port, charge, and countenance of a gentleman.

2. Inst. 668.

A YEOMAN is he that hath free land of forty shillings by the year, who is thereby qualified to serve on juries, vote for knights of the shire, and do any other act where the law requires one that is *probus et legalis homo*.

TRADESMEN, ARTIFICERS, and LABOURERS, form the rest of the commonalty, who, as well as all others, must in pursuance of 1. Hen. 5. c. 5. be styled by their estate, degree, or mystery, in all actions and other legal proceedings.

#### TABLE OF PRECEDENCE.

The King's children and grandchildren.		Marquisses younger sons.
The King's brethren.		Secretary of State, if a Bishop.
The King's uncles.		Bishop of London.
The King's nephews.		Bishop of Durham.
Archbishop of Canterbury.		Bishop of Winchester.
Lord Chancellor or Keeper, if a baron.		Bishops.
Archbishop of York.		Secretary of State, if a Baron.
Lord Treasurer.		Barons.
Lord President of the Council,	} if Barons.	Speaker of the House of Commons.
Lord Privy Seal,		Lords Commissioners of the Great Seal.
Lord Great Chamberlain. But see private stat. 1. Geo. 1. c. 3.	} Above all peers of their own degree.	Viscounts eldest sons.
Lord High Constable.		Earls younger sons.
Lord Marshall.		Barons eldest sons.
Lord Admiral.		Knights of the Garter.
Lord Steward of the Household.		Privy Councillors.
Lord Chamberlain of the Household.		Chancellor of the Exchequer.
Dukes.		Chancellor of the Duchy.
Marquisses.		Chief Justice of the King's Bench.
Dukes eldest sons.		Master of the Rolls.
Earls.		Chief Justice of the Common Pleas.
Marquisses eldest sons.		Chief Baron of the Exchequer.
Dukes younger sons.		Judges and Barons of the Cons.
Viscounts.		Knights Bannerets Royal.
Earls eldest sons.		Viscounts younger sons.
		Barons younger sons.
		Baronets.
		Knights Bannerets.
		Knights of the Bath.
		Knights Bachelors.

THE

THE MILITARY STATE includes the whole of the *soldiery*, or such persons as are peculiarly appointed among the rest of the people for the safeguard and defence of the realm.—Soon after the restoration of King *Charles* the second, it was thought proper to recognize the sole right of the crown to govern and command THE MILITIA, the laws relating to which are now, by the statute of 26. *Geo.* 3. c. 107, reduced into one Act; the general scheme of which is to discipline a number of inhabitants of every county, chosen by lot, for three years; and officered by the lord lieutenant, the deputy lieutenants, and other principal landholders; under a commission from the crown. They are not compellable to march out of their counties, unless in case of invasion or actual rebellion; nor in any case compellable to march out of the kingdom. They are to be exercised at stated times; and their discipline in general is liberal and easy; but when drawn out into actual service, they are subject to the rigours of martial law, as necessary to keep them in order.—It is one of the articles of the Bill of Rights, that the raising or keeping A STANDING ARMY within the kingdom in time of peace, unless it be with the *consent of Parliament*, is against law; but it has for many years past been *annually* judged necessary by the Legislature to maintain, even in time of peace, a standing body of troops under the command of the crown; who are, however, *ipso facto* disbanded at the expiration of every year, unless continued, as is now uniformly done;

Baronets eldest sons.  
Knights eldest sons.  
Baronets younger sons.  
Knights younger sons.  
Colonels.  
Serjeants at Law.  
Doctors.

Esquires.  
Gentlemen.  
Yeomen.  
Tradesmen.  
Artificers.  
Labourers.

N. B. Married women and widows are intitled to the rank among each other as their husbands would respectively have born between themselves, except such rank be professional or official;—and unmarried women to the same rank as their elder brothers would bear among men, during the lives of their fathers.

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by

by Parliament, regulating the manner in which this body of troops are to be provided for.

THE MARITIME STATE is nearly related to the former, and consists of all such persons as have appointments or services in the royal navy of *England*.

Many laws have been made for the supply of the navy with seamen; for their regulation when on board; and to confer privileges and rewards on them during and after their service.—FIRST, for their supply, the King is empowered to grant commissions for impressing them; and parishes may bind out poor boys apprentices to masters of merchantmen, who shall be protected from being impressed for the first three years. Great advantages, also, are given to *volunteer seamen*, in order to induce them to enter into his Majesty's service; and every foreign seaman who, during a war, shall serve two years on board an *English* ship, is *ipso facto* naturalized. But *fishermen, ferrymen, and Thames watermen*, are, under certain circumstances, protected from being impressed (*a*).—SECONDLY, The method of ordering seamen in the royal fleet, and keeping up a regular discipline there, is directed by certain acts of parliament (*b*), in which almost every possible offence is set down.—THIRDLY, With regard to the privileges conferred on *sailors*, they are pretty much the same with those conferred on *soldiers*; being provided for, when maimed, wounded, or superannuated, either by county rates, or *Greenwich* hospital; and by 1. *Geo. 2. ft. 2. c. 14.* no seaman on board his Majesty's ships can be arrested for any debt less than twenty pounds: beside this, they have several privileges as to *trades*, and the power of making *nuncupative testaments*.

Having considered persons in the relative capacities of *king and subject, clergy and laity, nobility and commonalty, the military and the maritime state;*

Foster's Rep.  
154.

(a) 5. Eliz.  
c. 5.  
7. & 8. Will. 3.  
c. 21.  
2. Ann. c. 6.  
4. Ann. c. 19.  
13. Geo. 2. c. 17.  
1. Geo. 2. c. 14.  
13 Geo. 2. c. 3.  
(b) 22. Geo. 2.  
c. 23.

state, we now proceed to consider persons in the relation of *public officers*, and *incorporated bodies*.

THE SHERIFF is an officer of very great antiquity in this kingdom, and is called in *Latin vice comes*, as being the deputy of the earl, or *comes*, to whom the custody of the shire is said to have been committed at the first division of this kingdom into counties; but the earls in process of time being delivered from the burden, the sheriff now does all the King's business in the county; the King by his letters patent committing *custodiam comitatús* to the sheriff, and him alone. Sheriffs, except where the shrievalty is of inheritance, were formerly chosen by the inhabitants of the several counties; but these popular elections growing tumultuous, the 9. *Edw.* 2. ft. 2. 14. *Edw.* 3. c. 7. 23. *Hen.* 6. c. 8. and 21. *Hen.* 8. c. 20. enact, that sheriffs shall be assigned and elected by the chancellor, treasurer, president of the King's council, chief justices, chief barons, all the judges and great officers of state, on the *morrow of All Souls* in the Exchequer; which is now altered to the *morrow of St. Martin*, where they propose three persons to the King, who afterwards appoints one of them to be sheriff. The office of sheriff cannot be determined until a new sheriff be named, unless by his own death or the demise of the King; in which last case it is now enacted by 1. *Ann.* ft. 1. c. 8. that all officers appointed by the preceding King may hold their offices for six months after the King's demise, unless sooner displaced by the successor. By 1. *Rich.* 2. c. 11. no man that has served the office of sheriff for one year, can be compelled to serve the same again within three years after.—The power and duty of a sheriff are either as a judge, as a keeper of the King's peace, as a ministerial officer of the superior courts of justice, or as the King's bailiff. In his *judicial capacity* he is to hear and determine Dal. c. 4. all causes of forty shillings value or under, in his county court. He is likewise to determine the  
Q 2
elections

v. Roll. Rep.  
437.

elections of knights of the shire, of coroners, and of verderers; to judge of the qualification of voters, and to return such candidates as he shall determine to be duly elected. As the *keeper of the King's peace*, both by the Common Law and special commission, he 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 country 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 comitatús*, or power of the county; which summons every person above fifteen years old, and under the degree of a peer, is bound to attend, upon warning, under pain of fine and imprisonment.— In his *ministerial capacity*, the sheriff is bound to execute all process issuing from the King's courts of justice. In civil causes he is to serve the writ, to arrest, to take bail, to summon and return the jury, and to see the judgment of the law carried into execution. In criminal matters, also, he arrests, imprisons, summons the jury, has the custody of the delinquent, and executes the sentence. As *the King's bailiff*, it is his business to preserve the King's rights within his bailiwick, by seizing all lands devolved to the crown by attainder or escheat; by levying all fines and forfeitures; by seizing and keeping all waifs, wrecks, estrays, and the like; and by collecting the King's rents within his county, when commanded by process from the Exchequer.

THE UNDER SHERIFF is the sheriff's deputy, and usually performs all the duties of the office; but

but he cannot practise as an attorney during his office, which he cannot hold for a longer term than one year.

BAILIFFS, or Sheriffs Officers, are either bailiffs of hundreds, or special bailiffs. The former are officers appointed over their respective districts by the sheriffs, to collect fines therein, to summon juries, to attend the judges and justices at the assizes and quarter sessions. The latter are generally mean persons employed by the sheriffs to serve writs, make arrests, and take executions; and, being usually bound to the sheriff for the due execution of their office, are called *Bound Bailiffs*.

GAOLERS are officers under the sheriff, for he is responsible for their conduct. Their business is to keep safely all such persons as are committed to them by lawful warrant; and if they suffer any such to escape, the sheriff must answer it to the King if it be a criminal matter, or in a civil case to the party injured.

1. Inst. 31.

4. Inst. 271.

THE CORONER, *Coronator*, à *coroná*, is an officer of the King that hath cognizance of some pleas of the crown. He is to be elected in full county court, by the freeholders, upon the King's writ *de coronatore eligendo*, and ought to have lands in fee in the county to answer all people; though now mean persons execute the office. The number of coroners is not fixed; in some counties there are four, besides several special coroners in divers liberties and privileged places; as the coroner of the verge, &c.; and by charter, several corporations have power to chuse coroners for their precincts. The chief justice of the King's Bench is the sovereign coroner of the realm, and may view a body and record it wherever he is. The power of coroner is either *judicial* or *ministerial*. The judicial authority of coroner, both general and special, is to enquire into the cause by which any person came to a violent death, to pronounce

Wood's Inst.

83.

28. Edw. 3. c. 6.

3. Edw. 1. c. 10.

14. Edw. 3. c. 8.

28. Edw. 1. c. 3.

4. Co. 57.

8. Co. 126.

Co. Lit. 288.



4. Edw. 1.  
1. Hen. 8. c. 7.

judgment upon outlawries in the county court, to take and enter appeals of murder, &c. He may also enquire of the escape of a murderer, of treasure-trove, wreck, deodands; but of no felony, except of the death of a man, and upon view of the body. The ministerial power of the coroner is only as the sheriff's substitute, to execute such process as may be directed to him, upon a just exception made against the sheriff. The coroner is chosen for life, but may be discharged by the King's writ *de coronatore exonerando*, for a cause to be therein assigned, as that he is engaged in other business, is incapacitated by years or sickness, hath not a sufficient estate in the county, or lives in an inconvenient part of it. By 25. Geo. 2. c. 29. which appoints the mode in which his *inquisition* is to be taken, extortion, neglect, or misbehaviour, are also made causes of removal.

THE CUSTOS ROTULORUM is the keeper of the records of the county, and principal justice of the peace.

THE TREASURER OF THE COUNTY is he that keeps the county stock. There are two of them in each county, to be chosen by the major part of the justices of the peace at *Easter* sessions.

See 11. Geo. 2.  
c. 20.

JUSTICES OF THE PEACE are persons appointed by the King's commission, to keep the peace of the county for which they are appointed. Some of them are made of the *quorum*, from the words of the commission, "*quorum A. B. C. D. & unum esse volumus*;" because some business of importance shall not be dispatched without the presence of them, or one of them; and now the practice is to raise them all to the dignity of the *quorum*. When any justice intends to act under this commission, he sues out a writ of *dedimus potestatem* from the clerk of the crown in Chancery, empowering certain persons, therein named, to administer the usual oaths to him; for until this  
be

be done, he is not at liberty to act. By 5. *Geo. 2.* c. 11. every justice (except as it is therein excepted) shall have 100*l. per annum*, clear of all deductions; and if he acts without such qualification, he shall forfeit 100*l.*: and no practising attorney, solicitor, or proctor, shall be capable of acting as a justice of the peace. The office of these justices is determinable,—1. By demise of the crown; that is, six months after. 2. By express writ under THE GREAT SEAL. 3. By superseding the commission by writ of *superfedeas*, which suspends the power of all the justices, but does not totally destroy it; for it may be again renewed by *procedendo*. 4. By a new commission, which virtually, though silently, discharges all former justices that are included therein; for two commissions cannot subsist at once. 5. By accession of the office of sheriff or coroner.—Their power is pointed out by the words of the commission, and by particular statutes.

CONSERVATORS OF THE PEACE were anciently what the justices of the peace are now, and were elected by the county, upon a writ directed to the sheriff. The King 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*. The lord chancellor or keeper, the lord treasurer, the lord high steward, the lord marshal and the lord high constable, all the justices of the court of king's bench by virtue of their office, the master of the rolls by prescription, are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it: the other judges are only so in their own courts:

The coroner is also a conservator of the peace within his own county, as is also the sheriff; and both of them may take a recognizance or surety of the peace. Constables, tithing-men, and the like, are also conservators of the peace within their own jurisdiction;

jurisdiction; and may apprehend all breakers of the peace, and commit them until they find sureties for keeping it.

Salk. 150;

CONSTABLES, anciently written *Coningstables*, from *coning*, a Saxon word signifying king, and *staple*, stability or safeguard, are officers appointed for the preservation of the peace in hundreds, parishes, and towns. They are of two sorts, *high-constables* and *petty-constables*. The former were first ordained by the statute of *Winchester*, and are appointed at the court-leets of the franchise or hundred over which they preside; or, in default of that, by the justices at their quarter sessions; and are removable by the same authority that appoints them. The petty-constables are inferior officers, chosen in the same manner, in every town and parish, subordinate to the high constable of the hundred, and they include in their official character the characters of headborough, tithing-man, or borsholder. The general duty of all constables is to keep the peace in their several districts; and to that purpose they arrest, imprison, break open houses, and the like. They are also, by the statute of *Winchester*, to keep watch and ward in their respective jurisdictions.

SURVEYORS OF THE HIGHWAYS. Every parish is bound of common right to keep the high-roads that go through it in good and sufficient repair, unless, by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person; and for this purpose a surveyor of the highways is appointed by 7. *Geo.* 3. c. 42. who is enabled to call the parish together, and to set them upon this work, under the restrictions mentioned in the act.

Stra. 1123.

OVERSEERS OF THE POOR are by 43. *Eliz.* c. 2. to be nominated yearly in *Easter* week, or within one month after; though a subsequent nomination will be valid, by two justices dwelling near the parish.

parish. They must be substantial householders, and so expressed to be in the appointment of the justices. Their office and duty are principally to raise relief for the poor, and to provide employment for such of them as are able to work; for which purpose they are empowered to make and levy rates upon the several inhabitants of the parish. The poor, however, must be confined to their respective parishes; and by 13. & 14. Car. 2. c. 12. a legal settlement may be gained by birth, inhabitancy, apprenticeship, or service. 1st, By birth; for wherever a child is first known to be, that is always *prima facie* the place of settlement, until some other can be shewn. This is also *always* the place of settlement of a bastard child. But in *legitimate* children, there may be, 2dly, Settlements by *parentage*, being the settlement of one's father or mother; all legitimate children being *really* settled in the parish where their parents are settled, until they get a new settlement for themselves. A new settlement may be gained, 3dly, By *marriage*; for a woman marrying a man that is settled in another parish, changes her own settlement; the law not permitting the separation of husband and wife. But if the man has no settlement, her's is suspended during his life, if he remains in *England* and is able to maintain her; but in his absence, or after his death, or during, perhaps, his inability, she may be removed to her own settlement.—The other methods of gaining a settlement are all reducible to this one of *forty days residence* therein: but this forty days residence (which is construed to be lodging or lying there) must not be by fraud or stealth, or in any clandestine manner; but accompanied with one or other of the following concomitant circumstances. The next method, therefore, of gaining a settlement is, 4thly, By forty days residence and notice; for if a stranger comes into a parish, and delivers notice in writing of his place of abode, and number of his family, to one of the overseers, which must be read in the church,

and

Ld. Ray. 1394.

Carth. 433.  
Salk. 485.

Salk. 528.

Ld. Ray. 4173.

Burn, S.C. 370.

and registered (and resides there unmolested for forty days after such notice), he is legally settled thereby; for the law presumes that such a one, at the time of notice, is not likely to become chargeable, else he would not venture to give it, or that in such case the parish would take care to remove him. But there are also other circumstances equivalent to such notice: therefore, 5thly, *Renting*, for the year, a tenement of the yearly value of ten pounds, and residing forty days in the parish, gains a settlement without notice; upon the principle of having substance enough to gain credit for such a house. 6thly, Being charged to, and paying the public *taxes* and levies of the parish (excepting those for scavengers, highways, and windows); and, 7thly, *Executing*, when legally appointed, any public parochial *office* for a whole year in the parish, as churchwarden, &c.; are both of them equivalent to notice, and gain a settlement if coupled with a residence of forty days. 8thly, Being hired for a year when unmarried and childless, and serving a year in some service; and, 9thly, Being bound *apprentice* for seven years, gives the servant and apprentice a settlement, without notice, in that place wherein they served the last forty days. This is meant to encourage application to trades, and going out to reputable services. 10thly, and lastly, Having an *estate* of one's own, and residing thereon forty days, however small the value may be, in case it be acquired by act of law or of a third person, or by descent, gift, devise, &c. is a sufficient settlement; but if a man acquire it by his own act, as by purchase, in its popular sense, in consideration of money paid, then, unless the consideration advanced *bonâ fide* be 30*l.* it is no settlement for any longer time than the person shall inhabit thereon. He is in no case removeable from his own property, but he shall not, by any fraudulent or trifling purchase of his own, acquire a permanent and lasting settlement. All persons not so settled may be removed to their

OWN

own settlement, on complaint of the overseers, by two justices of the peace, if they shall adjudge them likely to become chargeable to the parish into which they have intruded, unless they are in a way of getting a legal settlement, as by having hired a house of 10*l.* *per annum*, or living in an annual service; for then they are not removeable. And in all other cases, if the parish to which they belong will grant them a certificate, acknowledging them to be their parishioners, they cannot be removed merely because likely to become chargeable, but only when they become *actually* chargeable. But such certificate-persons can gain no settlement by any of the means above-mentioned, unless by renting a tenement of 10*l.* *per annum*, or by serving an annual office in the parish, being legally placed therein: neither can an apprentice or servant to such certificate-persons gain a settlement by such their service.

THE CLERK OF THE MARKET is an officer that hath cognizance of weights and measures; and for this purpose hath a court, in which he inquires whether they are of the proper standard; but his office is confined to this subject, and therefore he cannot set a price upon any article in the market over which he presides; neither can he take any fee, except for sealing; for if the weights or measures be false, they ought to be burned. The exercise of this office is now rendered almost useless, for the justices of assize, oyer and terminer, justices of the peace, sheriffs in their tours, and lords in their leets, may and do enquire of false weights and measures.

Wood's Inst.  
106.

4. Inst. 275.

Wood's Inst.  
107.

GOVERNORS OF HOUSES OF CORRECTION are to set rogues and other idle persons to work. This officer and his prison doth not belong to the sheriff; his nomination, duty, and allowance, being settled by several statutes.

Wood's Inst.

107.

39. Eliz. c. 5.

43. Eliz. c. 4.

7. Jac. 1. c. 4.

17. Geo. 2. c. 5.

5. Ann. c. 6.

10. Geo. 2. c. 28.

Having

Having enumerated the several characters under which persons in their relative capacities are considered as public officers, we proceed to consider those persons distinguished by the name of *Corporations*, or Bodies Politic.

Wood's Inst.  
108.

A CORPORATION is a person, in a political capacity, created by the Law; and is a body politic framed by policy and fiction to endure in perpetual succession: for as all personal rights die with the natural person, and as the necessary forms of investing a series of individuals one after another with the same individual rights would be very inconvenient, if not impracticable, it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute *artificial persons*, who may maintain a perpetual succession, and enjoy a kind of legal immortality. The first division of corporations is into *aggregate* and *sole*.

1.Bl.Com.467.

CORPORATIONS AGGREGATE consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever; as mayor and commonalty, dean and chapter, master and fellows of a college, master and brethren of an hospital.

Co. Lit. 43.

CORPORATIONS SOLE consist 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; as a king, a bishop, a dean of some chapter, an archdeacon, a prebendary, parson, vicar, the chamberlain of London, and the heads of seven hospitals.

Wood's Inst.  
108.

Another division of corporations, either sole or aggregate, is into *ecclesiastical* and *lay*.

ECCLESIASTICAL CORPORATIONS are, when the members that compose it are entirely *spiritual persons*,

*persons*; such as bishops, certain deans, prebendaries, archdeacons, parsons, and vicars, which are sole corporations; deans and chapters, and the like, which are bodies aggregate.

LAY CORPORATIONS are of two sorts, *civil* and *eleemosynary*. The *civil* are such as are erected for a variety of temporal purposes; as the King, to prevent any *interregnum* or vacancy of the throne; a mayor and commonalty, bailiff and burgessees, and the like, for the advancement and regulation of manufactures and commerce. The *eleemosynary* sort are such as are constituted for the perpetual distribution of free alms, or bounty of the founder of them, to such persons as he has directed; as all hospitals, colleges, &c.

A CORPORATION may be created by the Common Law, by the King's charter, by Act of Parliament, and by Prescription. When a Corporation is created, a name must be given to it, and by that name alone it must sue and be sued, and do all legal acts; for the name is the very being of its constitution: and though it is the will of the King that erects the Corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions. Hob. 211. 10. Co. 33. When a Corporation is duly created, all other incidents are tacitly annexed to it: as,—1. To have perpetual succession; and therefore, all Aggregate Corporations have a power, necessarily implied, of electing members in the room of such as go off.—2. To sue and be sued, implead 1. Roll. Abr. 514. or to be impleaded, 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 their successors; and to have a common seal.—4. To make bye laws, or private statutes, for the better government of the Corporation. An Aggregate Corporation must always appear by attorney; it cannot



cannot be made plaintiff or defendant in an action of battery, or for the like personal injuries; it cannot commit treason or felony, or other crime, in its corporate capacity, though its members may in their individual capacities; it is not capable of suffering a traitor's or a felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood. It cannot be executor or administrator, or perform any personal duties. It cannot be seised of lands to the use of another; neither can it be committed to prison, and therefore cannot be outlawed. It cannot be excommunicated, or summoned into the ecclesiastical courts, on any account. But an Aggregate Corporation may take goods and chattels for the benefit of themselves and successors, which a Sole Corporation cannot do. In Ecclesiastical or Eleemosynary Corporations, the King, or founder, may mark out the rules and ordinances they shall observe; but Corporations instituted for civil purposes are only subject to the Common Law, and their own bye-laws not repugnant to the laws of the realm. Aggregate Corporations also, that have by their constitution a head, as a dean, warden, or master, cannot do any acts during the vacancy of the headship, except only appointing another; but there may be a Corporation

Aggregate without a head, as the Governors of the Charter-House. In Aggregate Corporations, also, the act of the major part is esteemed the act of the whole. No Corporation, of any description, can take a devise of lands, except by 43. *Eliz.* c. 4. for *charitable uses*; which exception is narrowed by 9. *Geo.* 2. c. 36. by an abridgement of their privilege of purchasing from any living grantor, without the King's license; which purchases made by corporate bodies are considered to be purchases *in mortmain*, of which we shall treat hereafter.—The Ordinary is the *visitor* of all Ecclesiastical Corporations; and the founder, his heirs and assigns, of all Lay Corporations, whether Civil or Eleemosynary. A Corporation may be dissolved,

1. By act of parliament.
2. By the natural death

of

Co. Lit. 46.

See 33. Hen. 8.  
c. 27.

Hob. 136.

of all its members, in cases 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; in which case the Law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void. And the regular course is, to bring an information in nature of a writ of *Quo Warranto*, to inquire, By what *warrant* the members now exercise their corporate power, having forfeited it by such and such proceedings?

We now proceed to consider persons in the relative capacities of master and servant, husband and wife, parent and child, guardian and ward. Ante, 187.

MASTER AND SERVANT.—Servants are of several kinds. THE FIRST sort acknowledged by the Laws of England are *menial servants*; so called from being *intra mœnia*, or domestics living within the walls of the house. The contract or relation arises from the *hiring*; and if a master retains a servant generally, without expressing any time, the Law construes it to be for a year; but the contract may be for a longer or shorter term. By the statute 5. *Eliz.* c. 4. all single men between twelve years old and sixty, and married men under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, are compellable by two justices to go out to service in husbandry, or certain specific trades; and on every general hiring for a year, a quarter's warning must be given before the contract can be dissolved, unless upon reasonable cause, to be allowed by a justice of the peace: but they may part by consent, or make a special bargain.—THE SECOND kind of servants are *apprentices*, from *apprendre*, to learn; who are bound by indenture, with their own consents, or by the agreement of their friends, to serve for a certain number of years in some trade, upon condition that Menial Servants.  
1. Bl. Com. 425.  
Wood's Inst. 52.  
Co. Lit. 42.  
F. N. B. 168.

that the master shall, during the time, instruct them in his art or mystery. By several statutes (a), the children of poor persons may be apprenticed out by the Overseers, with the consent of two justices, till twenty-four years of age, to such persons as are thought fitting, who are compellable to take them; and gentlemen of fortune, and clergymen, are equally liable with others to such compulsion; for which purposes this 5. *Eliz.* c. 4. and 43. *Eliz.* c. 2. have made the indenture obligatory, though such parish apprentice be a minor. By the first of these statutes, s. 35. four justices, in open sessions, have power to discharge apprentices to trades, either at the request of themselves or masters; or by one justice, with appeal to the session, who may direct restitution of a ratable share of the money given with the apprentice; and by 20. *Geo.* 2. c. 19. parish apprentices may be discharged in the same manner by two justices. But by 6. *Geo.* 3. c. 26. if an apprentice with whom less than ten pounds hath been given, runs away from his master, he is compellable to serve out his time of absence, or make satisfaction for the same, at any time within seven years after the expiration of the original contract.—A THIRD species of servants are *labourers*, who are only hired by the day or the week, and do not live *inter mania* as part of the family. By 5. *Eliz.* c. 4. all persons meet for labour shall be compelled to serve by the day in the time of hay or corn harvest, and their wages shall be assessed yearly at every *Easter* session; which rates shall by 1. *Jac.* 1. c. 6. be publicly proclaimed by the sheriff; and no labourer retained for building or repairing, or for any other work done by *the great*, shall depart the same before the finishing thereof, without license.—THE FOURTH species of servants are, *stewards*, *factors*, and *bailiffs*; for these persons are considered by the law as servants, with regard to such of their acts as affect their masters or employers property. Servants by a hiring for a year, and apprentices by their binding, gain a settlement

(a) c. *Eliz.* c. 4.  
43. *Eliz.* c. 2.  
1. *Jac.* 1. c. 25.  
7. *Jac.* 1. c. 3.  
8. & 9. *W. & M.* c. 30.  
3. *Ann.* c. 6.  
4. *Ann.* c. 19.  
17. *Geo.* 2. c. 5.  
*Salk.* 57. 491.

*Cro. Car.* 179.

*Salk.* 67.

*Labourers.*

*Stewards,  
Bailiffs, and  
Factors.*

settlement in the parish where they serve the last forty days. Apprentices have an exclusive right to exercise their trade in any part of *England*; but no trades are held to be within the statute of 5. *Eliz.* c. 4. but such as were in being at the making of it; the following a trade, however, for seven years is sufficient to obtain this privilege without any binding. A master may correct his *apprentice*, so that it be done with moderation; but not any other servant: and by 5. *Eliz.* c. 4. if any servant, workman, or labourer, assault his master or mistress, he shall suffer a year's imprisonment. A master may support or *maintain* his servant in any action at law against a stranger, or may bring an action against another for beating or maiming him, assigning, as a ground for the action, a loss of service; or may even justify an assault in his defence; and if any person knowingly hire the servant of another, the first master may have an action to receive damages for the loss of his service, both against the servant and the person hiring him. But a master is answerable for the act of his servant, if done by his command, either expressly or impliedly given: *nam qui facit per alium, facit per se*; and therefore if a servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it, as well as the servant. Now, whatever a servant is *permitted* to do in the usual course of his business, is equivalent to a general command; as if I pay money to a banker's servant, the banker is answerable for it; or, if a steward lets a lease of a farm without the owner's knowledge, yet the owner must stand to the bargain, for the letting leases is in the regular course of the steward's business; and a wife, a friend, or relation, that use to transact business for a man, are *quoad hoc* his servants. If a servant, by his negligence, does any damage to a stranger, the master shall answer for his neglect; as if a smith's servant lames a horse while he is shoeing him, an action

5. *Eliz.* c. 4.  
6. *Geo.* 3. c. 26.

1. *Vent.* 51.  
2. *Keb.* 583.  
*Ld. Ray.* 1179.

*Cro. Car.* 179.  
2. *Show.* 289.

2. *Roll. Abr.*  
115.

9. *Co.* 113.

4. *Inst.* 109.

lies against the master, and not against the servant.

Co. Lit. 112.  
187.

**HUSBAND AND WIFE.** The law considers marriage in no other light than a civil contract; and therefore, like all other contracts, it is good when the parties at the time of making it were *willing* to contract, *able* to contract, and *actually did* contract, in proper form of law. As to the first, the maxim is, that *consensus, non concubitus, facit nuptias*. As to the second, all persons are able to contract themselves in marriage, unless they labour under the *canonical disabilities* of pre-contract, consanguinity, or relation by blood, and affinity or relation by marriage; and some particular corporal infirmities (but these disabilities only render the marriage voidable, and not *ipso facto* void); or under the *civil disability* of a prior marriage, as having another husband or wife living; of being under age; of wanting the consent of parents or guardians; and of being insane. As to the third, no marriage, actually performed, is by the temporal law *ipso facto* void; that is, celebrated by a person in orders, in a parish church or public chapel (or elsewhere by special dispensation), in pursuance of banns, or a license, between single persons consenting, of sound mind, and of the age of twenty-one years, or of the age of fourteen in males, and twelve in females, with consent of parents or guardians, or without it in case of widowhood. And no marriage is voidable, by the ecclesiastical law, after the death of either of the parties, or during their lives, unless for the canonical impediments of pre-contract, of consanguinity, of affinity, or of corporal imbecility, subsisting previous to the marriage.—**MARRIAGES** may be dissolved either by death or divorce. Divorce is either *à vinculo matrimonii*, for some of the canonical causes before-mentioned, and those existing before the marriage, as is always the case in consanguinity; not supervenient or arising afterwards, as may be the case in affinity,  
or

or corporal imbecility; or, merely *à mensa et thoro*, for some supervenient cause, which makes it improper or impossible for the parties to live together; as in the case of intolerable *ill-temper* or *adultery* in either of the parties. In case the divorce is *à vinculo matrimonii*, the marriage is declared null, as having been absolutely unlawful *ab initio*; and the parties are therefore separated *pro salute animarum*; but in divorce *à mensa et thoro*, the marriage bond is suspended, but not destroyed. The law considers *husband and wife* as one person; Co. Lit. 112. for the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing, and therefore is called a *feme covert*. A man therefore cannot grant any thing to his wife, or enter into covenant with her, for the grant would be to suppose her Co. Lit. 112. separate existence; and to covenant with her would Cro. Car. 551. only be to covenant with himself. But a woman may be attorney for her husband, for that implies rather a representation of, than a separation from, her husband. A husband, also, may bequeath F. N. B. 27. any thing to his wife by will, for that cannot take effect till the *coverture* is determined by his death. Co. Lit. 112. A husband is bound to provide his wife with necessaries, and if she contracts debts for them, he is obliged to pay them; but for any thing besides necessaries he is not chargeable. Also, if a wife Salk. 118. elopes and lives with another man, the husband 1. Sid. 120. is not chargeable even for necessaries; at least Stra. 647. if the person who furnishes them is sufficiently apprised of the elopement. If the wife be 1. Lev. 5. indebted before marriage, the husband is bound afterwards to pay the debt, for he has adopted her and her circumstances together. If the wife be 3. Mod 186. injured in her person or her property, she can bring no action without her husband's concurrence, and in his name as well as her own; neither can Salk. 119. she be sued, without making her husband a defendant. But if the husband has abjured the 1. Lev. 312.

realm, or if he be banished, or if the wife lives apart from her husband upon a separate maintenance, she may contract debts, and is liable to be sued for them alone. In criminal prosecutions, also, the wife may be indicted and punished separately, for the union is only a civil union. But in trials of any sort, they are not allowed to be evidence for or against each other. A married woman however may, notwithstanding her coverture, levy a fine, or do any other act of the like nature of record; but in this case she must be solely and secretly examined, to learn if the act be voluntary. She cannot by will devise lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion. A wife may have security of the peace against her husband, as in return a husband against his wife.

Co. Lit. 133.  
1. Hawk. 3.  
Co. Lit. f. 669.  
Co. Lit. 112.  
Stra 478. 875.  
1207.

PARENT AND CHILD. Children are of two sorts, *legitimate* and *spurious*. A LEGITIMATE CHILD is he that is born in lawful wedlock, or within a competent time afterwards. *Pater est quem nuptie demonstrant*, but the nuptials must be precedent to the birth. Parents are, by a principle of natural law, obliged to *maintain* their legitimate children; and it is provided by 43. *Eliz.* c. 2. that the father and mother, grandfather and grandmother, of poor impotent persons, shall maintain them at their own charge, if of sufficient ability, according as the quarter session shall direct: and by 5. *Geo.* 1. c. 8. if a parent runs away and leaves his children, the churchwardens and overseers of the parish shall seize his rents, goods, and chattels, and dispose of them towards their relief. If, therefore, a mother or grandmother marries again, and were before such second marriage of sufficient ability to keep the child, the husband shall be charged to maintain it. But no person is bound to make this provision, unless where the children are impotent and unable to work, either through infancy, disease, or accident, and then are only obliged to find them with

Puffendorf,  
bk. 4. c. 11.  
Montesquieu,  
bk. 23. c. 2.  
Stiles, 283.  
2. Bulst. 346.

with necessaries, the penalty on refusal being no more than 20s. a month. By 1. *Ann.* ft. 1. c. 30. if Jewish parents refuse to allow their protestant children fitting maintenance, suitable to the fortune of the parent, the Lord Chancellor may make such order therein as he shall see proper: and by 11. & 12. *Will.* 3. c. 4. the same is enacted, as to popish parents, with respect to their protestant children. It is also the duty of parents *to protect* Ld. Ray. 679. their legitimate children, and therefore a parent is *permitted* to support his children in law-suits, without being guilty of the crime of maintaining quarrels; he may also justify assault and battery in defence of the persons of his children. 2. *Inft.* 564. The last Puffendorf, bk. 6. c. 2. f. 12. duty of parents is to *educate* their children; and it is therefore provided by 1. *Jac.* 1. c. 4. and 3. *Jac.* 1. c. 5. that if any person sends any child under his government beyond the seas, either to prevent its good education in *England*, or in order to enter into or reside in any popish college, or to be instructed, persuaded, or strengthened in the popish religion, he shall forfeit 100l. And by See 11. & 12. Will. 3. c. 4. 3. *Car.* 1. c. 2. if any parent, or other, shall send or convey any person beyond sea, to be trained up in any priory, abbey, nunnery, popish university, college, school, or house of jesuits or priests, or in any private popish family, in order to be instructed in the popish religion, he shall be disabled both in law and equity. The *power* of parents over their children is given to enable them to perform their *duty*, and therefore a parent may lawfully correct his child, being under age, in a reasonable manner; and by 26. *Geo.* 2. c. 33. the consent of the parent to the marriage of his child is absolutely necessary to render the contract valid. A father has no other power over his son's estate, than as his trustee or guardian; for though he may receive the profits during the child's minority, yet he must account for them when he comes of age. The legal power of a *father* (for a *mother*, as such, is entitled to no power) over the person of his children ceases at the age of twenty-one, yet



till that age arrives, his empire continues, even after his death; for he may by his will appoint a guardian to his children. He may also, during life, appoint a tutor or schoolmaster, who is then *in loco parentis*, and has such a power of restraint and correction as may be necessary to answer the purposes for which he is employed. The duties of children to their parents also arises from a principle of natural justice and retribution, and a child is justifiable in defending the person or maintaining the cause of his parent; and is compellable, if of sufficient ability, to provide for his support.—**SPURIOUS CHILDREN** are those whom the law calls *bastards*. A bastard is one that is not only *begotten* but *born* out of lawful matrimony; or, if the father and mother be married, is born so long after the death of the husband, that, by the usual course of gestation, he could not be begotten by him. So also, if the husband be out of the kingdom, or *extra quatuor maria*, for above nine months, so that no access to his wife can be presumed, her issue, during that period, shall be *bastard*; but during coverture, access shall be presumed, unless the contrary be shewn. In a divorce also *à mensa et thoro*, if the wife breeds children they are *bastard*, unless access be proved; but in a voluntary separation by agreement, the law will suppose access, unless the negative be shewn. So also, if there is an apparent impossibility of procreation on the part of the husband, the issue of the wife shall be *bastard*. Likewise, in cases of divorce *à vinculo matrimonii*, all the issue born during the coverture are *bastards*; for such divorce is always upon some cause that rendered the marriage unlawful and null from the beginning. The duty of parents to their bastard children is principally that of maintenance; and therefore the Legislature hath ordained (a), that when a woman is delivered, or declares herself with child of a bastard, and will by oath before a justice of peace charge any person with having got her with child, the justice shall cause such person to be apprehended.

43. Eliz. c. 2.

Co. Lit. 244.

Salk. 123.

3. P. Wm. 276.

Stra. 925.

Salk. 123.

Co. Lit. 244.

Co. Lit. 235.

(a) 18. Eliz. c. 3.

7. Jac. 1. c. 4.

3. Car. 1. c. 4.

13. &amp; 14. Car.

2. c. 11.

6. Geo. 2. c. 31.

apprehended, and commit him till he gives security, either to maintain the child, or to appear at the next quarter session to dispute and try the fact. But if the woman dies, or is married before delivery, or miscarries, or proves not to have been with child, the person shall be discharged: otherwise the sessions, or two justices out of sessions, upon original application to them, may take order for the keeping of the bastard, by charging the mother, or the reputed father, with the payment of money or other sustentation for that purpose. But no woman can be compulsively questioned concerning the father of her child, till one month after her delivery. A bastard has no rights but such as he can *acquire*, for he can inherit nothing, Co. Lit. 3. being looked upon as the son of nobody; yet he may gain a name by reputation, though he has none by inheritance. A bastard is settled in the parish where he is born; but in case of fraud, as if a woman be sent, either by order of the justices, or comes to beg as a vagrant, to a parish which she does not belong to, and drops her bastard there; the bastard shall in the first case be settled in the parish from whence she was illegally re- Salk. 427. moved; or, in the latter case, in the mother's own parish, if the mother be apprehended for her vagrancy. A bastard cannot be heir to any one, 17. Geo. 2. c. 5. neither can he have heirs but of his own body; for being *nullius filius*, he is of kin to nobody, and has no ancestor from whom any inheritable blood can be derived; and can only be made legitimate by act of parliament.

GUARDIAN AND WARD. Guardians are of 1. Peer. Wms. 285. 703. 706. four kinds:—1. *Guardians by nature*, viz. the father and, in some cases, the mother of the 3. Peer. Wms. 154, 155. child; for if an estate be left to an infant, the father is by common law the guardian, and must account to the child for the profits. By the con- Co. Lit. 88. struction of 4. & 5. *Phil. & Mary*, c. 8. the father may assign a guardian to any woman-child under the age of sixteen; and if none be so assigned, the 3. Co. 39.

Co. Lit. 88. mother shall be guardian. 2. *Guardians for nurture*, which are of course the father or mother, till the infant attain the age of fourteen years; and in default of father or mother, the ordinary usually assigns some person to take care of the infant's personal estate, and to provide for his maintenance and education. 3. *Guardians in foccage*, or by the Common Law. These take place only when the minor is intitled to some estates in lands, and then this species of guardianship devolves upon his next of kin, to whom the inheritance cannot possibly descend; for the law judges it improper to trust the person of an infant in his hands, who may by possibility become heir to him. These guardians in foccage, 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. 4. *Testamentary guardians* are created by 12. Car. 2. c. 24. which enacts that any father under age, or of full age, may, by deed or will, dispose of the custody of his child, either born or unborn, to any person except a popish recusant, either in possession or reversion, till such child attain the age of twenty-one years — There are also *special guardians*, by custom of *London* and other places; but they are particular exceptions, and do not fall under the general law. The power and reciprocal duty of *guardian and ward* are the same, *pro tempore*, as that of a *father and child*; but the guardian, when the ward comes of age, is bound to account, and shall answer for all losses by his wilful default or negligence. The practice of many guardians, therefore, is to apply, account to, and act under the direction of the Court of Chancery; for the Chancellor, by right derived from the Crown, is the general and supreme guardian of all *infants*, as well as idiots and lunatics; the several capacities, privileges, and disabilities of whom, we have already endeavoured to describe.

2. Jones, 90.  
2. Lev. 163.

Lit. f. 123.  
Ambler's Rep.  
306.

2. Brown's  
Cases in Chan-  
cery, 583.

Co. Lit. 88.  
2. Peer. Wms.  
119. 561.

Ante, p. 182  
to 185.

§ II. Of

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 § II. *Of Property.*

HAVING in the preceding section considered See ante, p. persons, both in their natural and relative capacities, 181. we proceed to the consideration of *property*.

PROPERTY is distributed into two kinds, *real* 2. Bl. Com. 16. and *personal*. REAL PROPERTY is such as is permanent, fixed, and immoveable, which cannot be carried out of its place; as lands, tenements, and hereditaments. PERSONAL PROPERTY consists in goods, money, and all other moveables; which may attend the owner's person wherever he thinks proper to go. And first,

*Of Real Property.*

LAND is a word of a very extensive signification, and comprehends all things of a permanent, substantial nature, not only gardens, arable grounds, meadows, pastures, moors, *waters, rivers, marshes, furze, heath, but also messuages; that is, houses,* Wood's Inst. 114. Co. Lit. 4. tofts, or places where houses once stood, mills, castles, &c. in short, any ground, soil, or earth whatsoever, with all buildings thereon. Land also is of indefinite extent, upwards as well as downwards, *cujus est solum ejus est usque ad cælum;* and therefore, no man may erect any building, or the like, to overhang another's land; and whatever is in a direct line between the surface of any land, and the centre of the earth, belongs to the owner of the surface: so that the word *land* includes not only the face of the earth, but every thing under it, or over it.

TENEMENT is a word of still greater extent; and though, in its vulgar acceptation, it is only applied to houses and other buildings, yet, in its original, Co. Lit. 19, 20. Wood's Inst. 114. Comyns, 265. 2. Bl. Com. 16, 17.

original, legal, and proper sense, it signifies every thing that may be *holden*, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial, ideal kind. Thus, *liberum tenementum*, 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, and other property of the like unsubstantial kind, are all of them, legally speaking, tenements.

Co. Lit. 6. 16. HEREDITAMENT is the largest and most com-  
 3. Inst. 19. 126, prehensive word of all, and signifies whatever may  
 2. Bl. Com. 16. be *inherited*, or may come to an *heir*; be it corpo-  
 Wood's Inst. real or incorporeal, real, personal, or mixed;  
 114. and although it be not holden, or do not lie in  
 tenure. Thus, an heir-loom, or implement of  
 3. Co. 2. furniture, which by custom descends to the heir  
 together with an house, is neither land nor tene-  
 ment, but a mere moveable, yet, being inheritable,  
 is comprised under the general word hereditament;  
 and so a condition, the benefit of which may de-  
 scend to a man from his ancestor, is also an here-  
 ditament. HEREDITAMENTS are either *corporeal*  
 or *incorporeal*. Corporeal are such as affect the  
 senses; such as may be seen and handled by the  
 body; all which may be comprehended under  
 the general denomination of land only. Incor-  
 poreal is a right issuing out of a thing corporate  
 Co. Ljt. 19. (whether real or personal), or concerning, or  
 annexed to, or exerciseable within the same, and  
 is not the object of sensation; can neither be seen  
 nor handled; a creation of the mind, existing  
 only in contemplation; as a rent issuing out of  
 lands or houses, or an office, annuity, tithes, and  
 the like. But we shall first enumerate the several  
 species of real property which are considered of a  
 corporeal nature, and then proceed to state those  
 of the incorporeal kind.

## I. A FEE-

1. A FEE-SIMPLE. An estate in fee-simple, *feodum simplex*, is where one hath lands or tenements to hold to him and his heirs for ever. This is property in its highest degree, for a man cannot have a greater estate; and the owner is said to be seised thereof absolutely *in dominico suo*, in his own demesne. To have a fee is to have an inheritance; and *fee-simple* implies that it is to the heirs-general, and not limited to any special line of descent. But all lands were originally holden of some superior lord; and even at this day, in contemplation of law, the absolute or *allodial* property in all lands is supposed to reside in the King; and therefore, although an estate in fee-simple is said to be a man's demesne, *dominicum*, or property, since it belongs to him and his heirs for ever, yet it is of a qualified or feudal nature, his demesne *as of fee*; that is, not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides. All other estates and interests are derived out of a fee-simple, and therefore there must be a fee-simple at last in somebody, otherwise the lands are *in abeyance*, that is, in consideration and custody of law only: as if one grants a lease for twenty-one years, or for one or two lives, the fee-simple remains vested in him and his heirs, and after the determination of these years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee-simple: but if a grant be made to *John* for life, and afterwards to the heirs of *Richard*, the inheritance is plainly neither granted to *John* nor *Richard*, nor can it vest in the heirs of *Richard* till his death; for *nemo est hares viventis*; it remains, therefore, in waiting, or abeyance, during the life of *Richard*. The word *heirs* is necessary in order to make a fee; for if land be given to a man for ever, or to him and his assigns for ever, this vests in him but an estate for life. But this rule does not extend to *devises by will*, to *fines or recoveries*, to *creations of nobility*, to grants of land to *sole corporations* and their successors, or to the case of the King; for by a devise

Wright's Ten.

147.

Co. Lit. 2.

2. Bl. Com. 104.

Wood's Inst.

116.

Glanvill, bk. 9.

c. 4.

Spelm. on

Feuds, 21.

Bacon's Hist.

of Eng. Gov.

274.

Wright's Ten.

154.

Co. Lit. f. 647.

Co. Lit. 2.

devise to a man for ever, or to one and his assigns for ever, or to one in fee-simple, the devisor hath an estate of inheritance. In fines and recoveries, the estate of inheritance passes by operation of law; in the creation of nobility, the word *heirs* is implied; and in the case of corporations, and the King, the word "*successors*" supplies the place of "*heirs*."—A fee, or estate of inheritance, is divided into *simple* or *absolute*, which we have already described, and into *conditional* and *qualified*; therefore,

Heywood on  
Elections,  
p. 47.

2. A **BASE** or *qualified fee* is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end; as a grant to *A.* and his heirs, tenants of the manor of Dale; the grant is determined when the heirs of *A.* cease to be tenants of that manor. It is a *fee*, because by possibility it may endure for ever; but *base* or *qualified*, because it may end sooner.

Heywood, p.  
47.  
2. Bl. Com. 109.

Wright's Ten.  
187.

3. A **CONDITIONAL FEE**, at Common Law, was a fee restrained to some particular heirs, in exclusion of others: as, "to the heirs of a man's body," or, "the heirs male of his body." It was a *fee*, because it might possibly endure for ever; and *conditional*, because the condition expressed or implied at its creation was, that, on failure of such particular heirs, it should revert to the donor. Under the ancient rule of conditional fees remain annuities, and such like inheritances as fall not within the statute *De Donis*. As soon as the grantee had any issue born, his estate was supposed to become *absolute*, by performance of the condition, at least so far as to enable him to alien it, to forfeit it for high-treason, and to charge it with certain incumbrances. But upon the construction of 13. *Edw.* 1. c. 1. commonly called the statute *De Donis*, the judges determined that the donor 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, 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*; and leaving in the *donee* a new kind of particular estate, which they denominated a fee-tail.

4. ESTATES-TAIL are either *general* or *special*. Heywood, 48.  
 Tail general is where lands and tenements are 2. Bl. Com. 113.  
 given to one and *the heirs of his body begotten*: Co. Lit. 18. b.  
 which is called tail-general, because, how often 2. Inst. 331.  
 soever such donee in tail be married, his issue in Wright's Ten.  
 general, by all and every such marriage, is, in 186.  
 successive order, capable of inheriting the estate- Plowd. 242.  
 tail, by the *form of the gift*. Tenant in tail-special  
 is where the gift is restrained to certain heirs of the  
 donee's body, and does not go to all of them in  
 general. And this may happen several ways; as  
 where lands and tenements are given to a man and  
 the *heirs of his body on Mary his now wife to be be-*  
*gotten*: here no issue can inherit, but such special  
 issue as is engendered between them two; not  
 such as the husband may have by another wife;  
 and therefore it is called special tail. The words of  
 inheritance, "to him and *his heirs*," give an estate  
 in fee; but they being heirs *to be by him begotten*,  
 makes it a fee-tail; and the person being limited  
 on whom such heirs shall be begotten, viz. *Mary*  
*his present wife*, makes it a fee-tail special. Estates  
 in general and special tail are farther diversified by  
 the distinction of sexes in such intails; for both  
 of them may be either in *tail-male*, or in *tail-fe-*  
*male*: as if lands be given to a man and the  
*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 in-  
 herit, nor any derived from them; nor, *à conver-*  
*so*, the heirs male in case of a gift in tail-female. Co. Lit. f. 16.  
 As the word *heirs*, or some other word of inheri- 26. to 30.  
 tance,



*tance*, is necessary to create a fee, so the word *body*, or some other word of *procreation*, is necessary to make an estate tail, and ascertain to what heirs the fee is limited; and if either the words of inheritance or procreation be omitted, it will not be an estate tail; but in last wills, estates tail may be devised by irregular modes of expression.—

Co. Lit. 21.  
2. Roll. Ab. 67.  
Plowd. 158.  
Moor, 643.

FRANK-MARRIAGE is an obsolete species of estates tail, yet still capable of subsisting in law; which is, where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frank-marriage: and in this case the word *frank-marriage* gives the donees an estate in tail-special. The incidents to a tenancy in tail, under the statute *De Donis*, are chiefly,—1. That the tenant may commit waste. 2. That the husband of a female tenant in tail may be tenant by the courtesy; and 3. That it may be barred by fine or recovery.— And these four species of estates are alone estates of *inheritance*; those which follow being *freeholds*, but not of *inheritance*.

2. Bl. Com. 120.  
Wright, 190.  
Lit. f. 56.  
Co. Lit. 41. b.  
Cro. Jac. 200.

5. ESTATES FOR LIFE 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; and where the estate is for the life of another, the tenant is called *tenant pur autre vie*. These estates 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. Such estates 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 granted 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 cases, whenever the contingency happens, the estate is determined and gone.—

The

The incidents to an estate for life are,—1. That the tenant, unless restrained by covenant, may of common right, take upon the land demised to him reasonable *estovers* or *botes*. 2. That his representatives shall have the *emblements* or profits of the crop if he dies before harvest; for as the determination of his estate is contingent and uncertain, he shall not be prejudiced thereby. 3. That the under-tenants, or lessees of tenant for life, shall have the same indulgences as their lessors; and in these cases, where tenant for life shall not have emblements, as where he forfeits for waste, or does any thing to determine the estate by his own act, the exception shall not reach his lessee. By 11. *Geo.* 1. c. 29. s. 15. the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a rateable proportion of the rent from the last day of payment to the death of such lessor.

6. ESTATES IN TAIL, AFTER POSSIBILITY OF ISSUE EXTINCT. This happens where one is tenant in special tail, and the person from whose body the issue was to spring dies without issue; or, leaving issue, that issue becomes extinct: as, where one has an estate to him and his heirs, on the body of his present wife to be begotten,<sup>1</sup> and the wife dies without issue, the man has an estate tail, which cannot possibly descend to any one; and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate. This estate must be created by the act of God, that is, by the death of the person out of whose body the issue was to spring; for no limitation, conveyance, or other human act, can make it. This estate partakes partly of an estate tail, and partly of an estate for life. The tenant is not punishable for waste, but he shall forfeit it by an alienation in fee-simple. In general, however, the law considers this estate as equivalent to an estate for life only; and, as such, will permit a tenant in tail, after possibility of

Co. Lit. 42.

3. Co. 20.

Co. Lit. 41.

2. Bl. Com. 35.

Heywood on

Elections, 48.

Co. Lit. 27. b.

Dr. &amp; St. bk. 2.

c. 1.

4. Co. 63.

1. Roll. Ab.

296.

Cro. Eliz. 671.

2. Leon. 40.

3. Leon. 241.

Cro. Jac. 688.

2. Bl. Com. 126. of issue extinct, to exchange his estate with a tenant for life.

Wright's Ten.  
393.  
Co. Lit. 29.  
Dyer, 55.  
1. Co. 97.  
6. Co. 68.

7. TENANT BY THE COURTESY OF ENGLAND is, where a man marries a woman seised of lands and tenements in fee-simple, or fee-tail, and has by her issue born alive which was capable of inheriting her estate, and survives her, he shall, on her death, hold the lands for his life; but if a woman maketh a gift in tail, reserving a rent to her and her heirs, and the donor taketh husband, and hath issue, and the donee dieth without issue, when the wife dieth, the husband shall not be tenant by the courtesy of the rent, for that the rent newly reserved is, by the act of God, determined. There are four requisites to make a tenant by the courtesy: marriage, seisin of the wife, issue, and death of the wife. 1. The marriage must be canonical and legal. 2. The seisin of the wife must be an actual seisin or possession of the lands; and therefore, a man cannot be a tenant by the courtesy of a remainder or reversion: so, if the wife be an idiot, the King by his prerogative is entitled to the lands the instant she herself has any title. 3. The issue must be born alive, and during the life of the mother; so that if the mother dies in labour, and the Cæsarian operation is performed, the husband loses the estate, because at the instant of the mother's death he had no issue born; and the land descended to the child in the mother's womb, and being so vested, shall not be taken from him: if the issue was born during coverture, and capable of inheriting the mother's estate, it is immaterial at what time it was born; for in all possible circumstances, the husband shall be tenant by the courtesy.

Co. Lit. 30.  
6. Co. 57.  
Dyer, 21.

This estate is of a superior degree to a mere tenancy for life, and the husband may, even in the life-time of the wife, after the birth of issue, do many acts to charge the lands, although he is only tenant by the courtesy *initiate* till the death of the wife, wherein his estate is *consummate*: thus, if  
after

after issue born, the husband makes a feoffment in fee, and afterwards the wife dieth, the feoffee shall hold for the life of the husband; for it could not be a forfeiture; for at the time of feoffment, the estate was a tenancy by the courtesy initiate. If a man, intitled to be tenant by the courtesy, make a feoffment in fee upon condition, and entereth for the condition broken, and then his wife dieth, he shall not be tenant by the courtesy; because, although the estate given by the feoffment was conditional, yet his title to be tenant by the courtesy was extinguished by the feoffment, for the condition was not annexed to it.

8. TENANT IN DOWER is, where the husband dies seised of an estate in fee, or fee-tail, and the wife survives, and takes as her dower the third part of all the lands and tenements whereof he was seised during coverture, for the term of her natural life. And this third part is to be valued according to the value of the estate at the time of the assignment of the dower, whether the premises be improved or impaired since they came into the hands of the heir.

Dower by the Common Law, is the only species of dower now in use (a): and two points are material to consider:—1. Who may be endowed. 2. Of what. As to the first then, she must be the actual wife of the deceased, at the time of his death. A divorce *à vinculo matrimonii* destroys the dower, but not one *à mensâ et thoro*; but by the statute of *Westminster* the 2d, if a woman elopes from her husband, and lives with an adulterer, she loses her dower, unless her husband is voluntarily reconciled to her. The widows of traitors (except in case of certain modern treasons relating to the coin), but not of felons, are barred of their dower. And an alien, unless she is the queen consort, cannot be endowed, for an alien is incapable of holding lands; and, for that reason, the widow of an alien cannot claim dower of his lands, for he could legally possess none. As

Heywood on  
Elections,  
p. 51.  
Co. Lit. 31 to  
41.

(a) Dower  
"ad ostium  
"ecclesie,"  
and "ex assen-  
"su patris,"  
may now  
exist; but are  
totally disused.

Co. Lit. p. 31.

to the 2d, *Of what*: In general the widow may be endowed of all lands and tenements of which her husband was seised in fee-simple, or fee-tail, at any time during coverture, and of which any of her issue might by possibility have been heir; and a seisin *in law* of the husband will be as effectual as a seisin *in deed*, to entitle the wife to her dower. But of every seisin in law, or actual seisin of lands and tenements of the husband, a woman shall not be endowed; for if the grandfather of *A.* is seised of three acres of land in fee, and taketh wife, and dieth, this land descendeth to the father of *A.* and the widow is entitled to her dower, or one acre. The father dieth, and so doth the wife of the grandfather; the wife of the father shall be endowed only of the two remaining acres, for the dower of the grandmother is paramount the title of the wife of the father, and the seisin of the father, which descended, is defeated, and he had but a reversion expectant on a freehold; and, in this case, *dos de doto peti non debet*. But there is a great diversity here between a descent and a purchase; for, if the father had taken the estate by purchase, the wife of the father would have been endowed also of the part assigned to the grandmother. So, if the wife of the father is first endowed by the son, who enters after the death of his father and grandfather, the wife of the grandfather shall not be endowed of the dower of the wife of the father. In some cases, also, the husband may be seised in fee; yet, after his death, the wife shall not be endowed, as both of land given, and land taken in exchange, but she may have her election to be endowed of which she will. And where there are two joint-tenants in fee, if one maketh a feoffment in fee, yet his wife shall not be endowed. The seisin of the husband for a transitory moment only, when the same act which gives him the estate conveys it out of him again (as where, by a fine, land is granted to a man, and granted back again by the same fine), will not entitle to dower, for the land was merely

*in transitu*, and never rested in him; but if it had rested in him for a single moment, she would be endowed of it. If the husband make a lease for life of lands, reserving rent to him and his heirs, and he taketh wife, and dieth, the wife shall not be endowed of the reversion, because he was not seised of it during coverture; nor of the rent, because he had but a particular estate therein, and no fee-simple; but if the husband maketh a gift in tail, reserving a rent to him and to his heirs, and after taketh wife, and dieth, she shall be endowed of this rent, because it is a rent in fee, and by possibility may continue for ever. Co. Lit. p. 32.

In general, a wife may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, although the husband aliens the lands during the coverture, for he aliens them subject to his wife's dower; but there are a few exceptions to this rule, for she shall not be endowed of a castle built for the public defence of the realm; nor of a common without stint, though she may of a common certain; nor of copyhold estates, unless by custom;—but she may of the principal mansion, unless it be a castle built for defence of the realm, or *caput comitatus sive baronis*. She shall be endowed of rent-service, rent-charge, and rent-seck; but of an annuity that charges only the persons, she shall not, nor shall she if the freehold of the rents, common, &c. were suspended before the coverture, and continue so during the coverture; but if, after coverture, the husband do extinguish them, as by release, she shall be endowed of them. Co. Lit. p. 31. b.

Moreover, a woman shall not have dower of an estate wherein her husband had not the legal, but only an equitable interest, nor of lands whereof she has levied a fine, or suffered a recovery during coverture. Ib. p. 32.

By *Mag. Charta*, c. 7. the widow may remain in the chief house of her husband for forty days after his death, within which time her dower shall be assigned to her; but if that house be a castle, and Pigot of Recoveries, p. 66.

if she shall leave the castle, a house competent for her shall be immediately provided for her, in which she may dwell till her dower is so assigned. These forty days are called the widow's quarantine, and the lands to be held in dower must be assigned by the heir of the husband, or his guardian, to entitle the lord to demand his services of the heir for the lands so holden. If her dower is not assigned fairly, and within the forty days, she has her remedy by writ of dower; and after judgment, the sheriff, by a writ of execution, will be commanded to assign it. If the thing of which she is endowed is divisible, her dower must be set out by metes and bounds; if indivisible, she must be endowed specially, as of the third presentation to a church; the third toll-dish of a mill; the third part of the profits of an office, of stallage, or a fair; the third part of a dove-house or a fishery; and the surest way of taking dower of tithes is by every third sheaf, &c.

A woman loses her dower if she detains the title-deeds or evidences of the estate from the heir, until she restores them; and by the statute of *Gloucester*, if she aliens the land assigned her, she forfeits it *ipso facto*, and the heir may recover it.

Wood's Inst.  
123.  
Co. Lit. 36.  
4. Co. 2.  
2. Bl. Com.  
137. 180.

9. A JOINTURE is a competent livelihood of freehold lands or tenements for the wife, to take effect presently, in possession or profit, after the natural death of the husband, for the life of that wife at least, if she herself is not the cause of the determination or forfeiture of it; as where the estate is settled *durante viduitate*, and she marries. This description is framed from the purview of the statute 27. *Hen.* 8. c. 10. commonly called the Statute of Uses, which enacts, "that when an  
" estate is made in possession or use to husband  
" and wife and his heirs, or to the heirs of  
" their two bodies, or of one of their bodies, or  
" to them for their lives, or for the wife's life for  
" her JOINTURE, she shall not have DOWER."  
To effect, however, a perfect jointure within this  
statute.

statute, so as to bar a wife of her claim of dower; six requisites must be punctually observed:—1. The jointure must be made to take effect for her life, in possession or profit, immediately on the death of her husband. 2dly, It must be for the term of her own life, or of some greater estate, and not for years, or *pur autre vie*. 3dly, It must be made to herself, and no other in trust for her. 4thly, It must be made in satisfaction of her whole dower, and not of a part of it. 5thly, It must be expressed in the deed or instrument to be in satisfaction of dower. 6thly, It must be made either before or after marriage; but if it be made before marriage, the wife cannot waive it and claim her dower at the Common Law, as she may do when it is made after marriage.—This statute does not extend to copyholds, because dowers of copyholds are warranted by special custom; but if the wife hath a compensation for it, it shall in equity be deemed a satisfaction for her *freebench* in Wood's Inst. copyhold lands, which is in the nature of a customary dower. There are some advantages attending tenants in dower, that do not extend to jointresses; and so, *vice versa*, jointresses are in some respects more privileged than tenants in dower. Tenant in dower, by the old Common Law, is subject to no tolls or taxes; nor can the King distrain on her estate for his debt, if it be contracted during the coverture. Co. Lit. 31. But on the other hand, a widow may enter without any formal process on her jointure land; as she also might have done on dower *ad ostium ecclesie*; whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower. Co. Lit. 36. Dower is forfeited by the treason of the husband; but lands settled in jointure remain unimpeached to the widow. Co. Lit. 37. —And this brings us to consider those estates that are *less than freehold*, which are estates for years, at will, and by sufferance.



Wood's Inst.  
126.  
Lit. f. 57, 58.  
67.  
Co. Lit. 46.

1 Bl. Com. 143.

6. Rep. 35.

Co. Lit. 46.

Ibid. 45.

Ibid.

10. AN ESTATE FOR YEARS is a contract for the possession of lands or tenements for some determined period; as where a man lets them to another for the term of a certain number of years, agreed upon between the lessor and lessee, and the lessee enters thereon. A tenant for half a year, or a quarter of a year, is considered as a tenant for years; for a year is the shortest time which the law in this case will take notice of. 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; for every such estate must have a certain beginning and certain end. But *id certum est, quod certum reddi potest*: therefore if a man make a lease to another for so many years as *J. S.* shall name, it is a good lease for years; for though it is at present uncertain, yet when *J. S.* hath named the years, it is then reduced to a certainty. 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 *J. S.* 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. And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if *J. S.* 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 death of *J. S.* or his ceasing to be parson there.

We have before remarked, and endeavoured to assign the reason of, the inferiority in which the Law places an estate for years, when compared with an estate for life, or an inheritance: observing, that an estate for life, even if it be *pur autre vie*, is a freehold; but that an estate for a thousand

land years is only a chattel, and reckoned part of the personal estate. 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 *Titius* to hold from Michaelmas next for twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. 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 to a lease for years, such lessee is not said to be *seised*, or to have true legal seisin of the lands. Nor indeed does 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*, or *interesse termini*: but when he has actually so 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 hath the freehold. Thus the word *term* does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease: and therefore the *term* may expire during the continuance of the *time*; as by surrender, forfeiture, and the like. For which reason, if I grant a lease to *A.* for the term of three years, and after the expiration of the said term, to *B.* for six years, and *A.* surrenders or forfeits his lease at the end of one year, *B.*'s interest shall immediately take effect: but if the remainder had been to *B.* from and after the expiration of the said three years, or from and after the expiration of the said time, in this case *B.*'s interest will not commence till the time is fully elapsed, whatever may become of *A.*'s term.

Co. Lit. 46.

5. Rep. 94.

Co. Lit. 46.

Ibid. 45.

Tenant for term of years hath incident to, and inseparable from his estate, unless by

2. Bl. Com. 35.  
122.  
Co. Lit. 45. special agreement, the same estovers which the tenant for life was entitled to; that is to say, house-bote, fire-bote, plough-bote, and hay-bote.

With regard to emblements, or profits of land 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, 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. 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 emblements in the same manner that a tenant for life or his executors shall be intitled thereto. Not so, if it determined by the act of the party himself; as if tenant for years does any thing that amounts to a forfeiture: in which case the emblements shall go to the lessor, and not to the lessee, who hath determined his estate by his own default.

Co. Lit. 55.  
2. Bl. Com. 125.  
Wood's Inst.  
131. II. AN ESTATE AT WILL is, where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant, by force of this letting, obtains possession. Every estate at will must be at the will of both parties, though one party be only named; so that either of them may determine his will, and quit his connection with the other at his own pleasure. But if tenant at will sow the land, and the landlord before the corn is ripe, or when it is ripe, put him out, the tenant, notwithstanding, shall

shall have the corn, and shall have free egress and regress to cut and carry it away, and shall not be forced to bring his action for this, because he knew not at what time the landlord would enter upon him; and so it is if he sets or sows any other annual profit. But if the tenant plant trees, or sow the ground with acorns, there the landlord may put him out, because they will yield no annual present profit. But if the tenant himself determines the will, the landlord shall have the profits of the land. If a tenant at will commits voluntary waste, it amounts to a determination of the will; or if he holds the estate longer than he hath a right to do, it is a determination: so, also, the exertion of any act of ownership by the landlord, as by entering on the premises, cutting down timber, taking and impounding a distress thereon, or making a lease for years to commence immediately, and by a declaration that the lessee shall no longer hold, which must either be made upon the land, or notice must be given to the lessee. If rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half-year; and indeed, tenancies at will are now, in general, considered as estates from year to year, in which the law will not suffer either party to determine the tenancy, even at the end of the year, without reasonable notice to the other.

Co. Lit. 56.  
1. Vent. 248.

12. AN ESTATE AT SUFFERANCE is, where one comes on an estate, or enters by a lawful lease, and keepeth his possession after his lease is expired, and so holdeth over by wrong; as a tenant for term of years holding over his term; or if a man maketh a lease at will, and the lessee continues possession after the death of the lessor, for by his death the estate at will is determined. By 6. Ann. c. 18. guardians or trustees for infants, or persons seized in right of their wives, and every other person having any estate determinable upon life

Wood's Inst.  
127.  
Co. Lit. 57.  
1. Bl. Com. 150.  
1. Burr. 6c.  
Cro. Car. 302.

or

or lives, who after the determination of such particu-  
 larestate, hold over without the exprefs consent of the  
 person next intitled, his executors and administra-  
 tors, may recover against such person holding over  
 the value of the profits received. And by 4. *Geo. 2.*  
 c. 28. all such persons so holding over, after de-  
 mand and notice in writing to quit possession, shall  
 pay double the yearly value for the time they  
 shall hold over.—But no man can be tenant for  
 sufferance against the King.

See 8. Ann.  
 c. 14. as to  
 distresses for  
 rent.  
 Co. Lit. 57.

Having considered real property of a *cor-  
 poreal* nature, we shall now proceed to enume-  
 rate those hereditaments which are of an *incorpo-  
 real* kind. This species of property, as we have  
 already mentioned, consists of ten sorts.

Burn's E. L.  
 5.

2. Bl. Com. 21.

Co. Lit. 122.  
 10. Co. 63.  
 Hob. 323.

1. AN ADVOWSON is the right of presenting a  
 clerk to the bishop as often as a church becomes  
 vacant, and is synonymous with patronage; and  
 therefore he who has the right of advowson is  
 called the patron of the church. There may be  
 an advowson of the *moiety of the church*, and of a  
*moiety of the advowson*. The first is, where there are  
 several patrons, and two several incumbents of one  
 church, the one of the one moiety, and the other  
 of the other moiety of the church. The second  
 is, where two must join in the presentation, and  
 where there is but one incumbent; as where there  
 are two coparceners; for although they agree to  
 present *by turns*, yet each of them hath but the  
 moiety of the church. Advowsons, also, are  
 divided into *advowsons appendant*, and *advowsons in  
 gross*. The first is the right of presentation de-  
 pendent upon a manor, lands, or tenements, and  
 does not pass in a grant of the manor as incident  
 thereto. The second is a right subsisting by itself,  
 belonging to a *person*, and not to a *manor, lands,  
 &c.* So that when an advowson appendant is  
 severed by legal conveyance from the corporeal  
 inheritance to which it was appendant, it becomes  
 an advowson *in gross*, or at large, and can never  
 be

be appendant any more. 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 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 does by the one act of collation, or conferring the benefice, the whole act that is done in common cases, both by presentation and institution. An advowson donative is, where the King, or other patron, does, by a single donation in writing, put the clerk into possession, without presentation, institution, or induction; but if the patron once waives this privilege of donation, and presents to the bishop, and his clerk is admitted and instituted, the advowson is for ever after presentative.

Co. Lit. 119.

7. Co. 26.

Co. Lit. 344.

Cro. Jac. 63.

2. TITHES are a species of corporeal hereditament, consisting of the tenth part of the increase yearly arising from the profits of land, stock upon land, and the industry of the parishioners, payable, for the maintenance of a parish priest, by every one that hath things tithable, except he can shew a special exemption. They are an ecclesiastical inheritance, collateral to the state of the land, not issuing out of it, but distinct from it; and therefore not extinguished by unity of possession only. Tithes are of three kinds:—1. *Predial*, or those that immediately arise from the land, either by manurance or its own nature, as grain of all sorts, hay, wood, fruit, herbs, &c.—2. *Mixed*, as of wool, milk, pigs, consisting of natural products, but nurtured and preserved, in part, by the care of man; and of these the tenth must be paid in gross.—3. *Personal*, such as arise from the labour and industry of man, as occupations, trade, fisheries, &c. being a tenth part of the clear gains. Tithes, with regard to their value, are also divided into *great* and *small*. Great tithes

Wood's Inst.

157.

3. Burn. E. L.

2. Co. 40.

11. Co. 13.

1. Ro. Ab. 656.

tithes are, corn, hay, and wood. Small tithes are, all other predial tithes, except corn, hay, and wood, as also those tithes which are personal and mixed. These small tithes sometimes, in the endowments of vicars, are comprehended under the word *altargium*, as well as the profits that arise from the altar. Custom will make wood and hay a small tithe, in the endowment of a vicarage; and the *quantity* will turn a small tithe into a great one, if the parish is generally sown with it. Some things, also, may be great or small, in regard to the place; as hops, in *gardens*, are small tithes, but in *fields* they may be great tithes (a):

1. Ro. Ab. 643.  
Cro. Car. 467.

3. Burn's E. L. 375.

(a) *Sed Quære* if this notion is not now exploded?

3. Lev. 365.  
Bunb. 19. 169.

Hob. 296.  
2. Inst. 642.

2. Brown's Cas. in Chan. 161.

All tithes are due of common right to the parson or rector of the parish where they arise; but by endowment or prescription they may become due to the vicar; and the parson of one parish may prescribe to have a portion of the tithes, separately and divided, in the parish of another. But no *layman* is at this day capable of tithes, or a portion of tithes, except under the statute for dissolving religious houses, or from a grant made by the parson, patron, and ordinary, previous to the disabling statutes. Laymen, therefore, can only be exempted from the payment of tithes, either by a *real composition*, or by *custom*, or *prescription*. A real composition is an agreement made between the owner of the lands and the parson or vicar, with the consent of the ordinary or patron, that such lands shall for the future be discharged from payment of tithes, by reason of some land or other real recompence given to the parson in lieu and satisfaction thereof; but by 13. *Eliz. c. 10.* no real composition is good for any longer term than three lives, or twenty-one years. A custom or prescription is, where *time out of mind* such persons, or such lands, have been either partially or totally discharged from the payment of tithes; and is called a custom or prescription, either *de modo decimandi*, or *de non decimando*. A *modus decimandi* is where there is, by custom, a particular manner of tithing allowed, different from the general

general law of taking tithes in kind; as two-pence an acre for the tithe of land, or a couple of fowls in lieu of tithe eggs. This *modus* is supposed to be the full value of the tithe at the time of the original composition. And if it does not now come up to the value, it is to be intended, that the tithes are either improved; or else, that money is become of less value than it was at the time of the *modus* agreed on; which occasions the present inequality.

A *layman*, lord of a manor, may prescribe *de modo decimandi* for himself and copyholders; or copyholder may prescribe in the name of his lord; or a parish or hamlet for this or that sort of tithe, as to be quit of wood or hay, &c. or a *private* person for his own lands, or part thereof, paying a pension or rate-tithe in money, or so much yearly to the parson in lieu of the tithes. But to make a good prescription, the *modus* must be,

1. For the benefit and advantage of the parson, not for the benefit of another only.
2. One tithe must not be in consideration of another, as tithe of cows for tithe of oxen, &c.
3. It must be something different from the thing that is due. Therefore it is a void prescription, to pay a load of hay yearly in discharge of all tithe-hay; for that is to pay a part in discharge of the whole. But this holds only where tithes are payable of common right, not by custom only. For less than a tenth part of fish taken in the sea, and due by custom only, may be a good recompence.
4. It must be something as *certain* and *durable* as the tithe, tho' it may not be so valuable.

But a *modus*, tho' founded upon a good consideration, may be several ways discharged, and tithes may then become due in kind. As, 1. Where the land is converted to other uses, or the thing altered or destroyed, for which the *modus* was paid. So a prescription for a *modus* for hay or grass specially, in so many acres of land, is gone, if the land is converted into a hop-garden, or into tillage, so long as it continues a hop-garden or tillage.

13. Co. 152.  
Hob. 40, 41.

2. Co. 47.  
Cro. Car. 784.

Cro. Car. 587.

1. Roll. Abr.  
649, 650.  
Cro. Car. 276.  
1. Ro. Ab. 651.  
Cro. Car. 446.  
475, 786.

1. Lev. 179.

Cro. Car. 139.  
Hob. 40.

2. Danv. Abr.  
Tit. Difines,  
607, 608.



tillage; but when laid for hay or grass again, it shall revive. So where a park is disparked, and the lands are converted to tillage, &c. if the *modus* was general for the park; but it is otherwise if the *modus* is for the tithe of so many acres of land contained in the park; or if a *modus*, or certain sum of money, is for all the tithes of such a park, the *modus* shall stand, tho' the park is disparked; because the prescription is in the *soil* and not in the *park*, which is a franchise, and a thing incorporate and imaginary. Thus, by alteration of a fulling-mill into a corn-mill, the *modus* for the fulling-mill is gone, and tithes for the corn-mill must be paid in kind: but if the land is discharged by a *modus*, and the owner builds a corn-mill on the same, he shall not pay tithe for the mill. 2. By non-payment of the consideration, or by payment of tithes in kind for so long time, that the prescription for a *modus* cannot be proved. But a short interruption shall not destroy it. A payment of different sums is evidence that there is no *modus*. A *PRESCRIPTION de non decimando* is a claim to be entirely discharged of tithes, and to pay no compensation in lieu of them. Thus, the King by his prerogative is discharged from all tithes. So a vicar shall pay no tithes to the rector, nor the rector to the vicar, for *ecclesia decimas non solvit ecclesie*. But these *personal* privileges (not arising from or being annexed to the land) are personally confined to both the King and the clergy; for their tenant or lessee shall pay tithes, though in their own occupation their lands are not generally titheable. And, generally speaking, it is an established rule, that, in *lay* hands, *modus de non decimando non valet*. But spiritual persons or corporations, as monasteries, abbots, bishops, and the like, were always capable of having their lands totally discharged of tithes by various ways: as,—1. By real composition. 2. By the Pope's bull of exemption. 3. By unity of possession; as when the rectory of a parish, and lands in the same parish, both belong to a religious house, those lands were dis-

2. Inf. 490.

1. Roll. 932.  
Hob. 43.

Cro. Eliz. 511.

Ibid. 479.

Cro. Eliz. 479.

511.

Sav. 3.

Moore, 910.

Ibid. 511.

Hob. 309.

Cro. Jac. 308.

discharged of tithes by this unity of possession. 4. By prescription; having never been liable to tithes, by being always in spiritual hands. 5. By virtue of their order; as the Knights Templars, Cistercians, and others, whose lands were privileged by the Pope with a discharge of tithes: though upon the dissolution of abbeys by *Henry VIII.* most of these exemptions from tithes would have fallen with them, and the lands become tithable again, had they not been supported and upheld by the statute 31. *Hen. 8. c. 13.* which enacts, that all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of tithes, in as large and ample a manner as the abbeys themselves formerly held them. And from this original have sprung all the lands, which, being in lay hands, do at present claim to be tithe-free: for if a man can shew his lands to have been such abbey lands, and also immemorially discharged of tithes by any of the means before-mentioned, this is now a good prescription *de non decimando*. But he must shew both these requisites; for abbey lands, without a special ground of discharge, are not discharged of course; neither will any prescription *de non decimando* avail in total discharge of tithes, unless it relates to such abbey lands.

What things are titheable, and what not, and the manner of paying tithes where due, will best appear from the following table:

## A.

**ACORNS**, *Mast*, or *Pannage*, if severed and fold, pay tithe; not if they drop, and the hogs eat them. But if severed and given to swine, then the tenth of the value thereof is due.

*After-math* or *second mowth* pays no tithe, unless by custom.

*After-*

2. Rep. 44.  
Seld. T. h.  
c. 13. f. 2.

2. Inst. 643.  
11. Co. 49.  
Hetley, 27.

2. Inst. 652.  
2. Dan. Abr.  
589.

2. Inst. 621.  
652. *After-pasture* pays only by custom: for it is the remains of the grass before tithed.
2. Danv. Abr.  
600, 601.  
Cont. F. N. B.  
53. *Agistment* (from *giser*, *jacere* to lay) is a feeding of cattle upon pasture lands, which pay no other tithe that year; where the cattle are either taken in for hire, or not fed for plough or pail, or otherwise profitable to the parson by the tithe of their milk, wool, or labour. If the ground is let to a stranger, the tenth part of the money received is payable: otherwise respect ought to be had to the *number* of the *cattle*, and *time* of their depasturing in that *land*. If the owner eats it all up with unprofitable *cattle*, the tenth part of the value of the land is payable. But often *custom* or *prescription* directs the payment. If they are *guest* cattle (or taken in for hire) suit may be commenced either against the occupier of the *land*, or the owner of the *cattle*; but regularly against the occupier of the *land*.
2. Danv. Abr.  
614. *Agreement* for tithes by the parson with a parilhioner, is good for his time only.
- Cro. Jac. 199. *Alders* pay tithes, though above twenty years growth.
2. Inst. 643. *Ash* is timber, and therefore, if above twenty years growth, is free from tithe.
- Ibid. *Asp trees* are exempted if above twenty years growth, in places where they are used for timber,

## B.

11. Co. 49.  
2. Inst. 643. *Bark*, *Root*, and *Germins* (of what age soever), which grow upon the ancient stock, are not titheable, if the tree was timber.
2. Inst. 655,  
656.  
Cro. Car. 475. *Barren-land*, *beath*, or *waste ground*, which is so of its own nature (not by accident, or ill-husbandry), is not titheable. But when made good by husbandry, tithes shall not be paid for the first seven years, by the 2. & 3. *Edw.* 6. c. 13.
2. Danv. Abr.  
Tit. Dimes,  
589. *Beech* is titheable, but when used for timber it is exempted by the statute of *Sylva Cædua*, viz. 45. *Edw.* 3. c. 3,

Bees,

*Bees* are titheable for their honey and wax by the Cro. Car. 404. tenth measure, not by the tenth swarm.

*Birch* is titheable, tho' of twenty years growth, because it is not proper for building. 2. Inst. 643.  
3. Bur. 1310.

*Brick* is not titheable; for it is of the substance of the earth, and not an annual increase. 2. Inst. 651.

*Broom* shall pay tithe. But if burned in the owner's house, or kept for husbandry within the parish, it may be discharged. It may also be discharged by custom. 2. Danv. Ab. 597.  
Cro. Eliz. 609.

## C.

*Calves* are titheable; and the tenth is to be taken away when it is weaned, and can live on such food as the dam doth. Raym. 277.

*Cattle* feeding upon wastes and commons, where the bounds of the parish are not known, pay tithe to the parson where the owner of the cattle dwells, by the 2. & 3. Edw. 6. c. 13. s. 3. If they be kept for the plough or pail, they pay no tithe for their feeding. 1. Roll. Abr. 646, 647.

*Chalk* or *Chalk-pits*, *Clay*, and *Coal*, being part of the freehold, and not reserving annually, pay no tithe. 2. Inst. 651.

*Cheese* is only titheable where tithe is not paid of the milk, and is due only by custom. Cro. Eliz. 609.

*Cherry-trees* used for timber in the county are discharged, otherwise not. 1. Ro. Ab. 651.  
2. Roll. 83.

*Chickens* are not titheable where tithe eggs are paid. 1. Ro. Ab. 641.

*Colts* are titheable in the same manner as calves.

*Conies* are titheable only, by custom, for those that are sold, but not for those spent in the house. 2. Danv. Abr. Tit. Distnes, 583.

*Corn* is titheable; and the parishioners of common right ought to cut it down, prepare it, and bind it up into sheaves. 1. Ro. Ab. 644.  
1. Sid. 283.  
Freem. 335.

*Cows* pay no tithe for their pasturage if they yield milk. 3. Com. Dig. 98.  
Cro. Eliz. 446.

## T

*Deer*

## D.

2. Co. 43. *Deer* are not titheable except by custom, because they are *feræ naturæ*.  
 2. Inst. 651.  
 2. Inst. 643. *Dotards*, or old decayed trees, having been once privileged as *Sylva Cædua*, shall not pay tithes, tho' cut down for fire.  
 1. Ventr. 5. *Doves* kept in a dove-house are titheable, if spent in the house; but they are not titheable of common right.

## E.

1. Ro. Ab. 642. *Eggs* are titheable when tithe is not paid for chickens, or when the young are not paid in kind.  
 2. Inst. 643. *Elm*, being timber, is discharged by the statute of  
 12. Mod. 524. *Sylva Cædua*; but not if under twenty years growth.  
 Plow. 470.  
 Hob. 219. Cro. Jac. 199. Cro. Eliz. 155. 3. Burr. 1310. 5. Bac. Abr. 60.  
 3. Com. Dig. 94.

## F.

1. Ro. Ab. 642. *Fallow Ground* is not titheable, because it improves the land by lying fresh. But if it be kept fallow beyond the course of husbandry, to the prejudice of the parson, the parson ought to have tithes of the land.  
 2. Inst. 652. *Fern* is not titheable.  
*Fens*, being drained, are not privileged as barren land, by the 2. & 3. Edw. 6. c. 13.  
 2. Danv. Abr. *Fish* taken in the sea are titheable by custom in  
 Tit. Dimes, money, after costs deducted; because a personal  
 583, 584. tithe. Fish in ponds and rivers enclosed (not  
 Cro. Car. 339. common rivers), ought to be set forth as a predial  
 1. Lev. 179. tithe in kind. Fish in common rivers are titheable  
 1. Sid. 278. only by custom.  
 Noy 108.  
 1. Roll. Abr. 636. 5. Bac. Abr. 63. 3. Com. Dig. 101.  
 Hutton, 78. *Flax* is a small tithe, tho' sown in large fields;  
 3. Lev. 365. and every acre of hemp or flax sown, shall pay  
 Carth 264. yearly five shillings for tithe, and no more; and so  
 3. Com Dig. 93. proportionably for more or less ground, according to the 11. & 12. W. 3. c. 16.

Forest

*A Forest*, tho' in a parish, shall pay no tithes while in the hands of the King. But a forest within a parish, in the hands of a subject, shall pay tithes. And if a forest be disafforested, and within a parish, it shall pay tithes.

*Fowls*, as hens, geese, ducks, are titheable either in eggs or the young, according to custom, but not in both.

*Fruit*, as apples, pears, plums, cherries, &c. is due in kind when gathered; and if sold on the trees, the vendee shall pay the tithe.

*Fruit-trees* cut down and sold, pay no tithe if they have paid tithe-fruit that year, before they were cut down and sold.

*Fuel*, if spent in the parishioner's house, is not titheable.

*Furzes*, if sold, pay tithe. But if used for fuel in the house, or to make pens for sheep by the husbandman, they shall not pay tithe.

## G.

*Gardens* are titheable as other lands, and therefore tithe in kind is due for all herbs and plants, as *parsley, sage, cabbage, turneps, saffron, woad, &c.* But money is usually paid by custom or agreement.

*Grain*, as *wheat, barley, beans, &c.* sowed, is titheable according to the custom of the place; and is commonly tithed by the tenth shock, sheaf, or cock, where the custom of the place is not otherwise.

*Grass* mowed is titheable by payment of the tenth cock. But the manner of tithing is governed by custom.

*Gravel*, being of the substance of the earth, and not annually increasing, yields no tithe.

## H.

*Hazel, holly, willow, maple, white-thorn, &c.* regularly, are titheable, tho' of twenty years growth; unless

1. Ro. Ab. 655.

3. Cro. 94.

1. Roll. Abr.

462.

3. Com. Dig.

99.

Dr. &amp; Stud.

Dial. 2. c. 55.

2. Inst. 521.

Bunb. 183.

2. Inst. 652.

3. Com. Dig.

92.

Godb. 44.

Cro. Car. 28.

Hutton 77.

Palm. 220.

3. Car. Dig.

93.

Cro. Car. 393.

1. Roll. Abr.

644, 655.

2. Inst. 651.

2. Danv. Abr.

Tit. Difines,

589.

unless they are used for building by the custom of the country.

1. Roll. Abr. 643. 647. Carth 264. Cro. Jac. 47. 116. Moor, 683. 2. Mod. 117. Cro. Car. 403. Cro. Eliz. 660. Hob. 250. Stra. 245. 2. Inst 652. 3. Com Dig. 94. Ld. Ray. 243.

*Hay* is titheable by the payment of the tenth cock; and, if the custom be not otherwise, the parishioner shall make the grafs cocks into hay for the parson's tithe. But if the parishioner be not obliged to make the tithe into hay, he may leave it in grafs cocks or swaths, as the custom is, and the parson must make his grafs into hay; and he may do it on the lands in which it grew, and go over the land of the parishioner in *the way* to make it. And if meadow ground be so rich, that there are two crops of hay in one year, the parson shall have tithe of both. Tithe also shall be paid of hay made of grafs growing in orchards.

2. Inst. 652. 1. Ro. Ab. 646.

*Headlands* are not titheable, if only large enough for turning the plough; but of larger *Headlands* tithe is payable.

*Hearth-penny*, or *Smoke-penny*, seems to be a payment for wood burned in the house.

Dougl. 303.

*Herbage* is titheable for barren cattle kept for sale, which yield no profit to the parson.

2. Inst. 652.

*Herbage* of ground, whereon corn has grown the same year, and whereof tithe has been paid the same year, is not titheable.

1. Ro. Ab. 644. 1. Sid. 283. 443.

*Hops* pay tithe by the poll or measure; and the tenth may be set out after they are picked, and before they are dried. But the hop-poles are not titheable. There can be no *modus* for hops, because lately come into *England*.

11. Co. 16. 2. Inst 659, 660. Hob. 10. 1. Ro. Ab. 636. Cro. Eliz. 276. 3. Com. Dig. 102. Bunb. 102.

*Houses* do not pay tithes of common right. But a *modus* may be paid for houses, in lieu of the tithe of the land upon which the houses are built, and may be sued for in the ecclesiastical court. A great many cities and boroughs have a custom to pay a *modus* for their houses.

## K.

Bunb. 137. *Kids* are titheable as *Calves*.

Cro. Car. 403.

Cod. Ju. Eccl. 692. Cro. Eliz. 702. Bb. 133, 198. Moor 910. 3. Com. Dig. 98.

*Lamb*

## L.

*Lamb* is titheable in the same manner as *Calves*.  
 If they be payable at a certain day, and the parishioner fell all his *lambs* before the day, to deceive the parson, it is fraud, and he shall pay the value. If they be yeaned in another parish, and do not tarry there thirty days or more, no tithe is due for them to the parson of that place. A custom to pay a halfpenny for every *lamb* under seven; and if there be seven, then the parson to have the seventh *lamb*, paying three halfpence, &c. is good.

1. Ro. Ab. 652.  
 Bunb. 139.  
 3. Com. Dig. 97.  
 Lyndwood, cap. Quoniam propter.  
 3. Cro. 403.

*Lead* is only payable by custom; for it is of the substance of the earth.

2. Inst. 651.

*Lime* titheable only by custom, as lead.

*Loppings* are titheable, except of timber trees, the branches being then privileged with the body, according to the statute of *Sylva Cædua*. If the trees were usually lopped, the age of the loppings is not material; and although they were cut before within twenty years, yet they still continue privileged.

Dr. & Stud. Dial. 2. c. 55.  
 11. Rep. 48.  
 2. Inst. 643.  
 Cro. Eliz. 477.  
 478.

## M.

*Madder* pays a tithe of 5s. an acre, by 31. Geo. 2. c. 23.

*Milk* is titheable, when tithe is not paid of cheese, all the year, unless custom over-rules. And it is to be paid to the parson of that parish, for that time, where the cows feed, at every tenth meal, not by the tenth part of every meal, by reason of the trouble that would arise in collecting such small parcels. It must be brought to the house of the parson or vicar, unless there is a custom to bring it to the church-porch, &c. in which particular this tithe differs from all others, which must be fetched by the receiver.

2. Danv. Ab. Tit. Dimes, 596.  
 Cro. Eliz. 609.  
 2. Brownl. 31.  
 Bunb. 20.  
 3. Com. Dig. 99.

*Mills* are of two sorts, *corn-mills*, or *mills* for other uses, as *paper-mills*, *fulling-mills*, *iron-mills*, &c. *Corn-mills*, driven by wind or water, pay the

2. Danv. 590.  
 Bunb. 73.  
 2. Inst. 621.  
 1. Roll. Abr. 656.

2. Ro. Rep. 84. Shower, 281. 4. Mod. 45. Cro. Jac. 523. 429. 3. Atk. 17.



2. Inst. 621.

tenth toll dish to the parson of the parish where the mill stands. *Other* mills pay no tithe, unless by custom. All *corn-mills* not erected before the 9. *Edw.* 2. c. 5. are titheable. But if it can be proved that the mill was erected before the memory of man, and that it never paid tithe, the law will presume it to be such an *ancient mill* as is within that statute. But it is said that the tenth toll dish is no where paid, and that it is only a personal tithe, and must be paid, with deduction of costs, where the miller dwells and hears divine service: for a miller is of an art and faculty.—If one pay tithe for his corn, and after grinds the same at a mill in the same parish, no tithe is payable for the meal.

F. N. B. 53.

2. Inst. 651.

3. Com. Dig.  
101.

*Mines* are only chargeable by custom: for they are of the substance of the earth, and not an annual increase.

2. Inst. 491.

Strange 715.

*Mortuaries*, or corse-presents, are not tithes, yet they were given for recompence of personal tithes and offerings not paid, through ignorance, negligence, or fraud, in the life-time of the parishioner, as the best horse, &c. They are due by custom only, and are now settled to be paid in money by the 21. *Hen.* 8. c. 6.

## N.

1. Roll. Abr.

641, 642.

3. Com. Lig.  
96.

*Nags*, kept only for the master to ride on, pay no tithe for pasturage. But some insist, that if no tithes are to be paid for their pasturing, they ought to be rode by the master only about his concerns of husbandry.

2. Danv. &amp;c.

585, 614.

Hard. 380.

Cro. Car. 526.

*Nurseries* shall pay tithes, if the owner dig them up, and make profit of them, and sell them into another parish; or if the owner pull them up, he shall pay tithes. But if the owner sell them standing, and the vendee pull them up, the vendee shall pay the tithe.

Oas

## O.

*Oak*, together with *Ash* and *Elm*, is privileged as timber from paying tithe by the statute of *Sylva Cædua*, if of or above twenty years growth. *Oaks* under twenty years growth, which may be timber, are also privileged. And tho' they become dry and rotten, and not fit for timber, they shall pay no tithe if they were once privileged.

*Oblations, Obventions, Offerings*, which are one and the same thing, tho' *Obvention* is the largest word, are in the nature of tithes. *Offerings* are reckoned amongst personal tithes; and such as arise from the labour and industry of the parishioner, are payable according to custom to the parson or vicar, either occasionally at *sacraments, marriages, burials, churching of women*; or at constant *stated times*, as at *Easter, &c.* By 2. & 3. *Edw. 6. c. 13.* they are to be paid to the parson of the parish where the party dwells.

*Orchards* pay tithe of fruit; and if the soil of an orchard be sown with any kind of grain, the parson shall have tithe of the fruit-trees and of the grain, as also of the grafs; for they are of several and distinct kinds. If one cut down trees which have borne fruit, whereof tithe has been paid that year, no tithe shall be paid of the faggots or billets of the trees.

## P.

*Parks* pay tithe for the deer, and for the herbage, by custom. If converted into tillage, they shall pay tithe in kind.

*Partridges* and *Pheasants*, being *feræ naturæ*, yield no tithe of eggs or young. And tho' they be tame and kept in a place inclosed, and lay eggs, and hatch young ones, yet they shall pay no tithe.

1. Ro. Ab. 647. *Pease* gathered for sale, or to feed hogs, are titheable; but not green pease to eat in the house.
2. Danv. &c. 583. 593. 597. *Pigeons* ought to pay tithe, if they be sold, and not spent in the house. This is also true if they lodge in holes about a house, as well as in a dove-house. But by custom, pigeons spent in the house may be titheable, though not of common right.
3. Com. Dig. 97. *Pigs* are titheable as calves, as soon as they are weaned, and can live without the dam; usually when three weeks old.
1. Ro. Ab. 637. *Pits* and *Quarries* pay no tithe.
- 1 Lev. 189. *Pollards* of fifty years growth, when felled, pay tithe. *Pollards* are trees usually lopped, and therefore distinguished from timber-trees.

## R.

2. Inst. 652. *Rakings* are not titheable of common right; but this is to be understood of rakings involuntarily, not fraudulently scattered.
2. Danv. 598. Cro. Eliz. 660. Id. Ray 242. 2. Equity Caf. Abr. 735. 2. Peer. Wms. 531.
3. Com. Dig. 96. *Rate-tithe* is a payment by custom for feeding of sheep, &c.
2. Danv. &c. 585. 589. *Roots* are not titheable, unless by custom, if the wood paid tithe; because they do not renew annually. Roots of timber trees, of what age soever, are exempted, as parcel of the inheritance; and so are the germins that grow of the roots.

## S.

- Cro. Eliz. 467. *Saffron* is a predial and small tithe, and is titheable, though gathered but once in three years.
2. Ark. 365. and see the case of Sims v. Bennet, 5. Brown's Caf. Parl. 586.
- Salt* is not titheable, but by custom only.
7. Roll. Abr. 642. 647. *Sheep* are titheable for lamb and wool. But if killed and eaten in the house, no tithe is to be paid for their feeding.
- Cro. Car. 237. Moor, 909. Cro. Eliz. 476. Cro. Jac. 430. 5. Bac. Abr. 55.
2. Inst. 651. *Slate* is not titheable of common right, but only by custom.

Stubble

*Stubble* pays no tithe, because this is only part 2. Inst. 651. of the stalk upon which the corn, which was tithed before, grewed.

## T.

*Tares* or *Vetches*, and other coarse grain, pay 1. Cro. 139. tithe. But if they be cut down green, and given to the cattle of the plough, no tithe shall be paid of them, provided there be no sufficient pasture in the parish for the cattle that pay tithe.

*Tile* is not titheable, being of the substance of 2. Inst. 651. the earth, and no annual increase.

*Turf* is tithe-free, as part of the freehold. Ibid.

*Turkies* and their eggs are said to be exempt 2. Danv. &c. 583. from tithe, because *feræ naturæ*.

## U,

*Underwood* is titheable, and tithe shall be 2. Inst. 642. paid of underwood digged up by the roots. If 1. Lev. 189. Palm. 38. underwood is sold standing, the tithe shall be paid 1. Sid. 300. 447. by the buyer. 2. Leon. 79.

Hob. 219. Cro. Car. 113. 1. Vent. 75. Godb. 44. Bunb. 61. Cro. Eliz. 475.

## W,

*Waste*, where cattle feed, pays tithe. And by the 2. Inst. 655. Hal. 147. Moor. 909. Cro. Eliz. 475. 3. Bulst. 166. Bunb. 159. 1. Vezev. 115. 2. Edw. 6. c. 13. f. 3. the tithe of cattle feeding on large wastes, where the parish is not certainly known, shall pay tithe to the incumbent of the parish in which the owner of the cattle dwells.

*Willows* pay tithe, if not used for timber. 2. Inst. 642, 643. Hob. 219.

*Wood* growing in the nature of an herb, is a predial and small tithe.

*Wood* is titheable because it is of annual growth, 2. Danv. &c. 594. tho' the tithe be not of annual payment. It is a predial and great tithe, due of common right, Dr. & Stud. Dial. 2. c. 55. 13. Co. 13. tho' some say it is due by custom only. But between

Com. Dig. 94. between parson and vicar, either by virtue of the *endowment*, or by *prescription*, it has sometimes been construed to be a *small* tithe, and to belong to the vicar. Wood may be *discharged* of tithe. 1. With regard to the *age*, as timber of or above twenty years growth, by the statute of *Sylva Cædua*, 45. *Edw.* 3. c. 3.; and some have affirmed it may be discharged if under twenty years growth, if it be or may become timber. 2. With regard to the *use* it is put to, as for the owner's firing in a house of husbandry, or to burn brick to repair the house; or for hedging and fencing the estate in the same parish; unless that it be titheable by custom. 3. With respect to the *place* of its growth, as in the *wilds* or *wealds* (*sylva*, the woody part) of *Kent* and *Suffex*, it is discharged by *prescription*. For a County may prescribe to be quit of the tithe wood, or any other tithe, but a town cannot. When wood it is titheable; it is set out, while standing, by the tenth acre, pole, or perch, or when cut down, by the tenth faggot or billet, as the custom happens to be. If he that sells the wood do not set out the tithe, he is liable to pay treble damages by the 2. *Edw.* 6. c. 13. and the parson may sue either the buyer or the seller by the Spiritual Law; but the buyer only by the Common Law.

But *quere*,  
for perhaps the vendee may not be known.

1. Roll. Abr. 646, 647.  
F. N. B. 51.  
1. Roll. Abr. 645, 646, 649.  
c. Inst. 652.  
Cro. Eliz. 78.  
Bunb. 90.  
Lam. 16.  
3. Com. Dig. 93.

*Wool* is a mixed and small tithe. All agree that it is titheable of common right when it is clipped. It is due and payable of sheep killed and spent in the house, of rotten sheep which die, of neck-wool cut off for the benefit of the wool; but not if it be to preserve the sheep from vermin, nor of locks of wool, because otherwise there might be fraud, or an opportunity of spoiling the fleece under the pretence of neck-shearings. It is also due of the wool of lambs shorn at *Midsummer*, though tithe was paid of the lambs at *Mark-tide*; for this is a new increase. If sheep be removed from one parish to another between the time of shearing, each parson must have tithe *prorata*. But for feeding under thirty days

days, no rate tithe is to be paid. Likewise, if sheep feed all the year in one parish, and couch in another, the tithe shall be equally divided betwixt the parsons. If sheep be brought from one parish to be shorn in another, where they were not before, the tithe is payable to the parson of the parish from whence they came, if the parish is known; otherwise the whole tithe is payable where they are shorn. Lastly, if a son or daughter have five or six sheep in the father's flock, the father shall pay tithe for them with the rest, if he take the profits of them to his own use.

3. COMMON, or *right of common*, appears from its very definition to be an incorporeal hereditament; being a profit which a man hath in the land of another; as to feed his beast, to catch fish, to dig turf, to cut wood, or the like. Common is chiefly of four sorts. 1. Common of *pasture*. 2. Common of *piscary*. 3. Common of *turbary*. 4. Common of *estovers*.—COMMON OF PASTURE is, the right of putting beasts to feed on another's land; and this kind of common is either *appendant*, *appurtenant because of vicinage*, or *in gross*. *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 lands of other persons within the same manor. Commonable beasts are those which are employed for the maintenance of THE PLOUGH, as horse or ox; and for the maintenance of the land, as kine or sheep. *Common appurtenant* is, a common belonging to an estate for all manner of beasts, commonable or not commonable, as hogs, goats, and the like, although they neither plow nor manure the ground; and may be annexed to a house, cottage, meadow, pasture, as well as to arable land. *Common because of vicinage* is a sort of common appendant, and is where the tenants of two lords, who are seised of two towns lying next to one another, have used, time out of mind, to have common promiscuously, and proportionately to their extent of common on both sides,

4. Co. 37.  
2. Inst. 65.  
1. Vent. 387.  
Co. Lit. 47.  
1. Bac. Abr.  
385.  
2. Com. Dig.  
434.

2 Bl. Com. 33.  
3. Bl. Com. 239.  
2. Will. 274.  
1. Burr. 256.

1. Roll. Abr.  
401.  
Cro. Car. 542.

Co. Lit. 122.

fides, for all manner of beasts commonable. This is indeed only a permissive right, which the law suffers to prevent suits in open countries; for no man can *put* his beasts into this kind of common, but they may *stray* or *escape* of themselves from one field to another, without being guilty of trespass; and therefore, either township may enclose and bar out the other, though they have intercommoned time out of mind. *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 by *deed*, or gained by *usage*. Of these commons, some are *certain* for a particular number of beasts, as for ten cows; or for such as are *levant and couchant* on the land: and others are *uncertain*, or without stint, either with respect to the number of cattle or length of time. **COMMON OF PISCARY** is, a liberty of fishing in another man's waters. **COMMON OF TURBARY**, from *turba*, an old *Latin* word for *turf*, is a license to dig turf on another's ground, or in the lord's waste, but not in exclusion to the owner of the soil; and it must be appendant to a *house*, and not to *land*. **COMMON OF ESTOVERS**, when restrained to woods, is a right of taking wood out of another's woods, for house-bote, plough-bote, and hay-bote. The *Saxon* word *bote* is of the same signification with the *French estovers*, and denotes allowance, compensation, or satisfaction, for these three purposes. *House-bote*, therefore, is a right of taking timber to build or to repair the house, or of taking wood to burn in the house, which is also called *fire-bote*; and *plough-bote* and *hay-bote* is a right to take wood to mend ploughs, carts, harrows, or to repair hedges, gates, pales.

4. **WAYS** are a fourth species of incorporeal hereditament; and consist in the right of going over another man's ground. Ways may be divided into—1. *A private way*. 2. *A common way*, and 3. *A highway*. **A PRIVATE WAY** is, a passage or road belonging exclusively to a certain number

4. Co. 38.  
Co. Lit. 222.

Co. Lit. 122.  
4. Co. 38.  
1. Ro. Ab. 403.  
Wood's Inst.  
193.  
13. Co. 66.  
1. Bac. Abr.  
388.

2. Bl. Com. 34.

4. Co. 37.  
Co. Lit. 4.

Co. Lit. 41.  
2. Inst. 18.  
2. Bl. Com. 35.  
Wood's Inst.  
196.

2. Bl. Com. 35.  
Finch, 31. 63.  
Co. Lit. 56.  
1. Jones, 257.  
2. Show. 28.  
1. Vent. 189.  
208.  
1. Roll. Abr.  
397.  
1. d. Ray. 725.  
2. Com. Dig. 397. to 426.

number

number of persons, leading from one particular place to another, as from a house to a church; or from village to village; or from a private house to certain fields. This species of way may be claimed by prescription or by covenant, and may be either in gross, or appendant to house or land. A

COMMON WAY is that which leadeth from a village into the fields, the freehold and property of which are in him that hath the land next adjacent: and if it be stopped, remedy lies by presentment or indictment. THE KING'S HIGHWAY is that which leadeth from village to village, or from town to town, and through which all the King's subjects have a right to pass.

Wood's Inst.

197.  
1. Vent. 208.

Wood, 197.  
2. Bl. Com. 33.

1. Hawk. P. C.  
366.

5. OFFICES are also incorporeal hereditaments, consisting in a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging.

9. Co. 97.

1. Burr. 221.

Cro. Eliz. 587.

Wood's Inst.  
197.

6. DIGNITIES are also a species of incorporeal hereditaments, wherein a man may have a property or estate.

2. Bl. Com. 37.

See ante,  
p. 219 to 222.

7. FRANCHISES, which are synonymous with liberties, are a seventh species, and are defined to be, a royal privilege existing in the hands of a subject, either by charter, letters patent, or prescription. All liberties are derived from the crown, and therefore they are extinguished if they come to the crown again, by escheat, forfeiture, &c. A franchise or liberty may be vested in bodies politic or corporate, aggregate or sole; or in any persons that are not corporations; as counties, boroughs, towns, or in a single person. The several kinds of franchises are various, and almost infinite (a); but we shall endeavour briefly to describe some of the principal.

2. Bl. Com. 37.

Wood's Inst.

200.

Finch, 164.

F. N. B. 230.

2. Inst. 221.

(a) See 3. Com.

Dig. 390.

Co. Lit. 114.

1. To have a PRINCIPALITY like that of *Wales*, or a COUNTY PALATINE like those of *Lancaster*, *Durham*, and *Chester*, are franchises.

Wood's Inst.

200.

2. Will. 406.

4. Inst. 204.

2. To

2. Com. Dig.

391.



Wood's Inf.  
201.

2. To have a COURT OF ONE'S OWN, with liberty to hold pleas before a mayor, bailiff in such a place, according to the course of the Common Law. —

2. Stra. 810.  
2. Inf. 548.  
453.  
1. Vent. 406.

3. A BAILIWICK is that liberty which is exempted from the sheriff of the county, over which the lord of the liberty appoints a bailiff, to do such offices within his precinct, as the under sheriff doth at large under the high sheriff of the county; as the Bailiff of *Westminster*, and of the Dean and Chapter of *St. Paul's*.

Co. Lit. 233.  
4. Inf. 316.  
8. Co. 138.  
Ante, 138.  
Manwood's Forest Law 40.  
2. Com. Dig. 381.

4. A FOREST is a franchise, consisting of a certain territory of woody ground, privileged for beasts of venery, or those that are gotten by hunting; or for fowls of forest, chase, or warren, to rest and abide there in safety. The King may at this day make a forest in his own grounds, but not in the grounds of his subjects without their consent; and this privilege, when granted to a subject, is properly called *a chase*. A forest consists of eight parts, *viz.* soil, covert, laws, courts, judges, officers, game, and boundaries.

2. Bl. Com. 38.  
Co. Lit. 233.  
4. Inf. 317.  
2. Inf. 199.  
11. Co. 87.  
Jones 278.  
Cro. Jac. 155.  
Palm. 89.  
2. Com. Dig. 382.

5. A CHASE, from *Chasser*, is a privileged place for the receipt of deer and beasts of the forest, being of a middle nature between a forest and a park. It is commonly of less extent than a forest, and of larger compass than a park, and has more liberties than a park, and fewer than a forest. Every forest is a chase, but every chase is not a forest. It differs from a park, inasmuch as it is not enclosed; for although it must have certain metes and bounds, yet if it is inclosed, it is cause of forfeiture. But it may be in other men's grounds as well as our own; but cannot be created without license, for that would be to appropriate beasts *feræ naturæ* to one's own use. A chase is governed by the rules of the Common Law; and if it has never been a forest, it cannot have a *purlieu* (a).

(a) See Manwood's Forest Law 365. and 2. Com. Dig. 386. that "*purlieu*" from corruption of the French word "*pourallee*" signifies those parts of forests which were disafforested by *perambulations* made in the reign of Edward the third.

6. A PARK is an inclosed chase, extending only over a man's own grounds. No man can have a park without license under THE BROAD SEAL, for the Common Law does not encourage matters of pleasure which bring no profit to the Commonwealth. Beasts of park properly extend to buck, doe, &c. but in a common and legal sense to all beasts of the forest. Three things are required to constitute a lawful park:—1. A grant or prescription. 2. Inclosures by pale, wall, or hedge. 3. Beasts of a park. But there are parks in use and reputation erected without lawful warrant.

7. A WARREN is a liberty by grant from the King, for the preservation of hares, conies, partridge, pheasant, quail, rail, &c. for these being *feræ naturæ*, every one had a natural right to kill them; but upon the introduction of the Forest Laws, these animals being looked upon as royal game, this franchise was invented to protect them.

8. A FREE-FISHERY, or exclusive right of fishing in a public river, is also a royal franchise. It differs from a *several fishery*, because he that has a several fishery must also be owner of the soil, which in a free-fishery is not requisite. It differs also from a *common of piscary*, for it is an exclusive right, which a common of piscary is not.

9. A FAIR, or MARKET, is a privilege granted for buying and selling, and for the more speedy and commodious provision of such things as the subject needeth (a).

10. TOLLS also, which consist in a reasonable sum of money or payment to the owner of the fair or market, are franchises; and so also is the right of having the goods of felons, deodands, treasure-trove, waifs, estrays, wrecks; the nature

(a) Of tolls there are several kinds: as,—1. *Toll-turn*, which is payable for cattle or goods in return from a market or fair.—1. Sid. 454. 2. *Toll through* is a sum demanded for passage through a highway. 1. Mod. 47.—4. *Toll-traverse*, for passing over the soil of another. 5. Com. Dig. 547. See also 3. Wilf. 296. 1. Burr. 583. 3. Burr. 1404. Cowper, 47. and 1. Term Rep. 663.

of

of which, as forming parts of the King's prerogative, we have already described, and shall therefore proceed to the remaining incorporeal hereditaments; which are,

Finch, 162.

8. **CORODIES**, or a right of sustenance, consisting in a right to receive certain allotments of victuals and provision for one's maintenance.

Co. Lit. 144.  
2. Bl. Com. 40.

9. **ANNUITIES**. An annuity is a yearly sum, chargeable only on the person of the grantor, and therefore different from a rent-charge, which is a burthen imposed upon and issuing out of land.

Co. Lit. 147.  
10. Co. 128.  
Wood's Inst.  
177.  
5. Com. Dig.  
426.

10. **RENTS** are the last species of incorporeal hereditament. A rent is a sum of money, or other consideration, issuing yearly out of lands or tenements; and, being reserved out of the profits of the land, is not due until the tenant takes the profits. There are three sorts of rents:—1. Rent-service. 2. Rent-charge. 3. Rent-seck.—**RENT-SERVICE** (so called because it is ever accompanied

4. Bac. Ab. 335.  
Ld. Ray. 1160.  
4. Mod. 76.  
Salk. 262.

with some corporal service), is where one, upon a gift in tail, or lease for life or years, reserves to himself a certain rent, while the reversion of the lands and tenements continue in him. A **RENT-CHARGE** is where a man, by deed, makes his estate over to another in fee; or by gift in tail, the remainder over in fee; or any other grant where the whole estate passes, and by the same deed *reserveth* to him and his heirs a certain rent; and that if the rent be behind, it shall be lawful for him and his heirs to distrain. **RENT-SECK** is

Co. Lit. 143.  
Plowd. 134.  
4. Bac. Ab. 337.  
5. Com. Dig.  
427.

where a man by deed makes over his estate to another, and *reserves* to him and his heirs a certain rent, or grants a rent issuing out of his estate, without any clause of distress in the deed. To these three sorts of rent may be added, a rent reserved upon a lease at will, which may be distrained for of common right. There are also fee farm rents, quit-rents, rack-rent, old-rent, and improved-rent. A **FEE FARM RENT** is a rent-

Cro. Car. 520.  
Cro. Eliz. 656.  
7. Co. 51.  
Co. Lit. 147.  
5. Com. Dig.  
428.

2. Inst. 44.  
Co. Lit. 143.  
Moor, 168.  
6. Modern. 186.

Hard. 388. 5. Com. Dig. 426. (c. 3.)

charge

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. **QUIT-RENT** is a certain small rent payable yearly by the tenant of a manor, whereby he goes *quit* and free of all other services. **RACK-RENT** is supposed to be a rent to the full value of the tenement, or near it. **OLD-RENT** is that yearly rent, neither more nor less, which was always paid. **IMPROVED-RENT** is where the old rent has been raised.—A rent must be a profit issuing yearly out of lands and tenements corporeal, but the profit need not arise in money, for spurs, capons, horses, corn, and any other matters, may be rendered by way of rent; or it may consist in services or manual operations, as to plough so many acres of ground, to attend the lord, and the like, for such services are considered in law as profits. This profit must be *certain*, or that which may be reduced to a certainty by either party; and it must issue yearly. It must issue out of the thing granted, and not be part of the thing itself, which must be lands and tenements corporeal; that is, it must issue from some inheritance, whereunto the owner or grantee of the rent may have recourse to distrain: therefore, a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like.

By 4. *Geo.* 2. c. 28. remedy by distress is given for *all rents* that have been paid within twenty years next before the making of the statute, or that shall be afterwards created; so that the difference which formerly existed between them is now abolished. Rent is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation; but in the case of the King, the payment must be either to his officers at the Exchequer, or to his receiver in the country.

Co. Lit. 143.  
Mad. Fir.  
Burg. 3.  
Dougl. 602.  
note (1.)

Co. Lit. 201.

**BESIDES** the several kinds of estates already mentioned, there are estates upon condition: first, upon condition *implied*; and secondly, upon condition *expressed*;

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*expressed*;

- Co. Lit. 201. *expressed*: or, as they are called by LITTLETON, estates upon condition *in law*, and condition *in deed*. Estates upon condition *in law*, are such which have a condition by the law annexed to them, although it be not specified in writing;
- Co. Lit. 233. as, if a man grant by his deed to another, the office of parkerhip of a park, to have and occupy the same for the term of his life, the law annexes a condition, that he shall well and lawfully keep the park, and do that which to such office belongeth, or otherwise it shall be lawful for the grantor and his heirs to oust him, and grant it to another; 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. An estate on condition *expressed*, or *in deed*, is where an estate is granted, either in fee-simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition; as if a man, by deed indented, enfeoffs another in fee-simple, reserving to him and his heirs a certain yearly rent, payable at a particular time, on condition that if the rent be behind, the feoffor and his heirs may re-enter. These conditions, therefore, are either *precedent* or *subsequent*. *Precedent* are such as must happen or be performed before the estate can vest or be enlarged. *Subsequent* are such, by the failure or non-performance of which an estate already vested may be defeated. Among the estates defeasible by condition *subsequent* are,
7. Bl. Com. 154.
- Co. Lit. 207.
- See instances, Co. Lit. 217.

1. VIVUM VADIUM, or living pledge, which is where a man borrows a sum of money of another, and grants him an estate of so much *per annum*, to hold till the rents and profits shall repay the sum so borrowed; for immediately on the discharge of the debt, the land results back to the borrower,

## 2. MORTGAGE,

2. MORTGAGE, or dead pledge, which was called in Latin *mortuum vadium*, and 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 the money on a certain day, he may re-enter on the estate so mortgaged; or, as is now the more usual way, that the mortgagee shall re-convey 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 lands is then no longer conditional, but absolute. But so long as it continues conditional, that is, between the time of lending the money and the time allotted for payment, the mortgagee is called tenant in mortgage. 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 our courts of equity), it therefore became usual to grant only a long term of years by way of mortgage, with condition to be void on re-payment of the mortgage-money; which course has been since continued, principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are intitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

Lit. f. 332.

Ibid. f. 357.  
Cro. Car. 191.  
Hardr. 466.

As soon as the estate is created, the mortgagee may immediately enter on the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage-money at the day limited; and therefore the usual way is, to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here again the courts of

equity interpose; and though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at the Common Law, yet they 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 his estate; paying to the mortgagee his principal, interest, and expences: for otherwise, in strictness of law, an estate worth 1000l. might be forfeited for non-payment of 100l. or a less sum. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption*: and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But, 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 without possibility of recall; and also, in some cases of fraudulent mortgages, the fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not however usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious, or small; or where the mortgagor neglects even the payment of interest; when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands, in the nature of a pledge, or the *pignus* of the Roman law: whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was where the possession of the thing pledged remained with the debtor (a). But,

Stat. 4. & 5.  
W. & M. c. 16.

(a) *Pignoris appellatione eam proprie rem contineri dicimus, quæ simul etiam traditur creditori. At eam, quæ sine traditione nudâ conventionione tenetur, proprie hypothecæ appellatione contineri dicimus. J. ff. l. 4. t. 6. s. 7.*

by

by statute 7. *Geo.* 2. c. 20. after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee can maintain no ejection, but may be compelled to re-assign his securities.

3. STATUTE MERCHANT and STATUTE STAPLE are estates created by 13. *Edw.* 1. ft. 3. c. 1. and 27. *Edw.* 3. c. 9. whereby the lands of a debtor are conveyed to his creditors, till out of the rents and profits of them the debt may be satisfied.

4. ELEGIT, which is an estate obtained by this process of law, on which, after a plaintiff has obtained judgment for his debt, the sheriff gives him possession of *one half* of the defendant's lands and tenements until the debt and damages be fully paid.

Estates also may be considered with respect to the time of their enjoyment, and in this point of view may be either in *possession* or *expectancy*. Estates in possession, or estates *executed*, are where a present interest passes to, and resides in the tenant, not depending on any subsequent circumstance or contingency. Estates in expectancy are of two kinds. 1. A *remainder*. 2. A *reversion*.—A REMAINDER, which is created by the act of the parties, may be defined to be an estate limited to take effect and be enjoyed after another estate is determined: as if a man seised in fee letteth lands or tenements for term of years, the remainder over to another for life, in tail or in fee; here is first a *particular estate*, derived out of a general and greater estate, *viz.* a fee, and afterwards the residue or remainder disposed of: but it must be observed, that in contemplation of law, the particular estate, and all remainders of it, make but one estate in law.—The following rules are to be observed in the creation of remainders:

1. There must be a *particular estate* precedent made at the same time, that the remainder may

Plowd. 25 &c.  
Noy's Max.  
31. 123, 124, 125, 126, 127. Hern, &c. 2, 3, 4, 5.

U 3

depend



1. Rep. 66. depend on it. 2. The particular estate must  
 129, 130. 134. *continue* when the remainder shall vest; and the  
 138.  
 1. Inst. 378. a. remainder must commence in possession at the  
 very time the particular estate endeth; for there  
 must not be a mean between them. 3. The re-  
 mainder must pass out of the lessor executed or  
 executory at the time of the possession taken by  
 the particular tenant; but it cannot depend upon  
 a matter *ex post facto*: as where there is an estate-  
 tail, with condition, that if the tenant in tail  
 aliens in fee, fee-tail, &c. then the estate to  
 cease, and the land to remain to another; this  
 is a void remainder, because the alienation vests  
 the estate in the alienee, or else in the donor. A  
 remainder may depend upon a condition that is  
 not repugnant or against law, and then it will  
 pass either executed or executory. 4. The *person*  
 to whom the remainder is limited must be capable  
 at the time it was created, or else by common  
 possibility, or in *potentia propinquâ* to be thereof  
 capable during the particular estate. Therefore  
 lessee for life, or years, remainder to the right  
 heirs of *J. S.* is good; for by common possibility  
*J. S.* may die during the life of the particular tenant:  
 but if the tenant or lessee for life or years dieth,  
 living *J. S.* the remainder is become void, because  
 there is no person capable to take at that time.  
 But a remainder to the first-begotten son of *J. S.*  
 (in general terms) born during the particular  
 estate, is good. If the remainder had been limited  
 in particular by name of baptism and surname,  
 it had not been good, if he was not *in esse*; for it  
 was *potentia remota*, and not probable that *J. S.*  
 should have a son of that name (a). 5. The  
*thing* whereof a remainder shall be created must  
 be *in esse* before and at the time of the appoint-  
 ment and creation thereof, else the remainder is  
 void. As if I grant a rent out of my land, the

But see the  
 10. & 11.  
 W. 3. c. 16.

Lit. 720, 721,  
 722, 723.  
 1. Rep. 83.  
 1. Inst. 378. a.  
 Plowd. 25, &c.  
 35.  
 Noy's Max.  
 32.

2. Rep. 51.  
 3. Rep. 20.  
 1. Inst. 378. a.

1. Saund. 388.

(a) See the 10. & 11. Will. 3. born in their father's life-time, by  
 c. 16. for enabling posthumous way of remainder, &c.  
 children to take estates, as if

remainder in fee; this remainder is void, because the rent was not *in esse* before (a).

An estate at will is not such a *particular estate* whereon a remainder may depend; but a lease for years may be granted to one for so long time as he shall live, with remainder to another for the residue of the term. Remainders are either *absolute* or *contingent*.—AN ABSOLUTE REMAINDER is that which depends upon a certain event, upon the happening of which it must unavoidably rest; as a lease for years, remainder to another in fee, or in tail, &c. A CONTINGENT REMAINDER is a remainder limited, so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate; for if the preceding estate determines before such event or condition happens, the remainder will never take effect. There are four sorts of contingent remainders, which may be comprehended under this definition:—*First*, Where the determination of the preceding estate is itself dubious and contingent; as where it depends on an event which may never happen: as if *A.* make a feoffment to the use of *B.* till *C.* returns from *Rome*, and after such return of *C.* then to remain over in fee; here the particular estate is limited to determine on the return of *C.* an event which possibly may never happen; and therefore the remainder, which depends on such contingent determination of the preceding estate, is dubious and contingent.—*Secondly*, Where the contingency on which the remainder is to take effect, is indepen-

1. Co. 153.  
2. Ro. Ab. 415.  
Co. Lit. 378.  
3. Co. 20.  
10. Co. 85.  
Ferne's Essay  
on contingent  
Remainders,  
p. 4.  
See also 2. Bl.  
Com. 169.

Poph. 97.

(a) But by later cases it hath been held, that a rent *de novo* may be limited to one for life, with remainder over in fee, for that the law considers the whole interest or fee in the rent to be first granted, and the immediate or particular estate therein to be created out of it, and that it may be granted to commence *in futuro*; so that this fifth rule seems not to be law. See 2. Roll. Abr. 415. 2. Salk. 577. 1. Sid. 285. 1. Lev. 144. Ld. Raym. 52. 3. Peer. Wms. 230. 2. Wils. 166. 2. Bl. Com. 165. 374. 2. Eq. Cases Abr. 284. and Mr. Hargrave's Co. Lit. 298. a. note (2.)

dent of the determination of the preceding estate: as if a lease be made to *A.* for life, remainder to *B.* for life, and if *B.* die before *A.* remainder to *C.* for life; here the event of *B.*'s dying before *A.* does not in the least affect the determination of the preceding estate, nevertheless it must precede and give effect to *C.*'s remainder; but such event is dubious, it may or may not happen; and the remainder, depending upon it, is therefore contingent.—*Thirdly*, Where the condition upon which the remainder is limited is certain in event, but the determination of the particular estate may happen before it: as if a lease be made to *J. S.* for life, and after the death of *J. D.* the lands to remain to another in fee; now it is certain that *J. D.* must die some time or other, but his death may not happen till after the determination of the particular estate, by the death of *J. S.* and therefore such remainder is contingent.—*Fourthly*, Where the person to whom the remainder is limited is not yet ascertained, or not yet in being: as if a lease be made to one for life, remainder to the right heirs of *J. S.*; now there can be no such persons as the right heirs of *J. S.* until the death of *J. S.* for *nemo est hæres viventis*, which may not happen till after the determination of the particular estate, by the death of the tenant for life; therefore such remainder is contingent. 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. Thus, if land be granted to *A.* for ten years, with remainder in fee to the right heirs of *B.* it is void; but if granted to *A.* for life, with a like remainder, it is good. 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 resting somewhere; and in the case of a contingent remainder, it must vest in the particular tenant, else it can vest no where: unless, therefore, the estate of such particular te-

nant

3. Co. 20.

Co. Lit. 378.

2. Bl. Com. 171.  
1. Co. 130.

nant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void. In devises, however, by last will and testament, remainders, or, as they are more usually called, *executory devises*, may be created contrary to the rules before laid down; for wills are always more favoured in construction than formal deeds.

AN EXECUTORY DEVISE of land 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; and it differs from a remainder,—*First*, That it needs not any particular estate to support it. *Secondly*, That by it a fee-simple, or other less estate, may be limited after a fee-simple: and *Thirdly*, That by this means a remainder may be limited of a *chattel interest*, after a particular estate for life created in the same. And having said thus much concerning estates in expectancy, we proceed to that which is created by the act of law, and not by the act of the parties, *viz.*

A REVERSION, from *revertio*, to return, is the residue of the estate left in the grantor after some particular estate granted away: as if there be a gift in tail, the reversion of the fee-simple is in the donor; in a lease for life or years, the reversion is in the lessor. So also, if one hath a lease for twenty years, and leaves out ten of those years, the reversion is in the second lessor, as well as in the first that granted the twenty years. A *reversion* is never created by deed or writing, but arises from construction of law; a *remainder* can never be limited, unless by either deed or devise; but both are equally transferable when actually vested (*a*), being both estates *in presenti*, though taking effect *in futuro*.

(a) Estates, with regard to the certainty and the time of the enjoyment of them, are either vested or contingent. Vested estates are either in possession or in interest.

—Contingent estates are either remainders and future uses, executory devises, estates enlarged on condition, or on uncertain interests. An estate vested is, where there is

Estates

Fearne's Ex.

Dev. 298.

1. Eq. Ab. 186.

Carth. 310.

4. Mod. 258.

2. Vezey, 616.

2. Saund. 380.

See 2. Bl.

Com. p. 173.

175.

Co. Lit. 22.

2. Bl. Com. 172.

1. Will. 225.

2. Will. 29.

B. R. H. 258.

Estates also may be considered with respect to the number and connections of their owners; as,

2. Bl. Com.  
179.

1. A SOLE TENANT is he that holds lands or tenements in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. This is the most common and usual way of holding an estate; and they are all supposed to be of this sort, unless where they are expressly declared to be otherwise.

Co. Lit. 180.  
2. Bl. Com.  
180.

2. JOINT-TENANTS, so called because the lands or tenements, &c. are conveyed to them jointly, "*conjunctivè feoffati, &c.*" or, "*qui conjunctivè tenet,*" in contra-distinction from sole or several tenants, is, where lands or tenements are granted to two or more persons to hold in fee-simple, fee-tail, for life, for years, or at will. So also, if two persons, or more, disseise another of any lands or tenements to their own use, such disseisors are joint-tenants: but not if the disseisin is to the use of one of them only; for in such case, the person to whose use the disseisin is made is *sole tenant*, and the others are mere coadjutors in the disseisin. But this species of estate can only arise by the act of the parties, and never by the act of law. Joint-tenants must have one and the same *interest*, and therefore one cannot be tenant for life and the other for years; or the one tenant in fee and the other in tail.— They must also have an *unity of title*; their estate must be created by one and the same act. There must also be a *unity of time*; that is, their estates must be vested at one and the same period, as well as by one and the same title: and lastly, there must be a *unity of possession*, for joint-tenants are

Co. Lit. 181.

an immediate fixed right of present or future enjoyment. An estate vested in possession is, where there exists a right of present enjoyment. An estate vested in interest is, where there is a present

fixed right of future enjoyment. A contingent estate is, as we have above described, where a right is to accrue upon an event which is dubious and uncertain.

seised

seised *per my et per tout*, by the half or moiety and by all; "and this," says *Littleton*, "is as much Co. Lit. 185. as to say, that he is seised by *every parcel*, and "by *the whole*." The grand incident of a joint-estate is, that the tenants are entitled to the *jus accrescendi*, or benefit of survivorship: for when two or more persons are seised of a joint-estate of inheritance, for their own lives, or *pur autre vie*, or are jointly possessed of any chattel interest, the entire tenancy, upon the decease of any of them, remains to the survivors: but if they agree to part their lands, and hold them in severalty; as the tenancy is severed and destroyed by a disuniting of their possession, so the right of survivorship is, by such separation, also destroyed: and by 31. *Hen. 8. c. 1.* and 32. *Hen. 8. c. 32.* one joint-tenant may compel his co-tenants, by writ of partition, to divide the land. A joint-tenancy may also be destroyed by destroying the *unity of title*: as if a man enfeoff two joint-tenants in fee, and one of them aliens his moiety to another in fee; for the grantee and the remaining tenant hold by different titles. So also, if the *unity of interest* be severed, the joint-tenancy is Cro. Eliz. 470. destroyed; therefore, where there were two joint-tenants for life, and one of them purchased the reversion by fine, it was held, that the joint-estate was thereby severed and destroyed. In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the joint- Co. Lit. 192. ture: so also, if there be two joint-tenants for life, and the inheritance descends upon one of 2. Bl. Com. 186. them.

3. TENANTS IN COMMON are, where two or more Co. Lit. 188. have lands and tenements in fee-simple, fee-tail, Wood's Init. 145. for life, or years, by several titles, or by one 2. Bl. Com. 191. title and *several rights*, and none of them knoweth his own part, but takes the profits in common with his companions. This estate may be created by destroying the *unity of title* or *interest* in a joint-tenancy.

tenancy or coparcenery, and preserving the *unity of possession*: as if one of two joint-tenants in fee aliens his estate for the life of the alienee; in this case, the alienee and the other joint-tenant are tenants in common. So also, if there be a grant to a *man* and *woman*, and the heirs of their bodies, their issues shall be tenants in common. This estate may also be created by express limitation in a deed; as if lands be given to two or more, without using words which imply a joint-estate, as "*jointly and severally*," they shall be tenants in common. Estates in common can only be destroyed by uniting all the titles and interests in one tenant, or by making partition as before-mentioned.

See 31. Hen. 8. c. 1.  
32. Hen. 8. c. 32.  
8. & 9. Will. 3. c. 3.  
7. Ann. c. 18.

4. COPARCENERS are, where lands of inheritance descend from the ancestor to two or more persons: as by *the Common Law*, where tenant in fee-simple or in fee-tail dies, and hath no issue but daughters, or dies without issue, and leaves only sisters, aunts, cousins, or their representatives; for in this case they shall all inherit, making together one heir to their ancestors, and having one freehold among them: or as, *by custom*, where lands descend to all the sons alike, as in the tenure of *gavelkind*, there must be a union of interest, title, and possession, to form a coparcenary; but there is no unity of time necessary to this estate. The tenants may sue and be sued jointly; and the entry of one of them shall in some cases be the entry of all. They are intitled each to the whole of a distinct moiety, and of course there is no benefit of survivorship; for each part descends severally to their respective heirs, though the unity of possession continue. They are called PARCENERS, because they are compellable by the writ *De Partitione Facienda* to make partition<sup>(a)</sup>; but the estate may also be dissolved by consent, by the alienation of one parcener, or by the whole at last descending and vesting in a single person.

Wood's Inst. 143.  
Lit. f. 265.

Co. Lit. 188. 243.

(a) See 8. & 9. Will. 3. and 7. Ann. c. 18. by which an easy method of proceeding upon this writ is pointed out.

AN

AND having thus described the nature of Wood's Inst. estates or real property, we shall just mention the nature of *title* to them, and proceed to enquire by what means lands, tenements, or hereditaments, may be lost or acquired. <sup>210.</sup> 2.Bl.Com.195.

TITLE is sometimes said to be, when a man hath a lawful cause of entry into lands whereof another is seised, and for which he can have no action; as title of condition, title of mortmain, &c. But in a more general and legal sense, this word "*title*" includes also a *right*; for every *right* is a *title*, although every *title* is not such a *right* for which an action lies; and therefore, "TITULUS *est justa causa possidendi quod nostrum est,*" or the means whereby the owner of lands hath the just possession of his property. To form a complete TITLE to lands, tenements, or hereditaments, it is necessary that the *right of possession*, the *right of property*, and the *actual possession*, should be conjoined, the *juris et seisinæ conjunctio*; for then, and then only, is the title completely legal (a). Thus, for example, if a man be disseised of an acre of land, the disseisee hath the *right of property*, and the disseisor the *right of possession*; and if the disseisee release to the disseisor, he hath both the *rights of property and possession*; and, being seised in both these rights, hath complete title. The lowest degree of title, therefore, consists in the mere *naked possession*, without any apparent right; as in the case above, where the disseisor procures by the wrongful act of disseisin, without any shadow or pretence of right, the actual occupation of the estate, a mere naked possession. The second step, therefore, to a good and perfect title is, to procure the *right of possession*. *Right of possession* is of two sorts: an *apparent right of posses-*

(a) "There is," says Lord Coke, "*jus proprietatis*, a right of ownership; *jus possessionis*, a right of seisin or possession; and *jus proprietatis et possessionis*, a

"right both of property and possession; which was anciently called *jus duplicatum*, or *droit droit*." Co. Lit. 366. a.



*sion*, 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 die, and the land descend to his heir, the heir hath, by such descent, obtained an *apparent right of possession*, although the actual right still resides in the disseisee; and the *entry* which the disseisor had a right to make upon the disseisee for the recovery of the land, is by this descent *toll'd* or taken away, and, in order to divest the heir, he must have recourse to an action at law. But if by release, or any other legal means, the disseisor, or his heir, thus *actually possessed*, acquires also the *right of possession*, still the *right of property* may be wanting. The person, therefore, in whom the right of property resides, has, by permitting the disseisor, in the case above put, to gain both the actual occupation and right of possession, divested himself of his estate, and his title is turned into what the law calls a *mere right, jus merum*: and a person in this situation can only recover his property by a *writ of right*; which if he fails to pursue within sixty years, or a suit is determined against him, the disseisor, or those who claim under him, will have gained a complete title to the estate.

Titles to estates are either by occupancy, by descent, or by purchase.

2. Bl. Com.  
258.  
Wood's Inst.  
210.  
Co. Lit. 41. 388.  
1. Ro. Ab. 150.

I. OCCUPANCY is taking possession of those things which before belonged to nobody, and by the Common Law was confined entirely to the case where tenant *pur autre vie* died while *cestui que vie*, or he for whose life the lease was made, was living, and a stranger gained possession of the vacant estate, who was thereby entitled to hold it during the life of the *cestui que vie*, and was called a general occupant: but by 29. Car. 2. c. 3. estates *pur autre vie* may now be devised by will; or if the lessee dies intestate, his heir is ordained special occupant; and if there be no heir, the estate shall go to his personal representatives, and, by

14. *Geo. 2. c. 20. f. 9.* be distributed in the course of administration.

II. BY DESCENT, or hereditary succession, <sup>2. Bl. Com. 200. to 241. Co. Lit. 13. 237. 1. Vent. 415.</sup> which is a means whereby one doth derive his *title* to certain lands *as heir*, and by right of blood to some ancestor, unless hindered by illegitimacy, half blood, attainder, alienage, or act of parliament. And this is the noblest and most worthy means by which real property is acquired. A descent is either by the Common Law, by Custom, or by Statute. 1. By the Common Law; as where a man hath land of inheritance in fee-simple, and dies without disposing of it in his life time; for in such case the law casts the estate on the heir immediately on the death of the ancestor, and so, descending to him, is called his inheritance. 2. By Custom; as in tenures by <sup>Dr. & St. c. 10. Lit. 210. Co. Lit. 110. 140.</sup> gavelkind, borough *English*, and several others, where the lands descend to all the sons, or all the brothers, according as the custom may be. 3. By Statute; as in the case of estates in tail, by virtue of the statute *De Donis*, where the descent is restrained and regulated according to the words of the original *donation*.—Descent, by the Common Law, or by reason of *consanguinity* (*a*), is either *lineal* or *collateral*. Lineal is a descent downwards <sup>Co. Lit. 10, 11, 1. Vent. 415.</sup> in a *right line*, as from grandfather to father and grandson. Collateral is a descent which springeth out of *the side* of the whole blood, as grandfather's brother, father's brother, &c.: and therefore, if a man purchase land in fee-simple, and die without issue; there, for default of the right line, he who is next of kin, either personally, or *jure representationis*, though never so remote, in the collateral line of the whole blood, comes in by descent to such deceased ancestor. There is a next of kin by right of *representation*, and a right of kin by right of *propinquity* or nearness of blood;

(a) CONSANGUINITY is defined by writers on this subject to be "*vinculum personarum ab eodem stipite descendantium.*"  
and

and whoever is inheritable, is accounted next of blood with respect to inheritances. But this will be better explained on stating the rules by which estates are transmitted from the ancestor to the heir.

2. Bl. Com.  
208. 211.

1. " INHERITANCES shall lineally descend to the issue of the person last actually seized *in infinitum*, but shall never lineally ascend." Therefore, if there be grandfather, father, and son, and the father purchases land and dies, his son shall succeed him as heir, but not the grandfather; for, *hereditas nunquam ascendit*.

2. " THE male issue shall be admitted before the female." Thus sons, who are considered in law as the worthiest of blood, shall be admitted before daughters: as if a man hath two sons and two daughters, and dies, the eldest son, or in case of his death without issue the second son, shall succeed in preference to both the daughters.

3. " WHERE there are two or more males in equal degree, the eldest only shall inherit, but the females all together." Thus, as before, if a man hath two sons and two daughters, and dies, his eldest son shall alone succeed to his estate, in exclusion of the second son; but if both the sons die without issue before the father, the daughters shall both inherit the estate as coparceners.

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*. But these representatives shall neither take more nor less than their principals would have done. This taking by representation is called *succession in stirpes*, according to the roots.

5. " ON

5. " ON failure of lineal descendants, or issue of the person last seized, the inheritance shall descend to the blood of the first purchaser, subject to the three preceding rules." The first purchaser is he who first acquired the estate to his family, whether the same was transferred to him by sale, or by gift, or by any other method, except that by descent. Thus, if *A.* purchases land, and it descends to his son, who dies without issue, whoever succeeds to this inheritance must be of the blood of *A.* the first purchaser; and the remaining rules are only calculated to investigate who that purchasing ancestor was.

6. " THE collateral heir of the person last seized, must be his next collateral kinsman of the whole blood:" that is, he must be his next collateral kinsman, either personally or *jure representationis*; which consanguinity is reckoned according to the canonical degrees of consanguinity. Thus, when a man hath two sons, *A.* and *B.* and dieth; and *B.* hath two sons, *C.* and *D.* and dieth, but *C.* the eldest son of *B.* hath issue before his death; if *A.*, having purchased lands in fee-simple, die without issue, his nephew *D.* though nearest in blood to him, shall not inherit; but the issue of *C.* who represents the person of *C.* and who, if he had lived, would have been legally next of blood to *A.* There is, however, a diversity betwixt next of blood inheritable by descent, and next of blood capable by purchase; for where lands are limited to the next of blood by conveyance, or come otherwise than by descent, the next of blood by right of propinquity, which *D.* was, shall first take, though he was not legally next to take as heir by descent.

7. " IN collateral inheritances, the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, shall be admitted before those of the blood of the female), unless where the lands have in

“fact descended from a female.” Thus, the relations on the father’s side are admitted *in infinitum*, before those on the mother’s side are admitted at all; and the relations of the father’s father before those of the father’s mother, and so on.

Co. Lit. 18.

III. BY PURCHASE. Purchase, in *Latin*, is either *acquisitum* or *perquisitum*, and is intended to mean a title obtained by some kind of conveyance, either for money or for some other consideration, or else of free gift; and in this sense is contradistinguished from acquisition by right of blood, and includes every other mode of coming to an estate but merely that by inheritance. This legal signification of the word purchase, includes the title to estates gained by escheat, prescription, forfeiture, and alienation.

Wood’s Inst.

303.

2. Bl. Com. 245.

1. ESCHEAT, from *eschear*, or *eschier*, to fall, is when lands fall by accident to the lord of whom they are holden; and is founded on the principle, that the blood of the person last seised in fee-simple is, by some means or other, utterly extinct and gone. Escheats are frequently divided into those *propter defectum sanguinis*, and those *propter defectum tenentis*: the one sort, if the tenant dies without heirs, and the other, if his blood be attainted. But they may both be resolved into deficiency of blood, for he that is attainted suffers an extinction of blood, as well as he who dies without relations. Therefore, when a man dies without any relations on the part of any of his ancestors, or of those ancestors from whom his estate descended, or without any relations of the whole blood, the land shall escheat to the lord of the fee. So also, where there happens to be no other heir than a *monster* (a), a *bastard* (b), an alien (c), or a person attainted (d), the estate shall escheat; for they cannot succeed to it, as not having any inheritable blood; and therefore, the superior lord, as *ultimus hæres*, shall have it by escheat.

(a) Co. Lit. 7, 8.

2. Bl. Com. 246.

(b) *Vide ante*,

p. 70.

(c) *Vide ante*,

p. 209.

(d) *Vide post*,

under the

fourth section

of this chapter.

2. BY

2. BY PRESCRIPTION. Prescription is a title to real property by purchase, by a man taking his substance of the use and time allowed by law; as where a man can shew no other title to what he claims, than that he, and those under whom he claims, have immemorially enjoyed it. The distinction between a *custom* and a *prescription* is, that *custom* is a local usage, and not annexed to any *person*; *prescription* is a mere personal usage. All prescription must be either in a *man and his ancestors*, or in those *whose estate he hath*; which last is called, prescribing in a *que estate*. Nothing but incorporeal inheritances can be claimed by prescription; as a right of way, a common, &c. for no prescription can give a title to lands or other corporeal substances, of which more certain evidence may be had. A prescription must always be laid in the tenant of the fee; and therefore a tenant for life, for years, or at will, cannot prescribe; for as prescription is usage beyond time of memory, it is absurd for them to prescribe whose estates commenced within the remembrance of man. A prescription also cannot be for a thing which cannot be raised by grant, for the law allows prescription only to supply the place of grant, and therefore every prescription supposes a grant to have existed. Also, that which is matter of record cannot be prescribed for, but must be claimed by grant entered on record. 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*, or in himself and ancestors; for if he prescribe in a *que estate*, nothing is claimable but such things as are incident, appendant, or appurtenant to the lands.— Estates gained by prescription are not, of course, descendible to the heirs general.

Co. Lit. 113.  
*Præscriptio est  
 titulus ex usu  
 et tempore sub-  
 stantiam ca-  
 piens ab autho-  
 ritate legis.*  
 4. Co. 36.  
 9. Co. 57.  
 Cro. Car. 175.  
 4. Co. 32.  
 Co. Lit. 113.

Dr. & St. c. 8.  
 Finch, 132.

3. BY FORFEITURE, which is a punishment annexed by law to some illegal act or negligence of the owner of lands, tenements, or heredita-

ments, whereby he loses all his interest therein; and is occasioned by,—1. Crimes and misdemeanors. 2. By alienation contrary to law. 3. By non-presentation to a benefice. 4. By simony. 5. By non-performance of conditions. 6. By waste. 7. By breach of copyhold customs, and 8. By bankruptcy.

See Considerations on the Law of Forfeiture.

1. **CRIMES AND MISDEMEANORS.** The offences which induce a forfeiture of lands and tenements to the crown are principally,—1. Treason. 2. Felony. 3. Misprision of treason. 4. *Præmunire*. 5. Drawing a weapon on a judge, or striking in the King's courts of justice. 6. Popish recusancy.

17. Car. 2. c. 3.

2. & 3. Ann. c. 11.

1. Co. 24.

2. **BY ALIENATION** *contrary to law*, which is either in mortmain, to an alien, or by particular tenants. Alienation in mortmain, *in mortuâ manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But appropriators may annex the great tithes to vicarages; and all benefices under 100l. a year may be augmented by the purchase of lands, without license in mortmain. A man also may give lands to the maintenance of a school, an hospital, or any other charitable uses. But by 9. *Geo. 2. c. 36.* no lands or tenements, or money to be laid out thereon, shall be given for, or charged with any charitable uses whatever, unless by deed executed as the act describes. Alienation to an alien is also cause of forfeiture, for an alien is incapable of holding lands. Alienations by particular tenants is, when they grant estates greater than the law entitles them to make, and thereby give the remainder or reversion; as if tenant for his own life aliens by feoffment, and fine for the life of another, or in tail, or in fee.

2. Burn's Ecc. Law, 312.  
Words Inst. 154.  
2. Bl. Com. 276.

3. **LAPSE** is a title given to the ordinary to collate to a church, by the neglect of the patron present to it within six months after avoidance

or it is a devolution of the right of presenting from the patron to the bishop; from the bishop to the archbishop; from the archbishop to the King. The term from which the title by lapse commences, from one to the other successively, is six months; which are to be reckoned according to the calendar. But if the bishop be both patron and ordinary, he shall have a double time allowed him to collate in; for the forfeiture accrues by law, whenever the negligence has continued six months in the same person. The patron is bound at his peril to take notice of a benefice become void by *death, creation, or cession*; but if the avoidance happens by *resignation or deprivation*, the ordinary must give notice to the patron, and from such notice only does the six months begin.

Dr & St. c. 36.  
6. Co. 61.  
Co. Lit. 135.  
Hob. 154.  
2. Ro. Ab. 521.

Gibson's Co-  
dex, 769.

4. BY SIMONY, the right of presentation to a living is forfeited, and vested *pro hac vice* in the crown. Simony is the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward, contrary to the statutes 31. Eliz. c. 6. and 12. Ann. ft. 2. c. 12.

2. Bl. Com.  
278.  
See Cunningham's Law of Simony.  
4. Bac. Abr.  
466.  
3. Burn's Ec.  
Law, 324.

5. BY WASTE, *vastum, à vastando* to waste, is a spoil or destruction in houses, gardens, orchards, dove-houses, &c. to the prejudice of the heir, or of him in remainder or reversion. It is either *voluntary* or *permissive*, as by doing the waste, or suffering it to be done; and whatever does a lasting damage to the freehold or inheritance is waste.

2. Bl. Com.  
281.  
Hetley, 35.  
4. Co. 64.  
Co. Lit. 53.  
Cro. Jac. 478.  
Wood's Inst.  
293.  
2. Roll. Rep.  
21.  
11. Co. 81.  
10. Co. 199.

1. Roll. Ab. 507. 2. Roll. Abr. 815. Plowd. 29. 1. Co. 98. 2. Peccr. Wms. 606.

6. BREACH OF CUSTOMS, as of those customs of particular manors, by which copyhold estates are holden, and for which the lord may seize them again into his hands.

2. Vent. 38.  
Cro. Eliz. 499.  
2. Bl. Com.  
284.

7. BANKRUPTCY is the last species of *forfeiture*; for whenever a trader is declared bankrupt,

13. Eliz. c. 7.



See also the  
21. Jac. 1. c. 19.  
and 1. Jac. 1.  
c. 15.

rupt, the commissioners are empowered to dispose of all his lands and tenements which he had in his own right at the time he became bankrupt, or which shall descend or come to him at any time afterwards, before his debts are satisfied or agreed for; and all lands and tenements which were purchased by him jointly with his wife and children, to his own use (or such interest therein as he may lawfully part with), or purchased with any person upon secret trust for his own use.

Co. Lit. 42.

Co. Lit. 3.

IV. ALIENATION *according to law*, which is the most usual and universal method of acquiring a title to real estates, is performed,—1. By deed, 2. By Record. 3. By *special custom*, and 4. By *devise*. But, before we examine these several species of conveyance, it may be necessary to recapitulate, that persons attainted of treason, felony, and *præmunire*, are incapable of conveying, from the time of the offence committed, provided attainder follows; that idiots, and persons of *non sane* memory, infants, and persons under *duress*, are not totally disabled, either to convey or purchase, but *sub modo* only; for their conveyances and purchases are voidable, but not actually void; that a *feme covert* may purchase an estate without the consent of her husband, and the conveyance is good during the coverture, till he avoids it by some act, declaring his dissent; that an *alien* may purchase any thing, but cannot hold any thing, except a lease for years, for conveniency of merchandise; and that papists, by 11. & 12. *Will. 3.* c. 4. are disabled to purchase, except, by the 18. *Geo. 3.* c. 60., they shall, within six months after their title accrues, take the oath therein described.

Co. Lit. 35. 171.  
2. Bl. Com.  
295.  
Sheph. Touch.  
c. 4

I. BY DEED. A deed, *factum*, in the understanding of the Common Law, is an instrument written on parchment or paper, comprehending a contract betwixt party and party. A deed mul

b

be between persons able to contract, and to be contracted with, upon good consideration, either written or printed; and the matter legally and orderly set out. The formal and orderly parts of a deed are,—1. The *premises*, in which the number, names, additions and titles of the parties are set forth. 2. The *habendum*; the office of which is, to determine what estate or interest is granted by the deed. 3. The *reddendum*; or reservation, whereby the grantor reserves something to himself out of the thing granted. 4. A *condition*, which is a clause of contingency, on the happening of which the estate granted may be defeated. 5. The *warranty*, whereby the grantor, for himself and heirs, warrants or secures to the grantee the estate so granted. 6. The *covenants*, which are clauses of agreement contained in the deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform or give something to the other. 7. The *conclusion*, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly, or by reference to some day and year before-mentioned. Of DEEDS, some concern the realty, and some the personalty; some are mixed, and others are deeds indented or deeds poll. AN INDENTURE, *instar dentium*, is a conveyance, the paper or parchment of which is indented or cut unevenly, and made to tally with its counter-parts; for being made by more parties than one, there ought to be regularly as many copies as there are parties. A DEED POLL is made by one party only, and is not indented; but is polled or shaven quite even. To make a good deed, it must be read to any of the parties who desire it; for otherwise, as to him, it is void. So also, the party whose deed it is should *seal* and *sign* it; but the most essential requisite is its *delivery*, for it takes its effect entirely from this ceremony; and to commemorate this execution of it, it is necessary to its validity that this execution should be attested in the presence of credible witnesses.

Of deeds there are the following kinds:—1. *Feoffment*: 2. *Gift*: 3. *Grant*: 4. *Lease*: 5. *Exchange*: 6. *Partition*: which are called original conveyances, because by means thereof the estate is first created; but there are others also, as,—7. *Release*: 8. *Confirmation*: 9. *Surrender*: 10. *Assignment*: 11. *Defeasance*: which are called derivative conveyances; because the estate originally created, is thereby enlarged, restrained, transferred, or extinguished. To these may be subjoined, those conveyances which, 12thly, have their operation by the *Statute of Uses*.

Co. Lit. 9.  
Shepherd's  
Touchstone,  
199.  
Mad. Form.  
Angl. p. 4.  
1. Burr. 92.  
Pop'h. 39.  
2. Bl. Com.  
310.  
Spelman's  
Gloss. 510.  
Wright's Ten.  
22. 48.  
2. Inst. 110.  
199.  
Dalrymple on  
Feuds, 202.  
4. Co. 125.  
8. Co. 42.

1. A FEOFFMENT is properly *donatio feudi*, and may be defined, a gift of any corporeal hereditament to another. He that so gives or enfeoffs, is called the *feoffor*, and the person enfeoffed is denominated the *feoffee*. To a deed of feoffment *livery of seisin* is an indispensable requisite; for without it the feoffee has but a mere estate at will; and this ceremony consists in the delivery of corporal possession of the land or tenement. Livery of seisin is either in *deed* or in *law*. In *deed*, as when the feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney, come to the land; or to the house, and there in the presence of witnesses declare the contents of the feoffment or lease on which livery is to be made, and the feoffor deliver to the feoffee, all other persons being out of the premises, a clod, or turf, or twig, in the name of seisin. *Livery in law* is where the same is not made on the land, but in sight of it only, the feoffor saying to the feoffee, "I give you yonder land, enter and take possession." But this livery in law cannot be performed by attorney.

1. Roll. Rep. 61.  
Sheph. Touch.  
226.  
2. Bl. Com.  
316.  
1. Wood's  
Conveancing,  
116. 659.

2. A DEED OF GIFT is properly applied to the creation of an estate in tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment, but in the nature of the estate passing by it.

3. A GRANT is the instrument of transferring the property of incorporeal hereditaments, or such things whereof no livery can be had; for which reason all corporeal hereditaments are said to lie in *livery*, and all incorporeal to lie in *grant*. These, therefore, pass merely by the delivery of the deed, the operative words of which are, *dedi et concessi*, have given and granted.

4. A LEASE is properly a conveyance of any lands or tenements, in consideration of rent or other annual recompence, made for life, years, or at will, but always for a less time than the lessor hath in the premises; for if it be of the whole interest, it is more properly an assignment. The usual words of operation in it are, "demise, grant, and to farm let." By 32. *Hen. 8. c. 28.* tenant in tail may make leases to bind the issue in tail, but not those in remainder or reversion. A husband seised in right of his wife in fee-simple, or fee-tail, may, with her concurrence, make leases to bind her and her heirs; and all persons seised in fee in right of their churches, except parsons or vicars, may make leases to bind their successors, to endure for three lives, or one-and-twenty years; but all such leases must be by indenture; must commence immediately, and not at a future period; must be made within a year of the expiration of any former lease; be either for one-and-twenty years, or three lives, and not for both; must be of lands and tenements; or, by 5. *Geo. 3. c. 17.*, of tithes or other incorporeal hereditaments; commonly let for twenty years last past, reserving the most usual and customary rent, and not be made without impeachment of waste. But by 1. *Eliz. c. 19.* all grants by archbishops and bishops, which include those confirmed by dean and chapter, other than for one-and-twenty years, or three lives from the making, or without reserving the usual rent, shall be void, excepting grants made to the crown; and by the 13. *Eliz. c. 10.* 14. *Eliz. c. 11.* & 14. 18. *Eliz. c. 11.* and 43. *Eliz.*

43. *Eliz. c. 29.* all ecclesiastical corporations are retrained from making any leases exceeding twenty-one years, or three lives from the making, on which the accustomed rent, or more, shall not be yearly reserved; and where there is an old lease in being, no concurrent lease shall be made, unless where the old one will expire within three years: but houses in corporations or market towns may be let for forty years, provided they be not the mansion-houses of the lessors, nor have above ten acres of ground belonging to them; and provided the lessee be bound to keep them in repair: they may also be exchanged in fee-simple for lands of equal value. The leases of beneficed clergymen non-resident are void, except those of licensed pluralists, who are allowed to demise the living to their curates, on condition of not being absent above forty days in any one year.

For the restrictions on college leases, see 18. *Eliz. c. 6.*

13. *Eliz. c. 20.*  
14. *Eliz. c. 11.*  
18. *Eliz. c. 11.*  
43. *Eliz. c. 9.*

2. *Bl. Com. 323.*  
*Sh. Tou. ch. 16.*  
*Co. Lit. 50.*  
*Wood's Inst. 272.*

5. AN EXCHANGE is a mutual grant of equal interests, the one in consideration of the other; and in this conveyance the word "exchange," and no other in its stead, must be used.

2. *Co. 74.*  
*Shep. 182.*  
*Co. Lit. 102.*  
384.

6. A PARTITION is where two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands so held among them in severalty, each taking a distinct part.

*Terms de le Ley. Noy's Max. 74.*  
2. *Roll. Abr. 403.*  
*Wood's Inst. 265.*  
8. *Co. 136.*  
*Id. Ray. 515.*  
*Co. Lit. 264.*  
273.  
*Roll. Abr. 400.*  
*Terms of Law, 42.*  
*Shep Touch. 318.*

7. RELEASES are 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 therein are, "remised, released, and for ever quit-claimed." 1. Releases, according to the matter of fact, sometimes operate by enlargement of the estate of the releasee: as if a man let land to another for term of years, by force whereof he is in possession; and after, he release to him all the right he has, the releasee in this case will, without any other words, have an estate for life. 2. Releases may operate by *passing an*

*an estate*: as where one of two coparceners releaseth all her right to the other, this passeth the estate in fee-simple of the whole. 3. By way of *passing a right*: as if a man be disseised, and he releases to his disseisor all his right; for by this release his estate, which before was wrongful, is now made lawful and right. 4. A release may enure by way of *extinguishment*: as if my tenant for life letteth the same land over to another for term of the life of his lessee, the remainder to another in fee; now if I release to him to whom my tenant made a lease for term of life, I shall be barred for ever. 5. So also, a release may enure by way of *entry and feoffment*; for if a disseisee release to one of two disseisors, it shall enure to hold out his companion. Co. Lit. 278.

8. A CONFIRMATION is of a nature nearly allied to a release, and is an approbation of, or assent to, an estate already created, by which the confirmer strengthens and gives validity to it as far as it is in his power; but it has this operation only with respect to estates voidable or defeasible, and not upon estates absolutely void. The words are, "ratified, approved, and confirmed." Thus, if tenant for life lease for forty years, and die during the term, the lease is voidable by him in reversion; but if *he* hath confirmed the estate to the lessee for years, before the death of the tenant for life, it is no longer voidable, but sure. Co. Lit. 295.  
Gilb. Ten. 75.  
Braft. f. 32.  
2. Bl. Com. 325.  
Wood's Inst. 269.  
Shep. Touch. ch. 18.  
9. Co. 142.  
West's Symb. 457.  
Dyer, 40. 273.  
1. Ro. Ab. 478.  
5. Co. 81.

9. A SURRENDER, *sursum redditio*, properly, is a yielding up of an estate for life or years to him that hath the immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them. A surrender differs from a release in this respect, that the release operates by the greater estate descending upon the less; but a surrender is the falling of a less estate into a greater. A surrender immediately divests the estate out of the surrenderer, and vests it in the surrenderee. A surrender Co. Lit. 337. b.  
Perk. 581.  
2. Ro. Ab. 494.  
2. Bl. Com. 326.  
Dyer, 176.  
9. Co. 75.  
Shep. To. c. 17.  
Wood's Inst. 273.  
2. Salk. 618.

render is of two sorts, *viz. in deed*, or by express words; and *in law*. A surrender in law is, in some cases, of greater force than a surrender in deed: as if a man make a lease for years, to begin at *Michaelmas* next, this future interest cannot be surrendered, because there is no reversion wherein it may drown: but by a surrender in law, it may be drowned; as if the lessee before *Michaelmas* take a new lease for years, either to begin presently or at *Michaelmas*, this is a surrender in law of the former lease. *Fortior et æquior est dispositio legis quàm homines*. But by 29. *Car.* 2. c. 3. s. 3. no lease or other uncertain interest shall be surrendered, unless it be by deed or note in writing, signed as the Act directs.

10. Co. 67.  
6. Co. 69.  
Cro. Jac. 84.  
Dyer, 58.  
1. Roll. Abr.  
495.  
Gilbert's Cases  
in Equity, 236.  
2. Will. 27.

2. Bl. Com.  
326.  
Co. Lit. 301. b.  
Wood's Inst.  
271.  
3. Co. 24.  
Cro. Eliz. 735.

10. AN ASSIGNMENT is properly a transfer or making over to another of the right any one has in any estate; - but it is usually applied to an estate for life or years. The assignor parts with his whole property; and the assignee stands to all intents and purposes in his place.

Wood's Inst.  
381.  
Co. Lit. 236.  
2. Bl. Com.  
327.  
1. Ro. Ab. 590.  
1. Co. 113.  
Carth. 64.  
5 Co. 90.  
Plow. 131.  
Dyer, 6.  
Shepherd's  
Touchstone, ch. 22.

II. A DEFEASANCE. The name of this conveyance is fetched from the *French* word *defaire*, and signifies to defeat or undo, *infectum reddere quod factum est*: it 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.

To these conveyances may be subjoined several others, which derive their force and effect from the Statute of Uses, as, 12. *A covenant to stand seised.* 13. *Bargain and sale.* 14. *A lease and release.* 15. *A deed to lead or declare the uses.* 16. *A deed of revocation.* But before we attempt an explanation of the purposes for which they were invented and are employed, it may be proper to say something of the nature of uses and trusts.

USES

USES AND TRUSTS are, in their original nature, very similar, or exactly the same. A right existed in the Civil Law, of using a thing without having the ultimate property or full dominion of the substance; and the ingenuity of the ecclesiastics to avoid the effect of the statutes of mortmain, by which *lands* given to religious houses were forfeited to the crown, after many other devices had been suppressed, transplanted into *England* this notion of the Civil Law, and with it a novel mode of conveyance, called A FEOFFMENT *to a use*; which was a method of obtaining grants of lands, not to their religious houses directly, but *to the use* of their religious houses; and the court of Chancery, conceiving these *uses* binding in conscience, compelled the execution of them; thus distinguishing between the *possession* and the *use*, and receiving the actual profits, while the *seisin* of the land remained in the nominal feoffee. These *uses*, however, when thus employed to enrich the coffers of the ecclesiastics, were by 15. *Rich. 2. c. 5.* made subject to the statutes of mortmain; but the idea being once introduced, it afterwards continued to be applied to a number of civil purposes, and at length grew almost universal. Great mischiefs, however, soon became apparent from this practice of permitting the land itself to be in the possession of one person, while the enjoyment or use of it was in another; for *uses* might be assigned by secret deeds between the parties; they were not held liable to any of the feudal burdens, as escheat; they could not be extended by *elegit*, or other legal process, for the debt of *cestuy que use*, or him for whose use the grant was made; no wife could be endowed of such land; no husband be tenant by the courtesy. To remedy these inconveniencies, several statutes were made, all tending to consider *cestuy que use* as the real owner of the estate; and at length that idea was carried into full effect by the statute 27. *Hen. 8. c. 10.* usually called THE STATUTE OF USES; by which it is enacted, “ that where any person or persons stand  
“ or



“ or be seised of or in any honours, castles,  
 “ manors, lands, tenements, rents, services, re-  
 “ versions, remainders, or other hereditaments,  
 “ to the *use, confidence, or trust*, of any other  
 “ person or persons, or of any body politic, by  
 “ reason of any bargain and sale, feoffment, fine,  
 “ recovery, covenant, contract, agreement, will,  
 “ or otherwise by any manner or means whatso-  
 “ ever it may be, all and every such person and  
 “ persons, and bodies politic, that have or shall  
 “ have any such use, confidence, or trust, in fee-  
 “ simple, fee-tail, for term of life or for years or  
 “ otherwise, or any use, confidence, or trust, in  
 “ remainder or reverter, shall stand and be seised,  
 “ deemed and adjudged in lawful seisin, estate  
 “ and possession of and in the same with all their  
 “ appurtenances, to all intents, constructions,  
 “ and purposes in the law; and that the estate,  
 “ title, right, and possession, shall be clearly  
 “ deemed and adjudged to be in him or them that  
 “ have or shall have such use, confidence, or trust,  
 “ after such quality, manner, form, and condi-  
 “ tion, as they had before in or to the use, con-  
 “ fidence, or trust, that was in them.”—The  
 statute then *executes* the use, that is, conveys the  
 possession to the use, and transfers the use to the  
 possession, thereby making *cestuy que use* complete  
 owner of the lands, as well at law as in equity; but  
 as the intervening estate of the *feoffee* alone is  
 annihilated, but not the conveyance to uses  
 abolished, the courts consider them now as mere-  
 ly a mode of conveyance. The only service,  
 therefore, to which this statute is now consigned  
 is, in giving efficacy to the following deeds.

Co. Lit. 112.  
 7. Co. 40.  
 Wood's Inst.  
 246.  
 2. Bl. Com.  
 328.  
 2. Willf. 22. 75.

12. A COVENANT TO STAND SEISED TO USES,  
 which is, when a man who hath a wife, children,  
 brother, or kindred, doth by bare covenant in  
 writing under his hand and seal agree, in con-  
 sideration of natural love and affection, marriage,  
 or other *good consideration*, that for their, or any of  
 their provision or preferment, he and his heirs  
 will

will stand seised of land *to their use*, either in fee-simple, fee-tail, or for life. This conveyance need not be by deed indented, but it can only be made in consideration of blood or marriage.

2. Co. 15.  
1. Lev. 55.  
2. Stra. 934.  
Plowd. 302.

13. A BARGAIN AND SALE is a real contract upon *valuable consideration* for passing manors, lands, tenements, or hereditaments; and by 27. Hen. 8. c. 16. must be by deed indented, and enrolled within six months after the date of it, without livery of seisin or attornment of tenants. It is created by the words, "have bargained and sold;" although other words, as "alien, grant, covenant to stand seised upon valuable consideration," may amount to a bargain and sale. He that sells is the *bargainor*, and he that buys the *bargainee*. The use conveyed by this instrument must be always to the *bargainee*, upon a valuable consideration; for he cannot stand seised to the use of another.

2. Bl. Com.  
338.  
Wood's Inst.  
249.  
Shep. T. c. 10.  
7. Co. 40.  
8. Co. 93.  
2. Inst. 672.  
Dyer, 169.  
1. Co. 125. 176.  
11. Co. 25.

14. A LEASE AND RELEASE is the most common kind of conveyance of any the Statute of Uses produced. A lease, or bargain and sale, is first executed for *a year*, upon some pecuniary consideration, by the tenant of the freehold to the lessee or bargainee, to the intent that by virtue thereof the lessee or bargainee may be in actual possession of the lands intended to be released to him; and then, by virtue of the statute, he is enabled to take a grant or release of *the reversion* of the inheritance, to the use of himself and his heirs for ever. The next day, therefore, a release is granted to him.

2. Bl. Com.  
339.  
Ld. Ray. 235.  
664.  
3. Vent. 35.  
Wood's Inst.  
238.  
Co. Lit. 270.

15. A DEED TO LEAD OR DECLARE THE USES, is an instrument which usually accompanies a fine and recovery: if made previously, it is called a deed to *lead* the uses; if subsequent, to *declare* the uses.

16. A DEED OF REVOCATION OF USES. This instrument depends on a power previously reserved for

2. Bl. Com.  
335. 339.  
Co. Lit. 237.

for the purpose of making it, at the time the uses are raised: and is employed to revoke such as were then declared, and to appoint others in their stead.

These are the several conveyances founded on the Statute of Uses; but before we proceed to consider the second species of alienation BY RECORD, we shall just mention,

Co. Lit. 172.  
Cro. Eliz. 515.  
2. Ro. Ab. 146.  
2. Bl. Com.  
340.  
Wood's Inst.  
277.  
Shep. Touch.  
c. 21.

17. AN OBLIGATION, or *bond*, which is a deed containing a penalty, with a condition for payment of money, or to do or to suffer some act or thing. If it is without a condition, it is called a *bill*, which is sometimes with a penalty, and then it is called a *penal bill*, or *simple bond*. If it is without seal it is a *single bill*, and no deed. If the condition of a bond be not performed, it becomes forfeited or absolute at law, and charges the obligor while living, and after his death the obligation descends upon his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets by descent. A bond, the condition of which is impossible, or if it be to do a thing contrary to law, or if it be uncertain or insensible, yet the condition alone is void, and the bond shall be good as a *single bond*; but if the condition be possible at the time of making it, and afterwards becomes impossible by the act of God, the act of law, or the act of the obligee himself, the penalty of the obligation is saved; and by 4. & 5. Ann. c. 16. although the penalty of a bond become forfeited, yet payment, or tender of payment of the principal, interest, and costs, may be pleaded in satisfaction.

The manner in which a bond affects personal property. Vide *post*.

2. Bl. Com. 34.

18. A RECOGNIZANCE is an obligation of record, which a man enters into before some court of record or magistrate duly authorised, with a condition to do some particular act; as to appear at the assizes, to keep the peace, to pay a debt, or the like. There are also other recognizances, which are some-

sometimes called statutes, because they are framed upon certain acts of parliament (a), and are of two kinds:—1. *A statute-merchant*; and 2. *A statute-staple*. The first was contrived for the security of merchants only, yet at this day it is used by others, and is become one of the common assurances of the kingdom. The second was invented and is used only for merchants and merchandizes of the same *staple*, and is of the same nature with a statute-merchant; but the use of both of them is become obsolete.

19. A **DEFEASANCE** on a bond, on a recognizance, or on a judgment recovered, is a condition which when performed defeats or undoes it, in the same manner as a defeasance of an estate, before-mentioned. Ante, 316.

V. **BY RECORD.** Alienations by record are, 1. Private acts of parliament; 2. The King's grants; 3. Fines; and, 4. Common recoveries.

1. A **PRIVATE ACT** of Parliament, as a mode of alienating property, is never permitted to pass without evident necessity, and upon great caution and deliberation. The necessity may arise from the intricacies into which a large family estate may in a course of years fall, by the number of limitations it has undergone, or from other causes which make it essential to the family interest of the possessor to apply to the legislature for powers to abridge, enlarge, and dispose of it in such a way as the exigencies of his family may require. 2 Bl. Com. 340.

2. **THE KING'S GRANTS**, or Letters Patent, are first prepared by the attorney and solicitor general, in consequence of a warrant from the crown, and are then signed, that is superscribed at the top with the King's own *sign manual*, and sealed with the *privy signet*.

3. A **FINE** is an amicable agreement or composition of a suit, whether real or fictitious, between

2. Bl. Com.  
549.  
2. Ro. Ab. 13.

See 32 Geo. 2.  
c. 14.

tween the demandant and tenant, with the consent of the judges, and enrolled among the records of the court where the suit was commenced; by which lands and tenements are transferred from one person to another, or any other settlement is made relating to lands and tenements. 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 matters. A FINE consists of five parts:—1. The original writ; for when the parties have agreed to levy a fine, the person to whom the land is to be conveyed, commences an action or suit at law against the vendor, by suing out a writ of covenant against him, the foundation of which is a supposed agreement or covenant, that the vendor shall convey the lands to the purchaser; on the breach of which agreement the action is brought. 2. The *licentia concordandi*, or leave to agree the suit; for as soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of accommodation to the plaintiff, who accepting them, but having given pledges to prosecute his suit, applies to the court for leave to make the matter up, which is readily granted, on payment of a fine, which is called *the King's silver*. 3. The concord or agreement entered into openly in the court of Common Pleas, or before the Chief Justice of that court, or Commissioners duly authorized for that purpose, which is the foundation and substance of the fine. It is usually an acknowledgement from the deforceants, or those who keep the others out of possession, that the lands in question are the right of the demandant, and from the acknowledgement or recognition of right thus made, the party who levies the fine is called *the cognizor*, and the person to whom it is levied *the cognizee*. 4. The note of the fine; which is only an abstract of the writ of covenant and the concord, naming the parties, the parcels of the land, and the agreement. 5. The foot, chirograph, or indenture of the fine; which includes

cludes the whole matter, reciting the parties, the day, the year, the place, and the person before whom it was acknowledged or levied. Of this there are indentures made or ingrossed at the chirographer's office, and delivered to the cognizor and cognizee, beginning with these words: "*Hæc est finalis concordia,*" and then reciting the whole proceeding at length: the fine is thus completely levied at Common Law. But when fines became a more general mode of assurance, it became necessary to render the levying of them a matter of the most public notoriety, on account of those whose rights might be barred by not making their claim in due time. For this purpose it was enacted by 27. *Edw.* 1. c. 1. that the note of the fine shall be openly read in the court of Common Pleas, at two several days in one week, and during such reading all pleas shall cease. By 5. *Hen.* 4. c. 14. and 23. *Eliz.* c. 3. all the proceedings on fines either at the time of acknowledgement, or previous or subsequent thereto, shall be enrolled of record in the court of Common Pleas. By 1. *Rich.* 3. c. 7. confirmed and enforced by 4. *Hen.* 7. c. 24. the fine, after engrossment, shall be openly read and proclaimed in court sixteen times; *viz.* four times in the term in which it is made, and four times in each of the three succeeding terms; during which time all pleas shall cease: but this is reduced to once in each term by 31. *Eliz.* c. 2. and these proclamations are endorsed on the back of the record. It is also enacted by 23. *Eliz.* c. 3. that the chirographer of fines shall every term write out a table of the fines levied in each county in that term, and shall affix them in some open part of the court of Common Pleas all the next term: and shall also deliver the contents of such table to the sheriff of every county, who shall at the next assizes fix the same in some open place in the court, for the more public notoriety of the fine. Fines are divided into four sorts:—1. *Fines sur cognizance de droit come ceo*, which is the best and surest kind of fine; for the deforçant, in order to keep his supposed

Cruise on  
Fines, 62.  
Coke's Read-  
ings, 2.  
Co. Lit. 9.  
Salk. 340.  
Bro. Abr. 30.

covenant with the plaintiff, of conveying him the land in question, and at the same time to avoid the formality of an actual feoffment with livery of seisin, acknowledges in court a former feoffment, or gift in possession, to have been made by him to the plaintiff; so that it is rather an acknowledgement of a former conveyance, than a conveyance originally made; for the deforceant 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. This species of fine gives the cognizee immediate possession of the land; it will also pass a fee-simple without the word *heirs*, but a rent cannot be reserved on this or on any other fine which is executed. 2. Fine *sur cognizance de droit tantum*, or upon acknowledgement of the right only, without the circumstance of a preceding gift by the cognizor. This species of fine is generally 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 freehold and possession, during the particular estate, is vested in a third person. This fine may also be used by tenant for life, in order to make a surrender of his life estate to the person in remainder or reversion; and then it is called a fine upon surrender. It is also executory, and passes a fee-simple without the word *heirs*. 3. A fine *sur concessit* is, where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right or gift, grants to the cognizee an estate *de novo*, by way of supposed composition, which may be either an estate in fee, in tail, for life, or even for years. 4. A fine *sur done et render* is a double fine, comprehending the FINE *sur cognizance de droit come ceo*, and the FINE *sur concessit*. It is used in order to create particular limitations of estates; whereas the fine *sur cognizance de droit come ceo* conveys nothing but an absolute estate, either of inheritance, or at least of freehold. In this fine the cognizee, after the right is acknowledged to be in him, *renders* or grants back to the cognizor some other estate in the lands; and the

the *render* must be made of the lands demanded in the original writ, or of something issuing out of those lands; and as the cognizee can have nothing to render to the cognizor until he is in possession, it is a fine executed as to the first part and executory as to the second. The persons bound by a fine are *parties*, *privies*, and *strangers*. Parties are either the cognizors or cognizees; and these are immediately concluded by the fine, and barred of any latent right they may have, though even under the legal impediment of coverture. 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 since the 11. *Hen.* 7. c. 20. the vendee, the devisee, and all others who must make title by the persons who levied the fine. Strangers to a fine are all other persons in the world except parties and privies; and these also are bound by a fine, unless within five years after proclamations made, they interpose their claim; provided they have then a present interest in the estate, and are not under the impediments of either coverture, infancy, imprisonment, insanity, or absence beyond sea; for persons thus incapacitated to prosecute their rights have five years allowed them to put in their claims, after such impediments are removed.

4. A COMMON RECOVERY is the fourth species of assurance by matter of record; and in its most extensive sense, signifies the restitution of a former right, by the solemn judgment of a court of justice; but it is otherwise described to be a judgment obtained in a fictitious suit, brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in such suit: and these judgments, whether obtained after a real defence made by the tenant, or upon his default, or feint plea, have equally the same force and efficacy to bind the

See Cruise on Recoveries, *passim*.



right of the land so recovered, and to vest a free and absolute estate in fee-simple in the recoverers. A recovery, although like a fine it depends on a suit or action either real or fictitious, yet it cannot be, like a fine, immediately compromised; but must be carried on through every regular stage of the proceeding. The first thing requisite is, that the person who is to be the demandant, and to whom the lands are to be conveyed, should sue out a writ or *præcipe* against the tenant of the freehold; whence such tenant is usually called the *tenant to the præcipe* (a). In obedience to this writ, the tenant to the freehold appears in court, either in person or by his attorney; but instead of defending the title of the land himself, he calls on some other person, who, upon the original purchase, is supposed to have warranted the title, and prays that such person may be called in, to defend the title which he has warranted; or otherwise to give the tenant lands of equal value to those which he shall lose by the defect of his warranty. This is called "the voucher," *vocatio*, or calling to warranty. The person thus called to warrant the title (who is usually called *the vouchee*), appears in court, is impleaded, and enters into the warranty, by which means he takes upon himself the defence of the land. The demandant then desires leave of the court to imparl or confer with the vouchee in private, which is granted of course. Soon afterwards the demandant returns into court, but the vouchee disappears or makes default; in consequence of which it is presumed by the court, that he had no title to the lands demanded by the writ, and therefore could not defend them; whereupon judgment is given for the demandant, now called *the recoverer*, to recover the lands in question against the tenant; and judgment is also given for the tenant to recover against the vouchee lands of equal value, in recompence for the lands so warranted by him, and now lost by his default. This is called *the recompence*, or recovery in value; but as it is customary to vouch the cryer of the court of

Common

(a) By 14. Geo. 2. c. 20. although the legal freehold be vested in lessees, yet those who are intitled to the next freehold estate in remainder or reversion may make a good tenant to the *præcipe*. See 2. Bl. Com. 362.

Common Pleas, who is hence called *the common vouchee*, the tenant can only have a nominal recompence for the lands thus recovered against him by the demandant. A writ of *habere facias seisinam* is then sued out, directed to the sheriff of the county in which the lands, thus recovered, are situated; and on the execution and return of this writ, the recovery is compleated. The recovery here described is with single voucher; but a recovery may and is frequently suffered with double voucher, or farther voucher, as the exigency of the case may require. In a recovery with double voucher, the tenant or proprietor of the land conveys an estate of freehold to some indifferent person against whom the writ is brought; the tenant to the *præcipe* then vouches the proprietor of the land, who vouches over the common vouchee. In every common recovery, the demandant acquires the *fee-simple* of the lands recovered, although the word *heirs* be not mentioned in the judgment; because, the writ being brought for the absolute property or fee-simple of the land, if judgment is obtained, it must be for as much as was demanded in the writ, and in all adversary suits, every recoverer recovered a fee-simple. A common recovery is an absolute bar, not only of all estates tail, but of remainders and reversions expectant thereon. But by 34. & 35. *Hen. 8. c. 20.* no recovery had against tenant in tail, of the King's gift, whereof the remainder or reversion is in the King, shall bar such estate tail, or the remainder or reversion of the crown. And by 11. *Hen. 7. c. 20.* no woman, after her husband's death, shall suffer a recovery of lands settled on her by her husband; or settled on her husband and her by any of his ancestors. Also, 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.

VI. SPECIAL CUSTOM is another mode by which Wood's Inst. real property may be alienated, and is confined to <sup>132.</sup> 2. Bl. Com. 368. Co. Lit. f. 74. Co. Cop. f. 36. 4. Co. 25. 2. Peer. Wms. 258. 2. Atk. 37. Prec. Ch. 475. 2. Vezey, 164. 582. 1. Vezey, 64. 228. 1. Atk. 385. 3. Atk. 583.

Y 4

copyhold

copyhold lands; and such customary estates as are holden in *ancient demesne*, or in manors of a similar nature; and the method pursued in this species of alienation is called a surrender. A surrender, *sursum redditio*, is the yielding up of the land by the tenant to the lord, according to the custom of the manor, to the use of him that is to have the estate; but until the *presentment* and *admittance* of the *cestuy que use*, the lord taketh notice of the surrenderer as his tenant. Presentment, which is an information to acquaint the lord or his steward with the surrender that has been made, is to be made at the next court-baron, immediately after the surrender; but by special custom in some places, it will be good though made at the second or other subsequent court. It is to be brought into court by the same persons who took the surrender, and then presented by the homage. Admittance is the last stage or perfection of copyhold assurances, and it is the giving possession of the estate in the same manner as induction gives possession of a benefice. Admittances are of three kinds:—

1. An admittance upon a voluntary grant from the lord; for if a copyhold for life fall into the lord's hands by the tenant's death, though the lord may destroy the tenure and enfranchise the land, yet if he still continue to dispose of it as copyhold, he is bound to observe the ancient custom in every point, and can neither add to nor diminish the ancient rent, nor make any the minutest variation in other respects.
2. An admittance upon surrender of a former tenant; for in this case the lord is the instrument of the law, and no manner of interest passes to him by the surrender; and of course none can pass out of him by the admittance. The admittance of the surrenderee is a mere ministerial act, which every lord in possession is bound to perform.
3. An admittance upon a descent from the ancestor, which only differs from an admittance upon surrender, inasmuch as in the first case the heir is tenant by copy immediately upon

Wood's Inst.  
234.

2. Bl. Com.  
370.

Co. Lit. 59.  
4. Co. 27.

1. Co. 140.  
4. Co. 23. 27.

upon the death of his ancestor, but in the second nothing is vested in the *cestuy que use* before admittance.

VII. DEVISE is the last method of conveying real property. A devise, from *devifer*, to speak, is a bequeathing of lands or tenements by will in writing; for of a legacy, or disposal of personal property by testament, we shall speak hereafter. A will devising lands, is considered in law as an instrument declaring the uses to which the lands shall be subject. By the ancient Common Law, no lands in fee-simple were devisable by will, nor could they be transferred from one to another, except by the solemnity of livery of seisin, matter of record, or sufficient writing. But by 32. Hen. 8. c. 1. and 34. & 35. Hen. 8. c. 6. all persons having a sole estate, or interest in fee-simple, or in coparcenary, or in common, either in possession, remainder, or reversion, or of any rents or services incident thereto, except feme coverts, infants, idiots, and persons of *non sane* memory, have full and free liberty to give, dispose, will or devise to any person or persons (except bodies politic or corporate), by last will and testament in writing, or otherwise by any act lawfully executed in his life-time, *two-thirds* of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in soccage. So that now, as all tenures are converted by 12. Car. 2. c. 24. into free and common soccage, a man may devise his fee-simple lands, either in fee-simple, fee-tail, for life, or years, absolutely or conditionally, at his pleasure, without livery of seisin, or naming an executor. But lands in tail are not devisable by will, nor copyhold land, unless by custom, or being surrendered to the use of the owner's will. But by the construction of 43. Eliz. c. 4. not only a devise to a corporation, but a devise by a copyhold tenant, without surrender to the use of his will, and a devise (nay, even a settlement) by tenant in tail, without either fine

Wood's Inst.

282.

Co. Lit. 111.

2. Bl. Com. 380.

Shepherd, c. 23.

4. Co. 61.

1. Lev. 6.

2. Inst. 7.

3. Co. 30.

1. Peer. Wms

575.

Co. Lit. 111.

Wood, 282.

3. Peer. Wms.

360.

2. Bl. Com.

376.

Moor, 890.

2. Vern. 453.

Prec. Ch. 16.

OR

Duke's Cha-  
ritable Uses,  
84.

3. Lev. 1.

Freem. 486.  
2. Ch. Car. 109.  
Prec. Ch. 185.  
1. Peer. Wms.  
740.  
Sura. 1253.

or recovery, if made to a *charitable use*, are good by way of appointment. The statutes of *Henry the eighth*, however, having only appointed that these devises should be in writing, without marking out any form or ceremony under which it was to be performed, many frauds and perjuries were committed, to introduce mere notes of hand and other writings as bad wills. To remedy this inconvenience, the 29. *Car. 2. c. 3.* directs, that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction, and be subscribed in his presence by three or four credible witnesses: and a similar solemnity is requisite for revoking a devise. In the construction of this statute, the testator's name in the beginning of the will has been held a sufficient signing, without any name at the bottom; but the witnesses must subscribe their names *in his presence*, although they may see him sign, or acknowledge the signing at different times; and by 25. *Geo. 2. c. 6.* all legacies given to any of the subscribing witnesses to a will, are declared to be void — Creditors, however, are competent witnesses, although the land devised be charged with the payment of debts; and indeed, by the 3. & 4. *Will. & Mary, c. 14.* they are rendered less interested respecting the payment of their debts; for by that statute, all devises as against creditors shall be void; so that creditors by specialty may now maintain actions jointly against both the heir and the devisee.

AND as this concludes our enquiry into the nature and transmutation of Real Property, we shall proceed to the second division of the present section, by considering the nature of that species of property which is called Personal.

PERSONAL PROPERTY comprehends all sorts of things *moveable*, which may attend a man's person  
wherever

wherever he goes, which are usually termed *goods*; and something more, the whole of which is comprehended under the general name *chattels*.—Chattels may be either real or personal. Chattels real are those which concern the realty, or lands and tenements; as term for years of land, the next presentation to a church, estates by statute-merchant, statute-staple, *elegit*, or the like. Chattels personal are, properly and strictly speaking, things moveable; as gold, silver, plate, jewels, implements of household, cattle of all sorts, and the like. The ownership of a chattel is called *property*; and as persons are said to be *seised* of land, so they are said to be *possessed* of *chattels*, whether they be real or personal. The possession of this species of property is either *absolute* or *qualified*. Absolute possession is, when a man hath, solely and exclusively, the right and also the occupation of any moveable chattels, so that they cannot be transferred from him, or cease to be his, without his own act or default; such as may be all *inanimate* things, as plate, money, &c. or all *vegetable* productions, as fruits, plants, &c. But with respect to *animals*, which have in themselves a principle and power of motion, an absolute possession cannot be gained, unless they are *domesticated*, and rendered so tame that he may have them perpetually in his occupation, as horses, sheep, poultry, and the like: but in animals *feræ naturæ* no absolute property can be gained, unless they are reclaimed, and rendered valuable to the use of man. A qualified property, therefore, subsists in all wild animals:—1. *Per industriam hominis*, by a man's reclaiming and making them tame by art, industry, and education, or by so confining them within his own immediate power, that they cannot escape and use their natural liberty. 2. *Ratione impotentiae*, on account of their own inability; as when hawks, herons, or other birds, build in my trees, or conies, or other creatures, make burrows in my land. 3. *Propter privilegium*; as by being lawfully qualified to hunt, and having an exclusive authority to take or kill them. But  
 personal

personal property, as well as being thus in the actual or constructive possession of a man, may also be of a qualified or special nature; as in the case of *bailment*, or of the delivery of goods to another to a particular use; as to a carrier to convey to any place, here there is no absolute property in either the *bailor* or the *bailee*; for the bailor hath only the right, and not the immediate possession; and the bailee hath possession, and only a temporary right; but it is a *qualified property* in them both, and each of them is entitled to an action in case the goods be damaged or taken away. Personal property may also be in what the law calls *action*, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question, the possession remaining to be recovered by suit at law; and for this reason it is called a *chose in action*; as money due on a bond, damages for non-performance of a covenant or promise; the former depending on an *express contract* or obligation to pay a stated sum, and the second on an *implied contract*, that if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant. And of all these things, whether in possession or action, a man may have either in his own right or in the right of others, as executor, administrator, trustee, &c.: so, also, he may have them in expectancy, for they may be limited to him by way of remainder. They may also belong to their owners not only in severalty, but also in joint-tenancy and in common, as well as real estates.

Lit. f. 282. 321.  
1. Vern. 482.  
1. Eq. Caf.  
Ab. 292.  
Co. Lit. 182.

PERSONAL PROPERTY may be lost and gained in twelve different ways, *viz.*—1. By Occupancy: 2. Prerogative: 3. Forfeiture: 4. Custom: 5. Succession: 6. Marriage: 7. Judgment: 8. Gift or Grant: 9. Contract. 10. Bankruptcy: 11. Testament: and 12. Administration.

Brook's Abr. 18. 1. OCCUPANCY was the original and only primitive mode of acquiring any property at all, but  
2. Bl. Com. 401, 402. 2. Lev. 201. Carth. 396. Ld. Ray. 147. Salk. 667.

this

this has been abridged and restrained by the positive laws of society, in order to maintain peace and harmony among mankind; and the only instances wherein this right still subsists are the following:—1. The goods of an alien enemy may be seized by such persons as are authorized by the King, after a declaration of war; and in even the person of an alien enemy a man may acquire a sort of qualified property, by taking him a prisoner of war, and detaining him until his ransom be paid. So also, whatever goods are found on the surface of the earth, abandoned by the proprietor, may be appropriated by the first finder of them. So also, the elements of air, water, light, can only be appropriated by occupancy; for one man cannot obstruct another's light, nor, by erecting a mill, so obstruct a stream of water as to injure those who had obtained a prior occupation of it. So also with regard to animals *feræ naturæ*, any man may take them, unless where it is restrained by the civil laws of the country. Under this title may likewise be arranged the right of literary property by the rules of the Common Law; which right, by the statute 8. *Ann. c. 19.* is now appropriated to authors and their assigns for the term of fourteen years: and directed, that if at the end of that term the author himself be living, the right shall then return to him for another term of fourteen years. A similar privilege is extended to the inventors of prints and engravings for the term of eight-and-twenty years, by the statutes of 8. *Geo. 2. c. 13.* and 7. *Geo. 3. c. 38.*: and to the inventors of new patterns printed on cottons or callicoes, for the term of two months, by the statute of 25. *Geo. 3. c. 32.*

2. PREROGATIVE, whereby a right may accrue either to the crown itself, or its grantees, is a second method of acquiring personal property; as in wreck, treasure-trove, waifs, estrays, royal fish, swans, and the like. The King also has the right of printing at his own press, or that of his

2. Bl. Com.  
408.  
Wood's Inst.  
306.  
Bacon's Elements, 72.



1. Mod. 257. his grantees, all *acts of parliament, proclamations, and orders of council*; all *liturgies* and books of *divine service*; and such *law books* as were originally compiled at the expence of the crown; but he has not the exclusive right of printing *almanacks*, as has been heretofore conceived. The right of pursuing, taking, and destroying beasts *feræ naturæ*, is vested in the King; and in all cases of property, where the titles of a King and subject concur, as if a horse be given to the King and a private subject, the King shall have the whole.

Plowd. 243.  
323.  
Cro. Eliz. 263.  
Finch. 178.  
10. Mod. 245.  
Co. Lit. 30.

3. FORFEITURE is also a method by which a title to goods and chattels may be acquired and lost; such as is the forfeiture of 40 s. a month by the 5. *Eliz.* c. 4. for exercising a trade without having served seven years apprenticeship; so also, of 10l. by 9. *Ann.* c. 23. for printing an almanack without a stamp, and the like. At the Common Law also, goods and chattels are forfeited by *conviction, outlawry, flight, and standing mute*, in all felonies, from high-treason to petit-larceny inclusive; and also in the several misdemeanors of, 1. Drawing a weapon on a judge; 2. Striking in the King's courts; 3. *Præmunire*; 4. Pretended prophecies, upon a second conviction; and 5. By challenging to fight, on account of money won at play.

Co. Lit. 391.  
1. Inst. 316.  
3. Inst. 320.

2. Bl. Com. 422.  
Wood's Inst. 129.

4. CUSTOM is a fourth method of acquiring property in things personal, whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom; as, for instance, in the acquisition of *heriots, mortuaries, and heir-looms*.—1. *HERIOT, heregate*, from *herus* lord, and *gate* best, is a render made at the death of the tenant to the lord, of the best beast, or other thing, and consists in either *heriot-service* or *heriot-custom*; the first of which is never due without being specially reserved in the grant; but

Co. Lit. 185.  
Co. Cop. 24.  
2. Bl. Com. 97.  
3. Bl. Com. 15.  
Kitch. 267.  
1. Will. 28.  
2. Inst. 132.  
8. Co. 105.  
Ld. Ray. 1002.

but the second, being due by custom, may be seized without any reservation, although it cannot be *distrained*. 2. *Mortuaries*, or, as they are sometimes called, *corse presents*, are a sort of ecclesiastical heriot, being a customary gift claimed by and due to the minister in very many parishes, on the death of his parishioners. By 21. *Hen.* 8. c. 6. the value of those mortuaries due by custom, are fixed and settled in proportion to the value of the personal property the parishioner dies possessed of. Also, by the 12. *Ann.* c. 6. and 28. *Geo.* 2. c. 6. the mortuaries due to *Welsh* bishops are abolished, and a pecuniary equivalent settled on the bishop in its room.—3. **HEIR-LOOMS** are such goods and personal chattels as go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor; and generally consist of such things as cannot be taken away without damaging or dismembering the freehold. The ancient jewels of the crown are heir-looms. Charters, deeds, court-rolls, and other evidences of land, together with the chests in which they are contained, are in the nature of heir-looms; and many other articles of the like kind.

2. Bl. Com. 425.  
Wood's Inst. 164.  
2. Bl. Com. 427.  
Wood's Inst. 67.  
Co. Lit. 8. 185.  
388.  
Ld. Ray. 728.  
3. Inst. 202.  
Cro. Jac. 367.  
12. Mod. 520.  
12. Co. 105. 113.  
1. Hale, 515.

5. **SUCCESSION** is a fifth method of gaining a property in chattels, either real or personal; and is, strictly speaking, applicable only to corporations aggregate; for 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. In the case of sole corporations, which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession; but where such corporation represents many, as the Chamberlain of London, chattels given to him alone shall go to his successors.

2. Bl. Com. 431.  
Dyer, 48.  
Cro. Eliz. 464.  
Co. Lit. 46.  
Cro. Eliz. 682.  
Hob. 247.  
1. Ro. Ab. 550.  
1. Bac. Ab. 683.  
Cro. Car. 344.  
4. Co. 64.  
Co. Lit. 9. in notis.

6. **MARRIAGE** is a sixth method of acquiring property in goods and chattels; for marriage is a

2. Bl. Com. 433.  
Co. Lit. 351.  
1. Bac. Ab. 289.

Sid. 111. 10. Co. 42. 2. Inst. 510. 1. Ro. Ab. 347.

gift

gift in law of all the wife's property to her husband:—1. Of her chattels personal in possession absolutely. 2. Of her chattels real in action, from the time the husband reduces them into possession. 3. Of the rents and profits of her real property during the coverture. Thus, all the personal estate of a woman, as money, goods, cattle, household furniture, and the like, that were in her possession at the time of the marriage, are absolutely vested in the husband; so that of these he may make any disposition in his life-time without her consent, or may by will devise them; and if he die intestate, they shall go to his personal representative, and not to the wife, though she survive him; but she must be possessed of these goods in her own right, and not as executrix or bailee; for chattels personal which she has *in autre droit*, shall not go to the husband. Chattels personal *in action* only, as debts upon bond, contracts, and the like, vest only in the husband by his recovering them at law, for upon such recovery they are absolutely and entirely his own; but if he die before he thus recovers the possession, they shall survive to the wife (a). Chattels real also vest in the husband, not absolutely, but *sub modo* only; as in case of a lease for years, the husband shall receive all the rents and profits of it, and may if he pleases sell, surrender, or dispose of it during the coverture, and if he survives his wife, it shall be absolutely his own; but if he make no disposition thereof in his life-time, and die before his wife, it cannot be disposed of by his will.

(a) Except arrears of rents, which are given to the husband by 31. Hen. 8. c. 37. Co. Lit. 351.

2. Bl. Com. 436.  
2. Lev. 141.  
Stra. 1169.  
Cro. Eliz. 138.  
11. Co. 65.  
2. Ro. Rep. 136.  
3. Inst. 194.  
1. Hawk. c. 85. s. 21.  
Cowp. 611.  
Doug. 239.

7. JUDGMENT, obtained in consequence of some suit or action at law, is also a mean of acquiring personal property. Where the right subsists previous to the action, as in all debts due to a man, and wherever he has a *chose in action*, the property becomes vested in him the moment the right accrues; as in the case of a bond, or book debt, the title of the creditor commences the moment the bond is executed, or the contract made;

made; and the judgment only settles and confirms the right, by reducing the property into possession. But in penalties given to common informers, and in those damages which are given to a man by a jury, as a compensation and satisfaction for some injury sustained, as for battery, imprisonment, slander, or trespass; the party has no claim or title until after suit commenced, and judgment obtained.

8. GIFTS OR GRANTS are the eighth method of transferring personal property. Gifts are always gratuitous: Grants are always upon consideration or equivalent. By 3. *Hen.* 7. c. 4. all deeds of gift of goods, made in trust to the use of the donor, shall be void; and by 13. *Eliz.* c. 5. every grant or gift of chattels, as well as lands, with intent to defraud creditors or others, shall be void as against such persons to whom such fraud would be prejudicial, but as against the grantor himself shall stand good and effectual. The true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately, for if it does not, it is rather a *contract* than a *gift*, and cannot be good for want of consideration. A general gift of all a man's goods without exception, or if the exception be colourable only, is presumed to be fraudulent; and in the case of a trader, if the portion of goods granted be so great as to disable him to continue his trade, it is not only void, but an act of bankruptcy.

2. Bl. Com.

4+1.

3. Co. 21.

Wood's Inst.

306.

Perk. 57.

Hob. 230.

See Cooke's

Bankrupt

Laws.

9. A CONTRACT is an agreement, upon *sufficient consideration*, to do or not to do a particular thing. The agreement which arises from a mutual bargain or convention, made between at least two persons, who are by law capable of contracting, may be 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 other goods, to pay a stated price for them, and the like. Im-

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plied

2. Bl. Com.  
443.  
1. Powel on  
Contracts, 131.

Bacon's Max.  
79.  
1. Powel on  
Contracts,  
158. 330.

Plowd. 302.  
Dyer, 30.  
Id. Ray. 909.  
2. Bl. Com.  
445.  
1. Powel on  
Cont. 331.

1. Com. Dig.  
338. and the  
cases there  
cited.  
Dr. & St. c. 24.  
2. Bl. Com.  
445.

plied contracts are such as the law presumes every man intends and undertakes to perform; as if a person usually send his servant to market, the law raises an implied contract between the vendor and the master: so also, there is one species of implied contracts which runs through, and is annexed to all other contracts and agreements, that if one of the parties fail in his part, he shall pay to the other such damages as he has sustained by the non-performance. A contract also may be either *executed*; as if *A.* agrees to change horses with *B.* and they do it immediately, here the possession and the right are transferred together; or it may be *executory*; as if they agree to change next week, here the right only vests, and their reciprocal property in each other's horse is not in possession, but *in action*. It follows, therefore, that as a contract executed conveys a *chose in possession*, a man cannot grant or convey by it any thing in which he has not an actual or potential interest at the time of the conveyance; but that in executory contracts, which convey only a *chose in action*, a man may convey that of which at the time he is not actually possessed. A contract, however, cannot be good, unless it be made upon sufficient consideration; which is defined to be, that, in expectation of which each party was induced to make the agreement. A consideration of some sort or other is so absolutely necessary to the performing of a contract, that an agreement to do or pay any thing on one side, without any consideration on the other, is *nudum pactum*, and totally void in law; for, *Ex nudo pacto non oritur actio*. But any degree of reciprocity will prevent the *pact* from being *nude*; and therefore, if the consideration be in any degree for the benefit of the defendant, or to the trouble or prejudice of the plaintiff, an action of *assumpsit* will lie; nay, even if the contract be founded on a prior moral obligation (as a promise to pay a just debt, though barred by the Statute of Limitations), it is no longer *nudum pactum*. But by 29. Car. 2. c. 3. no verbal promise shall be sufficient

ficient to ground an action upon, where an executor or administrator contracts to answer damages out of his own estate; where a man undertakes to answer for the debt, default or miscarriage of another; where any agreement is made upon consideration of marriage; where any contract or sale is made of lands, tenements, or hereditaments; or where there is any agreement not to be performed within a year from the making thereof, unless some note or memorandum of it shall be made in writing, and signed by the party to be charged therewith. The most usual contracts whereby the right of chattels personal may be acquired are, by *sale* or *exchange*: by *bailment*: by *hiring* or *borrowing*: and by *debt*.

I. A SALE OR EXCHANGE is a transmutation of property from one man to another, in consideration of some price or recompence; as an exchange is a commutation of goods for goods. A man may sell or exchange his goods in any manner, at any time, and to any person he pleases, unless judgment has been obtained against him, and the writ of execution is actually delivered to the sheriff. On an agreement for goods, the vendee cannot carry them away without payment, unless the vendor agree to trust him; for it is no sale without payment. But if any part of the price be paid down, or any portion of the goods delivered by way of *earnest*, the vendee may recover the goods by action, as well as the vendor may the price of them. But by 29. Car. 2. c. 3. no contract for the sale of goods to the value of ten pounds or upwards shall be valid, unless this payment or delivery be performed, or unless some note in writing be made and signed by the party or his agent, who is to be charged with the contract. But if a vendee, after the bargain is struck, tender the money, and the vendor refuses it, the property is absolutely vested in the vendee. A contract also by sale may be good, although the vendor hath no property in the goods sold at the time of the

See 29. Car. 2:

c. 3.

Hob. 41.

Noy, 42.

sale; for the buyer, by taking proper precautions, may at all events be secure of his purchase. Goods sold in market-overt is binding, not only between the parties, but on those to whom the property may in truth belong; as if a man steal goods, although the owner may at any time seize them, yet if the thief sell them in market-overt, the property is changed by the sale. Market-overt, in the country, is only on stated days; but in *London*, every day, except *Sunday*, is an open market for such things as the owner of the open shop professes to trade in. By 1. *Jac.* 1. c. 21. if stolen property be taken to any pawnbroker in *London*, or within two miles, he shall restore it to the owner.

*Cro. Jac.* 68.  
*Godb.* 131.  
 5. *Co.* 83.  
 12. *Mod.* 527.  
 See also the  
 2. *Phil. & Mar.*  
 c. 7. and  
 31. *Eliz.* c. 12.  
 respecting the  
 sale of horses.  
 2. *Bl. Com.*  
 453.  
 See also Sir  
 William  
 Jones's Essay  
 on the Law of  
 Bailments.

2. BAILMENT, which is a delivery of goods in trust upon a contract, expressed or implied, that the trust shall be faithfully performed on the part of the bailee; by which delivery a special qualified property is transferred together with the possession; and as such bailee is responsible to the bailor, if the goods are lost or damaged by his wilful default, or gross negligence, so the bailee may maintain an action against such as injure or take them away from him; for the bailee has a legal property in them against all the world except the right owners.

3. HIRING AND BORROWING are also contracts by which a qualified property may be transferred to the hirer or borrower. Hiring is always for a price or recompence; borrowing is merely gratuitous; but the law in both cases is the same. Thus, if a man hires or borrows a horse for a month, he has the possession and a qualified property therein during that period; on the expiration of which, his qualified property determines, and the owner becomes, in the course of hiring, intitled also to the premium or price for which the horse was hired. So also, if a man borrows money of another, the lender is intitled by 12. *Ann.* st. 2. c. 16. to the rate of five *per cent. per annum*, until the principal be paid.

See Cases in  
 Crown Law,  
 "Pear's Case."

*Yelv.* 172.  
*Cro Jac.* 236.

4. **DEBT** is the last species of contracts whereby a *chose in action*, or right to a certain sum of money, is mutually acquired and lost; and any contract whereby a *determinate sum of money* becomes due, and is unpaid, raises a debt. Debts are either of Record, by Specialty, or by Simple Contract.—A **DEBT OF RECORD** is, where any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law; and is a contract of the highest nature. Recognizances also, entered into to the crown, together with statutes-merchant, statutes-staple, &c. are debts of record. **DEBTS BY SPECIALTY** are such, whereby a sum of money becomes, or is acknowledged to be due by deed or instrument *under seal*; as covenants, bonds, &c. These are the next class of debts after those of record. **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, the most simple of any; or by notes unsealed. But there is one species of simple contract, by *bills of exchange* and *promissory notes*, which we must more particularly describe. A **BILL OF EXCHANGE** is a written order or request, and a **PROMISSORY NOTE** a written promise for payment of money; the peculiar privileges of which are, that they are always *prima facie* presumed to have been made upon sufficient consideration, and negotiated. The privileges of bills of exchange depend upon the custom of merchants; and by 9. & 10. *Will.* 3. c. 17. and 3. & 4. *Ann.* c. 9. notes are put on the same footing. The maker of a bill or note is called *the drawer*; he to whom it is directed *the drawee*; and the person to whom it is payable *the payee*. The payee has a property *in action* vested in him by the *express contract* of the drawer, in the case of a promissory note; and in the case of a bill of exchange, by his *implied contract*, viz. that provided the drawee does not pay the bill, the drawer will; for which reason it is usual, in bills of exchange,



change, 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. The payee may, by indorsement, or merely writing his name on the back of the bill, assign over his whole property to the bearer, or, by a special indorsement, to any particular person by name; and in either case, the person to whom the bill is so transferred is called the *indorsee*, or *holder* of the bill. The holder must carry the bill to the drawee for acceptance; which acceptance (so as to charge the drawer with costs) must be in writing. If the drawee accepts the bill, either verbally or in writing, he then makes himself liable to pay it; this being now a contract on his side, founded on an acknowledgement that the drawer has effects in his hands to warrant the acceptance. If the drawer refuse acceptance, it must be *protested*: but if it be accepted and not paid, there must be a protest also for non-payment: and if no protest be made, and any damages accrue by such neglect, it will fall on the holder. The bill, when refused, must be demanded of the drawer immediately; for the responsibility of the drawer is not only conditional, with respect to the non-payment by the drawee, but that the holder should give him notice of such non-payment, in order that he may get the money which the bill supposes he has in the hands of the drawee. The indorsee of the bill may call upon either the drawer or the indorser for payment, on default of the drawee; or if there be several indorsers, upon any or all of them; for each indorser is a warrantor for the payment of the bill; but the first indorser can only resort to the drawer.

10. BANKRUPTCY is a tenth method of transferring personal property; but as a minute detail of the law relating to this title would far exceed the limits of the present work, we shall only here observe, that the Commissioners have powers as extensive with respect to personal as to real property;

perty; and refer the student to such treatises as have been particularly written on this subject (a).

II. TESTAMENT, OR LAST WILL, is another method of transferring personal property. A testament, however, in some degree differs from a last will. A testament, *testatio mentis*, is where some person or persons are appointed EXECUTORS, to carry the directions of the testator, with respect to his personal property, into effect; for an executor cannot meddle with a devise of real property. A last will, *ultima voluntas*, of which we have already spoken, is where no executor is appointed; as is used in the disposing of lands and tenements. There is also an instrument, which may be annexed either to a will or testament, called a CODICIL, derived from *codex*, a little book; and signifies nothing more than a schedule or supplement of that to which it is annexed (b). Testaments are either written or nuncupative.

Richardson on  
Last Wills,  
2. 23.  
Perkins, 209.

A NUNCUPATIVE TESTAMENT is where the testator, without any writing, declares his will before a sufficient number of witnesses. It is called *nuncupative à nuncupando*, that is, *à nominando*, of naming; because in this species of conveyance, he must make his executor, and declare his whole mind before witnesses; and is commonly used when the testator is very sick, weak, and past all hopes of recovery. By the 29. Car. 2. c. 3. s. 19. no nuncupative will shall be good,—1. where the estate thereby bequeathed shall exceed the value of thirty pounds: 2. that is not proved by the oaths of three witnesses at least, who were present at the making of it: 3. nor unless it be

(a) See Cooke's Bankrupt Laws, in which this title is explained with great perspicuity and learning.

(b) A testament is thus defined:—TESTAMENTUM est voluntatis nostræ jussu sententia de eo quod quis post mortem suam fieri velit. A last will, ULTIMA

VOLUNTAS est legitima dispositio de eo quod quis post mortem fieri velit. A codicil, CODICILLUS est voluntatis nostræ jussu sententia de eo quod quis post mortem suam fieri velit absque executoris constitutione. See Swinburne, book 1. part 1. s. 2.

proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will: 4. nor unless it be made in the time of the last sickness of the deceased: 5. and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will; except where surpris'd by sudden sickness or accident. 6. By 4. & 5. *Ann.* c. 16. no nuncupative will shall be proved by the witnesses after six months from the making, unless it was put in writing within six days; nor shall it 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.

2 Bl. Com.

501.

Wood's Inst.

308.

Swinburn, 7.

Richardson, 5.

Godolphin,

c. 21.

Gilb. Rep 260.

Sheppard, c. 23.

4. Burn's E.L.

280.

Finch, 167.

West, 633.

Ld. Ray, 1282.

Comyns, 452.

A WRITTEN WILL is that species of conveyance which is reduced into writing at *the time of the making thereof*. By 29. *Car.* 2. c. 3. the directions of which with respect to devises of real property we have already mentioned, also directs, that 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 by him in the presence of three witnesses. Written wills, however, relating to personal property only, need not any witness to their publication; for if written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication, it is good, provided sufficient proof can be had that it is his hand-writing; and although written in another man's hand, and never signed by the testator, yet if proved to be according to his instructions, it is a good testament. It is safest, however, to sign, seal, deliver, and publish it in the presence of witnesses. No testament is of any effect till after the death of the testator, until which time it is said to be ambulatory; and therefore, if a will be previously cancelled

celled or revoked, either expressly or impliedly, by making a testament of a later date, it is void. It may also be avoided if made by a male infant under fourteen years of age; by a female infant under twelve years of age; by a feme covert unauthorised to make a will by agreement with her husband; or if made by a person who from madness, idiocy, or any other cause, is adjudged not to have *liberum animum testandi*, a free and disposing mind and memory.

AN EXECUTOR, as we have already observed, Wood's Inst. 310. is he to whom the execution or performance of another man's will is committed after his death; but 2 Bl Com. 504. Shep. 400. if no will be made, the personal property of the deceased must be *administered* or dealt out by the Noy's Max. 102. law, under the direction of AN ADMINISTRATOR. 4. Eurn's E. L. Richardson, All persons are capable of being executors that are 313. capable of making wills, and many others besides; for feme coverts, infants, nay even infants unborn *in ventre sa mere*, may be executors; but a person attainted of treason or felony cannot. An executor may refuse to act or take upon himself the burden of the will; and in this case, or if the testator has made a will without naming executors, or has named persons incapable of being executors, the Ordinary must grant ADMINISTRATION *cum testamento annexo* to some other person; and then the duty of the administrator, as also when he is constituted *durante minore etate*, &c. of another, is very little different from that of an executor. The power of an executor being founded on the appointment of the deceased, he may transmit the interest with which he is vested to other persons after his decease; and the executor of the executor will, in such case, be equally the executor of the first as of the second testator: but if an executor die without making this transmission, the law will appoint an administrator *de bonis non*, to administer the goods of the original testator *not administered* by the executor. The Ordinary is compellable by 29. Car. 2. c. 3. to grant letters of administration

Cro. Car. 106. ministrations of the goods and chattels of the wife to the  
 1. Peer. Wms. husband or his representatives; and of the husband's  
 181. effects to the widow or next of kin; but he may  
 Salk. 36. grant it to either, or both, at his discretion:  
 Sara. 532. Among the kindred, those are to be preferred who  
 are in the nearest degree to the intestate; but of  
 persons in equal degree, the ordinary may take  
 which he pleases. The children of the deceased  
 are first entitled, or, on failure of children, the  
 parents of the deceased. Then follow brothers,  
 grandfathers, uncles, or nephews, with the fe-  
 males of each class respectively, and lastly cousins.  
 The half blood is admitted as well as the whole,  
 and the brother of the half blood shall exclude  
 the uncle of the whole blood; but the Ordinary  
 may grant administration to the sister of the half,  
 or brother of the whole blood, at his own discretion.  
 If none of the kindred of the deceased will take  
 out administration, a creditor may do it; if the  
 executor renounces or dies intestate, it may be  
 granted to the residuary legatee, in exclusion of  
 the next of kin; and in defect of all these, it may  
 be granted to such person as the Ordinary shall  
 approve of. In the case of a bastard the course is,  
 for some one to procure letters patent or other au-  
 thority from the King, and then the Ordinary of  
 course grants administration to such appointee of  
 the crown. An administrator cannot act until  
 letters of administration are issued, but an execu-  
 tor may do many things before a probate of the  
 will is obtained: if, however, a stranger takes  
 upon himself to act as executor, without any just  
 authority, he becomes AN EXECUTOR *de son tort*,  
 or in his *own wrong*, and is liable to all the  
 trouble and responsibility of the executorship,  
 without any of the profits or advantages; for he  
 is chargeable with the debts of the deceased so  
 far as assets come to his hands, and as against  
 creditors cannot retain his own debt, although  
 he shall be allowed all payments made to any other  
 creditor, in the same or a superior degree. An  
 executor must bury the deceased in a manner  
 suitable

2. Bl. Com.

496. 504.

28. Hen. 3. c. 5.

Proc. Ch. 527.

593.

2. Bl. Com.

203. 207.

Godol. c. 34.

2. Vern. 125.

1. P. Wms. 41.

1. Atk. 455.

1. Vent. 425.

Allen, 36.

Stiles, 79.

Salk. 38.

1. Sid. 281.

1. Vent. 219.

Plowd. 278.

2. Bl. Com.

506.

3. Peer. Wms.

33.

32. Mod. 471.

Dyer, 166.

1. Ch. Cal. 33.

6. Rep. 30.

Moore, 527.

suitable to the estate he leaves behind him. The executor or administrator is to make an inventory of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver to the Ordinary upon oath, if required. He is to collect all the goods and chattels so inventoried; and a sale or release by one executor, shall be good against his companion; but one administrator cannot release a debt so as to bind his fellow. The property thus recovered is called *assets*, and is sufficient to make the executor or administrator chargeable to a creditor or legatee, so far as they extend. In the payment of debts, the expences of the funeral, and proving the will, shall be first discharged.

2. Debts due to the King, on record or specialty. 3. Debts preferred by particular statutes, as forfeiture for not burying in woollen, money due on poor rates, letters to the post-office, &c. 4. Debts of record, as judgments, statutes, and recognizances. 5. Debts due on special contracts, as for rent, or upon bonds, covenants, or the like, under seal; and, 6. Debts on simple contracts, as upon notes unsettled, and verbal promises. Among debts of equal degree, the executor or administrator is allowed to pay himself first, by retaining in his hand so much as his debt amounts to. If a creditor constitutes his debtor his executor, this amounts to a release of the debt, whether the executor acts or not. When all the *debts* of the deceased are discharged, the *legatees* have the next claim. A LEGACY is a gift of goods or chattels left by the deceased, to be paid or performed by the executor or administrator. Legacies are either *general* or *pecuniary*, as of money; or *specific*, as of a particular piece of plate; but in either of these cases, the legatee cannot take the thing given without the assent of the executor. In case of deficiency of assets, all the general legacies must *abate*; or if paid, the legatees *refund* proportionally, in order to pay the debts; but a specific legacy is not to abate at all.

A LAPSED LEGACY

1. Atk. 460.

30. Car. 2. c. 3.

9. Ann. c. 10.

17. Geo. 2. c. 38.

4. &amp; 5. W. &amp; M. c. 20.

4. Rep. 60.

Cro. Car. 363.

2. Bl. Com. 512.

Plowd. 184.

Salk. 299.

Richardson,

186.

Dyer, 59.

1. Eq. Cas. 295.

2. Peer. Wms. 601. LEGACY is where the legatee dies in the life-time of the testator, and the legacy in this case shall sink into the general fund. A VESTED LEGACY is where the legatee has an immediate and present interest in the bequest, although it be payable at a future time; as a legacy left to one, *to be paid* when he attains the age of twenty-one years; in which case, although the legatee die before that age, the legacy shall be paid to his representatives. A CONTINGENT LEGACY is where a legacy is left to one *when* he attains such an age, or *if* he does such a thing; here if the legatee die before the contingency happens, the legacy shall *lapse* in the same manner as if he had died in the life-time of the testator. There is also another kind of bequest, called *donatio causâ mortis*, or gift in consideration of death; which is where a man, moved with the consideration of his mortality, doth deliver something to another, to be his in case the giver die; but if he lives, he is to have it again. When all the *debts* and legacies are paid, the surplus must be paid to the *residuary legatee*, if any be appointed by the will; but if there be none, it shall in general go to the executor, except it appear to have been the testator's intention that it should not; in which case it shall then go to the next of kin, and be distributed according to the direction of the 22. & 23. *Car. 2. c. 10.* which enacts, that the surplusage of intestates estates, except *femes covert*, which by the 29. *Car. 2. c. 3. f. 25.* shall go to the husband as her administrator, shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: one-third to the widow, and the residue in equal proportions to the children; or if dead, to their representatives or lineal descendants. If there are no children or legal representatives living, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree, and their representatives. If no widow, the whole shall go to the children. If neither widow nor children, the whole shall be distributed

2. Bl Com. 513.  
 2. Peer. Wms. 26.  
 3. Term Rep. 14.

Richardson,  
 187.

Godol. c. 32.  
 1. Lev. 233.  
 Cart. 125.  
 2. P. Wms. 447.  
 Ray. 4:6.  
 Ld. Ray. 571.

distributed among the next of kin in equal degree, and their representatives : but no representatives are admitted among collaterals, farther than the children of the intestate's brothers and sisters. The next of kindred are to be investigated in the manner before mentioned with respect to letters of administration. A father shall succeed to all the personal estate of his children who die intestate without wife or issue : but by the 1. *Jac.* 2. c. 27. if the father be dead, the mother and each of the remaining children, or their representatives, shall divide the effects in equal portions. It is, however, further enacted by the statute of distributions, that no child of the intestate, except his heir at law, on whom he settled in his life-time any estate in lands, or to whom he gave any pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters ; but if such settlement or portion be unequal, then the surplusage may be so distributed as to make all their shares equivalent.

### §. III. Of Civil Injuries.

HAVING in the two preceding sections of this chapter given a summary account of the law respecting *persons* and *property*, we shall now proceed to shew in this and the subsequent section, in what manner they may be affected by *civil injuries*, or *crimes and misdemeanors*, with the modes of redress and punishment. CIVIL INJURIES, or *private wrongs*, are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals ; the remedy for which is by civil suit, or action in a court of justice ; for it is an established maxim, that no possible injury can exist, for which the Law has not provided an adequate remedy. We shall therefore endeavour to describe the several species of actions by which civil injuries are redressed ; subjoining a few cases  
in



in which the Law allows the injured party to obtain redress himself.

ACTIONS are defined to be, "the lawful demands of one's right;" *Actio nihil aliud est quàm jus prosequendi in judicio quod sibi debeat*; and they are distinguished into three kinds: actions *personal*, *real*, and *mixed*.—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 *torts*, or wrongs. REAL ACTIONS, which concern real property only, are such whereby the plaintiff, 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; and by these actions, formerly, all disputes concerning real estates were decided: but they are now almost totally laid aside; a more expeditious method of trying titles having been since introduced by other actions, personal and mixed. MIXED ACTIONS, therefore, are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained: and under these three heads may every species of remedy by suit or action in the courts of Common Law be comprised. But it is necessary to premise, that all civil injuries are of two kinds; the one *without force*, as slander and breach of contract; the other coupled with *force and violence*, as batteries or false imprisonment. Actions founded on contracts are either on *simple contracts*, as verbal agreements, notes, or contracts unsealed; or on *special contracts*, as deeds, instruments under seal, recognizances, or judgments: and these form the actions of *assumpsit*, *debt*, and *covenant*; the first are simple, the two latter are special contracts. Actions also are founded on *torts*, or wrongs; and these constitute what are termed actions of *trespass*. Trespass

is either *vi et armis*, where the trespass is immediately injurious, and accompanied with some degree of force and violence; or *on the case*, where it is unaccompanied with force, and *in its consequences only* injurious. Both these species of actions of trespass may be divided into, 1. TRESPASS *vi et armis*, as trespass with respect to *the person*, assault and battery, false imprisonment, and adultery; into trespass with respect to *personal property*, as replevin, and trespass proper; and into trespass with respect to *real property*, as ejectment. 2. TRESPASS *on the case* likewise is divisible into trespass with respect to the person, as slander, and malicious prosecution; or with respect to *personal property*, as trover; and with respect to *real property*, as in trespass on the case, properly so called. Actions founded upon contract are,

1. ASSUMPSIT, which is an action founded on simple contract, whereby damages are recovered for the breach of any promise, contract, or undertaking. A promise is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. If, therefore, it be to do any explicit act, it is an *express contract*; as if a builder undertake to build a house within a time limited, and fail to do it, this action of *assumpsit* on the case lies against him, on his express promise, for the injury sustained by his non-performance of it. The obligations of natural justice call upon every man to do that which he ought to do, and therefore the law raises a *promise* to perform it; as if I employ a person to transact any business for me, or perform my work, the law raises a promise on my part to pay him so much as his labour deserves; and on this *implied contract* this action will also lie. *Assumpsit* is of two sorts:—1. *Indebitatus Assumpsit*, which in its nature is an action of debt; as if in the case of a debt, the debtor promises to pay it, and does not, this breach of promise intitles the creditor to this action, instead of being driven to an action of debt; for in *indebitatus assumpsit*, the plaintiff re-

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covers not only damages for the special loss, if any, but to the amount of the whole debt: and therefore a recovery in this action would be a good bar to an action of debt brought on the same contract. The general causes for which this action may be brought are either—1. For money lent: 2. For money laid out and expended: 3. For money had and received to the plaintiff's use: 4. For a sum certain, as ten pounds for goods sold and delivered: 5. For goods sold *quantum valebant*: 6. For a sum certain for work and labour: 7. A *quantum meruit* for work and labour: and, 8. On an account stated.

1. *Espinasse*, 182, 183.  
 3. *Bl. Com.* 153.  
*Buller's N. P.* 167.  
*Osflow's N. P.* 169.

2. DEBT is an action founded upon an *express contract*, in which the certainty of the sum or duty appears, and in which the plaintiff is to recover the sum he goes for in *numero*, and not in *damages*; for debt, in its legal acceptation, is a sum of money due by certain and *express* agreement; as by 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 does not depend on any after-calculation to settle it. So also, if one *verbally* agree to pay a man a *certain price* for a *certain parcel* of goods, and fail in the performance, an action of debt will lie, for this is also a *determinate* contract; but if he agree for no settled price, not debt, but a special action on the case, according to the nature of the contract, must be brought.

*Espinasse*, 311.  
*Bull. N. P.* 156.  
 3. *Bl. Com.* 155.  
 2. *Co.* 72.  
 1. *Ro. Ab.* 518.  
*Osflow's N. P.* 160.

3. COVENANT is an action founded on contract, brought for the recovery of damages for breach of any agreement entered into *by deed* betwixt the parties. This agreement must always be by deed, but the action lies equally whether it be by *indenture* or *deed poll*. There is no set form of words necessary to be made use of in creating a covenant, and therefore any will do which shew the party's concurrence to the performance of a future act.

## 4. ACCOUNT

4. ACCOUNT is an action which, at Common Law, lay only against a guardian in foccage, bailiff, or receiver, and, in favour of trade, between merchants. The 13. *Edw.* 3. c. 23. gave it to the executors of a merchant: the 25. *Edw.* 3. c. 5. to the executors of executors: and the 31. *Edw.* 3. c. 11. to administrators; and now by 3. & 4. *Ann.* c. 16. it may be brought against the executors and administrators of every guardian, bailiff, and receiver, and by one joint-tenant, tenant in common, his executors and administrators, against the other *as bailiff*, for receiving more than his share, and against their executors and administrators.

ACTIONS for injuries affecting the person are, Bull. N. P. 3.

1. SLANDER, which is defaming a man in his reputation, by speaking or writing words which affect his life, office, or trade; or which tend to his loss of preferment in marriage or service; or to his disinheritance; or which occasion any other particular damage. If slander be spoken of a peer or other great man, it is called by a particular name, SCANDALUM MAGNATUM, and is punishable in a particular manner by *West.* 1. c. 34. Common slander may be committed,—1. By words: 2. By writing, which is called LIBEL *in scriptis*: 3. By pictures, or representations of that sort, which is called LIBEL *sine scriptis*. Wherever the slander may endanger a man in law, as to say that he has poisoned another, or is perjured; or where it may exclude him from society, as to charge him with having an infectious disease; or where it may impair his trade, as to call a tradesman a bankrupt, a physician a quack, a lawyer a knave; or where it may affect a peer of the realm, or magistrate, or one in public trust; an action will lie without proving any particular damage to have happened, but merely upon the probability that it might happen. But with regard to words that do not thus apparently, and upon the face of them, im-

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port 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 the action with a *per quod*. Words of heat and passion, if productive of no ill consequences, are not actionable; neither are words spoken in a friendly manner, by way of advice, admonition, or concern, or in the course of legal proceedings; for in these cases they are not *maliciously* spoken, which is part of the definition of slander. And if the defendant be able to justify and prove the words to be true, no action will lie, even though special damage hath ensued, for then it is no slander or false tale; and where there is no injury, the law gives no remedy. But with regard to LIBELS, or that species of slander which affects a man's reputation by printing, writing, pictures, signs, and the like, there are two kinds of remedies; one by *indictment* or *information* for the public offence, as tending to break the peace, or provoke others to break it; and the other by *action*, to repair the party in damages: and as to the public, the offence is the same, whether the matter contained in the libel be true or false; and therefore a defendant on an *indictment* or *information* is not allowed to alledge the truth of it by way of justification; but in the remedy by *action* he may, as for words *spoken*, justify the truth of the facts, and shew that the plaintiff has received no injury at all.

1. Lev. 52.  
Cro. Jac. 97.

2. *Espinasse*,  
270.  
2. B. Com. 126.  
Buller's N. P.  
11.  
F. N. B. 116.  
Finch. 305.  
2. Ray. 374.  
1. Salk. 14.

1. Saund. 228.  
1. Vent. 12.  
1. Sid. 424.

2. MALICIOUS PROSECUTION is another action of trespass on the case with respect to the person, to recover damages for proceeding against a man by indictment, or other legal process, maliciously, and without any just ground or cause for so doing. But it is not actionable to bring a civil action, though there be no good ground for it, because it is a claim of right: if, however, one who has a cause of action to a small sum, or has no cause of action at all, maliciously sue another, with intent to imprison him for want of bail, or to do him  
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some special prejudice, an action shewing the special grievance will lie. So also, for suing a man in the ecclesiastical court for matters not cognizable there, this action lies; and for prosecuting an indictment falsely it will lie, though the indictment was bad, or not found by the grand jury: but it is in all cases incumbent on the plaintiff to shew that the defendant prosecuted *maliciously* and without any *probable cause*, for both must concur to support this action: the malice however may, and most generally is, inferred from the want of probable cause; but what shall be deemed a probable cause, is matter for *the Court* to decide, and not *the Jury*.—An action on the case, in the *nature of a conspiracy*, also lies where *two* or more combine for the purpose of preferring indictments, charging crimes against any one without foundation, or otherwise conspiring to prejudice a man wrongfully, either in his person, in his fame, or in his property; but it cannot be brought except against *two*, and therefore the most usual way is, to bring the action for a malicious prosecution.

Cro. Jac. 133.  
Hob. 260.

1. Stra. 691.

Cro. Jac. 490.

2. Stra. 977.

Bull. N. P. 14.

4. Burr. 1974.

1. Term Rep.

544. 493.

1. Will. 232.

2. Term Rep.

225.

3. Bl. Com. 126.

Espinasse, 278.

1. Espinasse,

283.

Bull. N. B. 15.

3. Bl. Com. 120.

Pulton, 4.

6. Mod. 173.

2. Ro. Ab. 545.

1. Vent. 256.

1. Bac. Ab. 154.

Finch, 203.

Wood's Inst.

418.

Pulton, 5.

Dalton, 282.

Lutw. 929.

2. Bl. Com. 120.

Espinasse, 383.

Ray. 62. 231.

Buller's N. P. 15. 1. Bac. Ab. 154. Salk. 407. Ld.

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a button; for the least touching of another's person wilfully, and in an angry and insulting manner, is a battery; and it is not even any excuse to say that he did it *casualiter et per infortunium, contra voluntatem suam*; for no man shall be excused in trespass, unless it may be entirely justified without his default: neither is it any answer to this charge to say that the plaintiff and defendant fought by consent, and *volenti non fit injuria*; for, the fighting being unlawful, consent will not bar an action for any consequential injury. There are, however, three sorts of defence to an action of assault and battery:—1. By *inficitation*, or denying the fact, by pleading the general issue Not Guilty, and proving the falsity of the charge; for matter of justification cannot be given in evidence on this issue, even in mitigation of damages. 2. By *matter of excuse*, which is a plea admitting the fact, but shewing that it was done accidentally, without any default in the defendant; but this defence is seldom specially pleaded, because it may be given in evidence under the general issue. 3. By *justification*, which must always be *pleaded*, and is an insisting on something that made it lawful for the defendant to do the fact laid to his charge; as *son assault*, or that the plaintiff made the *first assault*; or that he was a husband or servant, and did it in defence of his wife or master; or that he was a parent or master, and did it in giving moderate correction to his child, his scholar, or his apprentice. So also, in defence of a man's goods or possessions, he may justify *laying hands* upon another, to prevent his taking away the one, or depriving him of the other. So also, in the exercise of an office, as that of church-warden or beadle, a man may lay hands upon another, and plead what is called a *manus molliter imposuit*, to turn him out of church, and prevent his disturbing the congregation. On account therefore of these causes of justification, battery is defined to be, the *unlawful* beating of another.

Bull. N. P. 17.

Finch, 203.  
3. Bl. Com. 121.

1. Sid. 301.

#### 4. MAYHEM

4. **MAYHEM** is an aggravated species of assault and battery, for which a remedy by trespass *vi et armis* also lies. It consists in violently depriving another of the use of a member proper for his defence in fight; and among these defensive members are reckoned, not only arms and legs, but a finger, an eye, and a fore-tooth, and also some others: but the loss of one of the jaw-teeth, the ear, or the nose, is no mayhem at Common Law, as they can be of no use in fighting; tho' the 37. *Hen.* 8. c. 6. hath punished the cutting off an ear, by giving the injured party treble damages.

1. Hawk. P. C. 175.  
 Stamp. 3.  
 3. Bl. Com. 121.  
 Co. Lit. 126.  
 4. Bl. Com. 206.

5. **FALSE IMPRISONMENT** is an injury to personal liberty, for which an action of trespass may be brought. It consists in the unlawful detention of the person, without any legal authority. Every restraint of a man's liberty, under the custody of another, either in a gaol, house, stocks, or in the street, is in law an imprisonment. This action is commonly joined to an assault and battery; for every imprisonment includes a battery, and every battery an assault. To constitute the injury, therefore, of false imprisonment, there are two points requisite:—1. The detention of the person: 2. The unlawfulness of such detention. An illegal detention or arrest may be with reference to the person; as where a writ is sued out against an executor or administrator, without suggesting a *devastavit*, for otherwise they are not liable to be arrested; or if any person be arrested by *civil process* on a Sunday: but it is not false imprisonment to arrest a witness in returning home from the courts, or a peer of the realm, or a certificated bankrupt, or an insolvent debtor; for in the first case, the privilege is not to the person of the witness, but to the court; and in the others, the officer is justified by the writ: nor will this action lie against a Judge of a court of record, for any act done by him in the execution of his office; but in general, unless a person who arrests another be authorized by process from the courts of justice,

Co. Lit. 253.  
 Bull. N. P. 22.  
 3. Bl. Com. 127.  
 1. Espinasse's Dig. of Actions, 405.  
 2. Inst. 589.

3. Willf. 368.  
 2. Bl. Rep. 1190.  
 See 29. Car. 2. c. 7.

Dougl. 646.

6. Co. 52.

Salk. 396.



or by some warrant from a legal officer having power to commit under his hand and seal, and expressing the cause of such commitment; or for some other special cause warranted for the necessity of the thing, either by the Common Law or Act of Parliament; such as the arresting of a felon by a private person without warrant, the impressing of mariners for the public service, or the like; this action will lie. But the damages in which the injured party may be recompensed by means of this action, would be a very inadequate satisfaction, if the imprisonment also could not be removed; the Law, therefore, has for this purpose provided the writ of *habeas corpus*, the most celebrated writ in the *English* Law.

10. Mod. 219.  
Stra. 691.  
2. Inst. 589.  
Foster. 754.  
See the case of  
Alexander  
Broadfoot,  
where the *le-  
gality* of press-  
ing is examin-  
ed and proved.

3. Bl. Com. 134.

Bul. N. P. 25.  
2. Espinasse,  
365.

Finch, 188.

F. N. B. 427  
Cro. Eliz. 219.

2. Lev. 172.

Cro. Jac. 446.

2. Lev. 196.

6. NEGLIGENCE OR FOLLY may also be productive of injuries, for which the party may bring an action of trespass on the case; for every man ought to take care that he does not injure his neighbour; and therefore, wherever a man receives any hurt, either in his *person* or *property*, through the default of another, whether by doing *some act*, or by the neglect of *any duty*, though the same were not wilful, yet if it be occasioned by negligence or folly, the law gives him this action to recover damages for the injuries so sustained; as where the defendant, by uncocking his gun, accidentally wounded the plaintiff, who was standing by to see him do it; or where a man retains an attorney to conduct a cause, and he by some omission loses it, and thereby injures his client; or where a person who is bound to cleanse a ditch, suffers it to become so foul that his neighbour's land is overflowed and injured: for it is no excuse for the defendant in this action to say, that the injury was *involuntary* on his part; or that, by proper attention, the person who received the injury might have avoided it: but if the injury was occasioned by the plaintiff's own neglect or folly, the action will not lie.

7. ADULTERY

7. ADULTERY is an injury that may be offered to a person considered as a husband, for which the Law gives him a satisfaction, by an action of trespass *vi et armis* against the adulterer. The ground of this action is the injury done to the husband, by alienating the affections of his wife, destroying the comforts arising from her company and that of her children, and imposing on him a spurious issue; wherein the damages recovered are usually very large and exemplary. But they are properly increased or diminished by the particular circumstances of each case; the rank and quality of the plaintiff, the condition of the defendant; his being a friend, relation, or dependant of the plaintiff, or being a man of substance; or proof of the plaintiff and his wife having lived comfortably together before her acquaintance with the defendant, and her having always born a good character till then, as well as proof of a settlement or provision for the children of the marriage, are all proper circumstances of aggravation. On the other hand, proof that the wife had before eloped with others, or that the husband had turned her out of doors and refused to maintain her, and that he kept company with other women, or that he was acquainted with and consented to the defendant's familiarity with her, is proper in mitigation of damages. So the defendant may give in evidence that the wife had a bastard before marriage; but he cannot give evidence of the general reputation of her being or having been a prostitute (a), for that may be occasioned by her familiarity with the defendant; though perhaps, after having laid a foundation, by proving her being acquainted with other men, such general evidence may be admitted. The plaintiff in this

3. Bl. Com. 139.  
Bull. N. P. 26.  
1. Espinasse,  
430.  
Onslow's N. P.  
tu. 'Adultery.'

Bull. N. P. 27.

Cibber v.  
Sloper, per  
LEE, C. J.  
Roberts v.  
Marleton, at  
Hereford, 1756,  
per WILLES,  
C. J.  
Rigby v.  
Stephenson,  
Stafford, 1745,  
per FOSTER, J.  
Sir Richard  
Worsley v.  
Bisser. Sit.  
after Hil. 1782.

(a) By LORD MANSFIELD, in the case of *Smith v. Allison*, at the Sitting at Westminster in the King's Bench, after Trinity Term, 5. Geo. 3. if a woman be suffered to live as a prostitute with the privacy of her husband, and a man is thereby drawn into *crim. con.* an action will not lie, for it is *damnum absque injuria*. Bull. N. P. 27.

action must bring proof of the actual solemnization of a marriage; for neither cohabitation, reputation, nor any collateral proof whatever, is sufficient: but the fact of marriage may be proved either by a copy of the Register, or by the testimony of one who was present at the ceremony; and this witness, or any other who was present, may prove *the identity* of the persons married; for both these facts may be proved by other than the *subscribing* witnesses to the Register. This action may be brought at any time within *six years*; and the plaintiff shall have his *costs*, although the jury find *damages* under *forty shillings*.

4. Burr. 2057.  
Doug. 162.

Birt v. Barlow, Mich. 1779.

Doug. 162.  
Bull. N. P. 28.

2. Burr. 753.

3. Will. 319.

2. Bl. Rep. 855.

ACTIONS for injuries affecting a man's *personal property* are,

8. DECEIT. A writ of deceit lies at the Common Law to give damages in some particular cases of fraud, and principally where one man does any thing in the name of another, by which he is deceived or injured; as if one brings an action in another's name, and then suffers a non-suit where the plaintiff becomes liable to costs; or where one suffers a fraudulent recovery of lands or chattels, to the prejudice of him who hath the right. But now AN ACTION ON THE CASE *in nature of deceit*, is more usually brought upon these occasions, which lies wherever a person has, by a false affirmation, or otherwise, imposed upon another to his damage, who has placed a reasonable confidence in him; as if a man in possession of a horse or a lottery ticket sell it to another for his own; for possession of a personal chattel is a colour of title, and therefore it was but a reasonable confidence which the buyer placed in him, when he affirmed it to be his own. But it is incumbent on the plaintiff to prove that the defendant knew it not to be his own at the time of the sale. So if the vendor affirm that the goods are the goods of a stranger, his friend, and that he had an authority from him to sell them, whereas in truth

Ray, 593.

Allen, 91.

Bull. N. P. 30.

Salk. 210.

Cro. Jac. 41.

1. Danv. 176.

truth they are the goods of another, and he had no such authority, the action will lie. So also, if the seller affirm the rent of a house to be more than it really is, whereby the purchaser is induced to give more than it is worth. So, if a merchant sells one kind of silk for another, whereby the purchaser is imposed upon in the value. So also, if the vendor of a horse affirm at the time of the sale that he is sound wind and limb, whereupon the purchaser, *fidem adhibens*, gives so much; if the horse be blind, the action will lie; but if the first contract with *warranty* be broken off, the warranty will not extend to a subsequent sale. And in a late case it was determined by three Judges against one, that where one *Joseph Freeman*, intending to deceive one *John Pasley*, did persuade the said *John Pasley* to deliver goods to one *Falch*, by falsely affirming that *Falch* was a person safely to be trusted and given credit to, whereas in truth he was not, which the said *Joseph Freeman* well knew, by which false affirmation (*Falch* becoming bankrupt) the plaintiff lost his goods; this action would lie, although the defendant was not benefited by the deceit, or in collusion with the person who was.

Ray. 1118.  
1. Sid. 146.  
Salk. 211.

Salk. 289.

Salk. 21.  
Onslow's Nisi  
Prius, 27.

Pasley v.  
Freeman,  
3. Term Rep.  
51. Hilary  
29. Geo. 3.

9. TROVER AND CONVERSION is also, in its original, an action of trespass on the case, considered with respect to personal property; and lies to recover 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. This action now lies against any man who has in his possession, by any means whatsoever, the personal goods of another, and refuses to deliver them when demanded. The possession of goods by finding is not unlawful, but the finder cannot acquire a property therein, unless the owner be forever unknown; the injury, therefore, is now supposed to lie in the illegal *conversion*, which must be precisely proved,

Espinasse, 287.  
Onslow's N. P.  
29.  
3. Bl. Com. 151.

proved, and the fact of finding a *trover* is totally immaterial.

Bull. N. P. 49.  
3. Bl. Com. 151.  
Co. Lit. 286.  
295.

10. **DETINUE** is an injury affecting a man's personal property, and lies for the recovery of goods in specie, and also for damages for the detainer; but as in this action the defendant may *wage his law*, trover is the action in more common use. In detinue, it is necessary to ascertain the thing detained in such a manner that it may be specifically known and recovered; and therefore it cannot be brought for money, corn, and the like; for that cannot be known from other money or corn, unless it be in a bag or sack, for then it may be distinguishably marked. In order, therefore, to ground an action of detinue, 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: 4. That they may be ascertained in point of identity.

Bull. N. P. 52.  
3. Bl. Com. 147.  
2. Espinasse, 1.  
3. Bl. Com. 13.  
Co. Lit. 145.

11. **REPLEVIN**. The action of replevin is of two sorts: first, in the *detinet*; and secondly, in the *detinuit*; and it lies in any case where a man has had his goods taken from him by another on a **DISTRESS**, being a re-deliverance to the first possessor of the thing distrained, on security given by him to try the right, and to re-deliver the distress if judgment be against him. Formerly, when the party distrained upon intended to dispute the right of distress, he had no other process by the old Common Law than by a writ of replevin, *replegiari facias*, which issued out of chancery, commanding the sheriff to deliver the distress to the owner, and afterwards to do justice in respect to the matter in dispute in his own county-court. But to prevent the delay incident to this mode of proceeding, it is ordered by the 32. *Hen. 3. c. 21.* commonly called the Statute of *Marlbridge*, “ that the sheriff, on complaint made, shall re-deliver “ the

“the beasts taken.” And to carry the directions of this act more conveniently into effect, it is enacted by 1. & 2. *Philip & Mary*, c. 12. that the sheriff, within two months after he receives his patent, or at his next county court, shall depute four persons, dwelling at least twelve miles from each other, to issue *replevins*. Upon application therefore, whether by *writ* or *plaint*, either to the sheriff or one of his deputies, the sheriff, in pursuance of the 13. *Edw.* 1. c. 2. commonly called the Statute of *Westminster* the Second, must, before he grants the *plaint* or executes the *writ*, take security:—

FIRST, That the party replevying will pursue his action against the distrainer, and for which purpose he puts in *plegios de prosequendo*, or pledges to prosecute. SECONDLY, That if the right be determined against him, he will return the distress again; and for this purpose he is also bound to find *plegios de retorno habendo*. These pledges are merely discretionary in the sheriff; but on a distress for rent, it is required by the 11. *Geo.* 2. c. 19. that the officer granting a replevin on a distress for rent, shall take a bond with two sureties, in a sum of double the value of the goods distrained; which bond shall be assigned to the *avowant*, or person making *cognizance*, on request made to the sheriff; and if forfeited, may be sued in the name of the assignee. The sheriff, on receiving such security, is immediately by his officers to cause the chattels taken in distress to be restored into the possession of the party distrained upon, unless the distrainer claims a property in *the goods* so taken; for in such case the sheriff cannot make **Bull. N. P.** replevin of them, but the party must sue out a <sup>52, 53.</sup> *writ de proprietate probanda*; upon which the sheriff must summon an inquest of office, to try in whom the property previous to the distress subsisted; and if upon such inquisition the property is found in the distrainer, the sheriff can proceed no further, but must return the claim of property to the court of King’s Bench or Common Pleas, to be there farther prosecuted and finally determined.

But

But if no claim of property be put in, or if upon trial the sheriff's inquest determines it against the distrainers, then the sheriff is to replevy the goods; making use even of force if the distrainee makes resistance, in case the goods be found within his county. But if the distress be carried out of the county, or concealed, then the sheriff may return that the goods or beasts are *eloigned*, carried to a distance, to places to him unknown; and thereupon the party replevying shall have a writ of *capias in withernam*, or *in vetito namio*; in which the sheriff is commanded to take other goods of the distrainer, in lieu of the distress formerly taken and *eloigned* or withheld from the owner. This distress being taken to answer the other distress by way of reprisal, goods taken *in withernam* cannot be replevied till the original distress is forthcoming. But in common cases, the goods are delivered back to the party replevying, who is then bound to bring his action of replevin. An action of replevin may be prosecuted in the county court, be the distress of what value it may; either party, however, may remove it into the superior courts; the plaintiff at pleasure, the defendant upon reasonable cause: and also if in the course of proceeding any *right of freehold* comes in question, the sheriff can proceed no farther; so that it is usual in the first instance to carry it up to the courts in *Westminster-hall*. Upon this action brought, the distrainer, who is now the defendant, makes **AVOWRY**, that is, he *avows* taking the distress in his own right or the right of his wife; 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 legal merits of this avowry or cognizance, the cause is determined. If it be determined for the plaintiff, *viz.* that the distress was wrongfully taken, he has already got

his

Finch, 316.450.  
Co. Lit. 145.  
2. Inst. 193.

Raym. 475.

his goods back into his own possession; and shall keep them, and moreover recover damages. But if the defendant prevails, and obtains judgment that the distress was legal, 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. Or, in case of rent arrear, he may have a writ to enquire into the value of the distress by a jury, and shall recover the amount of it in damages, if less than the arrear of rent; or if more, then so much as shall be equal to such arrear; and if the distress be insufficient, he may take a farther distress or distresses (a): but otherwise, if, pending a replevin for a former distress, a man distrains again for the same rent or service, then the party is not driven to his action of replevin, but shall have a writ of *recaption*, and recover damages for the defendant's contempt of the process of the law.

F. N. B. 69.

(a) see

17. Car. 2. c. 7.

12. **RESCOUS** is where the owner, or other person, takes away by force a thing distrained from the person distraining; but the person must be actually in possession of the thing, or else it is no rescous; as if a man come to make a distress, and he is disturbed to do it; but the party may bring an action on the case for this disturbance.

Bull. N. P. 61.

13. **MISBEHAVIOUR** in an office, trust, or duty, is an injury for which the remedy is by action on the case; as if a sheriff make a false return to a writ, or a mayor to a *mandamus*, or deny a poll to one who stands candidate for an elective office, or for refusing to take a vote at such election, or for not returning him who is duly chosen; or if a justice refuse to take the examination of a party robbed, so that he is prevented from recovering against the hundred upon the statutes of hue and cry.

## 14. TRESPASS



Bull. N. P. 74.  
Espinasse, 364.

1. Stra. 334.

Espinasse, 48.  
Buller's Nisi  
Prius, 80.

Six Carpenters'  
Case, 2. Co.

Cro. Jac. 147.

4. Burr. 2092.

9. Lev. 37.

14. TRESPASS ON THE CASE is an action brought for the recovery of damages, for acts *unaccompanied with force*, and which in their *consequences only* are injurious; as if a man who ought to inclose against my land do not inclose, by which the cattle of his tenants enter into my land, and do damage to me. Thus also, where the defendant put up a spout in his own concerns, which was an act lawful in itself, but when it produced an injury to the plaintiff, by conveying the water into his yard, this action was adjudged to lie for such consequential injury.

15. TRESPASS VI ET ARMIS is also an action which lies for an injury done by one private man to another, where the *immediate act* itself occasions the injury, either to his person, goods, or lands; but having already mentioned the first, and meaning hereafter to mention the last, our present observations will be confined to those injuries which affect goods only. Thus, where entry, authority, or license, is given to any one *by the law*, and he abuses it, he will be a trespasser *ab initio*; but when it is given *by the party*, he may be punished for the abuse, but he will not be a trespasser *ab initio*; but the *not doing* cannot make the party who has authority or license by law, a trespasser *ab initio*, because *not doing* is no trespass. Thus, if a person enters into a tavern, which every man by law has a right to do, yet if he *steals* any thing from thence, his first entry shall be deemed unlawful, and he a trespasser *ab initio*. But by 11. Geo. 2. c. 19. a distress for rent shall not be deemed irregular, nor the party deemed a trespasser *ab initio*, for an irregularity in the subsequent disposition of it. To constitute a trespass, the act causing the injury must be voluntary, and with some degree of fault, for if done involuntarily and without fault, no action lies; but if it proceed from *mistake*, an action lies, for there is some fault from the neglect and want of proper care; as where one man cut another's grafs in a common field, and pleaded that he had mistaken it for his own.

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AN ACTION also will lie for injuries affecting a man's real property:—1. Such in which damages alone are to be recovered, as trespass *vi et armis*, and trespass on the case. 2. Such in which a term for years may be recovered, as ejectment.—3. Such by which a freehold may be recovered, as a writ of right, a formedon, dower, waste, assise, and *quare impedit*.

1. TRESPASS VI ET ARMIS lies for the doing of any act which is *immediately* injurious to another's lands. Every unwarrantable entry on another's soil, is in law a *breaking his close*, and the trespasser may by this action be called upon to shew *quare clausum querentis fregit*; for every man's land is supposed to be inclosed and set apart from his neighbours, either by a visible and material fence, as hedge, paleing, walls, &c. or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close, carries necessarily along with it some damage or other; for if no other special loss can be assigned, yet still the words of the writ specify one general charge, of *treading and beating down* the plaintiff's grass. However, in certain cases, the law has given a right to enter on the lands of another; as if a man comes to execute a legal process, to demand money, or landlord to distrain, or reversioner to see that no waste has been done, or traveller to get refreshment at an inn, all these are cases in which an entry is allowed by law, and therefore the entry is not a trespass. A man also may 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. 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 necessary that the party have a lease and possession of the

vesture

Buller's Nisi  
Prius, 8.

2. Espinasse's  
Dig. 57.

3. Bl. Com.  
208. 309.

vesture and herbage of the land. A man is answerable not only for 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 and spoil his neighbour's herbage, and spoil his corn or his trees, the owner must answer in damages. By 43. *Eliz.* c. 6. and 22. & 23. *Car.* 2. c. 9. s. 136. when the jury give less than forty shillings, the plaintiff shall have no more *costs* than *damages*, unless the Judge certify that the freehold was chiefly in question. But by 8. & 9. *Will.* 3. c. 11. if the Judge certify that the trespass was wilful and malicious, the plaintiff shall have full costs, though the damages be under forty shillings: and also by 4. & 5. *Will. & Mary*, c. 23. if the trespass be committed in violation of the Game Laws.

2. TRESPASS ON THE CASE also lies to recover damages for injuries to land, where the injury happens in *consequence* of the act, and not immediately from the act itself; as if any person erects a smelting-house, or works for making *aqua fortis*, and the vapour or smoke spoils the grass, corn, or injures the cattle of his neighbour, he shall pay damages for the injury sustained, and the nuisance be abated.

1. Ro. Ab. 89.  
White's Case,  
1. Burr.

Runnington  
on Ejectments,

1. Comb. 250.  
3. Bl. Com. 203.

2. Espinasse's  
Digest, 126.

3. EJECTMENT is a *mixed action*, by which a lessee for years, when *ousted*, may recover his term and damages: it is *real* in respect to the land, but *personal* in respect of the damages. Since the difuse of real actions, this mixed proceeding is become the common method of trying the title to lands or tenements; and it may be brought either on the title, or for non-payment of rent. When it is brought on the title, he who claims the land against the person in possession is *supposed* to make A LEASE for years to some *fictional person*, who is then *supposed* to ENTER and be in possession until

until he is ejected or OUSTED, either by the tenant in possession (a), or by some fictitious person, who is called *the casual ejector* (b); against whom the fictitious lessee brings his action for the expulsion, and he (*the casual ejector*) gives notice to the tenant in possession to defend his title to the land, which thereby comes in issue. The defendant is obliged to confess the LEASE, the ENTRY, and the OUSTER; and if the issue be found against him, the lessor of the plaintiff, who is understood to be the real party, is put into possession. The action of ejectment for rent was given by the statute 4. Geo. 2. c. 28. which enacts, that every landlord who hath by his lease a right of re-entry in case of non-payment of rent, when half-a-year's rent is due, and no sufficient distress is to be had, may serve a declaration in ejectment on his tenant, or fix the same on some notorious part of the premises, which shall be valid, without any formal re-entry, or previous demand of rent; and a recovery in such ejectment shall be final and conclusive, both in law and equity, unless the rent and all costs be paid and tendered within six calendar months afterwards. An ejectment will lie for an orchard, for a stable, a cottage, a house, a chamber described as in any story of a house; for part of a house; for a close called *Dray-field*, containing so many acres; for a certain place called *The Vestry*, in D.; for a messuage and tenement; for so many acres of furze, moor, heath, marsh, bogland, &c.; for a coal mine.

3. Bl. Com. 206.

See also  
7. Geo. 2. c.  
as to eject-  
ments by  
mortgagees.

Cro. Eliz. 854.  
Cro Jac. 654.  
3. Leon. 210.  
3. Lev. 96.  
Cro Jac. 150.  
Salk. 255.  
Cowp. 305.  
1. Term Rep.  
11.

4. A WRIT OF RIGHT is a writ of the highest nature known in the law respecting real property, for it is not to recover the possession only, as in other writs, but the property itself; and is the only refuge to which the owner of an estate can fly to recover it, after he, or those under whom he

Fitz. Nat. Bre.  
p. 1. to 12.  
Bul. N. P. 115.  
3. Com. Dig.  
p. 137.  
Co. Lit. 158.

(a) Which by 11. Geo. 2. c. 19. he is obliged to do on pain of forfeiting three years rent.

(b) This should be some real person to answer for the defendant's costs. Run. Ej. 63. 6. Mod. 389.

B b

claims,

claims, has neglected to bring an action by writ of entry, writ of assise, either of *mort d' ancestor* or *novel disseisin*, for the space of thirty years. And by 32. Hen. 8. c. 2. no persons shall have a writ of right of the possession of his ancestor, but within *sixty years* after disseisin complained of; nor of his own possession but within *thirty years*. A claim or entry to prevent the limitation of this statute must be upon the land, unless there be some special reason to the contrary.

Buller's N. P.  
115.

Buller, 115.  
3. Bl. Com. 192.  
F. N. B. 211.  
217. 255.  
3. Co. 88.

5. A FORMEDON is a writ distinguished into three species; a *formedon* in the *descender*, in the *remainder*, and in the *reverter*. The first lies where a gift in tail is made, and the tenant in tail aliens the lands, or is disseised of them, and dies. The second lies where one giveth lands to another for life, or in tail, with remainder to a third person, in tail, or in fee, and he who hath the particular estate dieth without issue inheritable, and a stranger intrudes upon him in remainder, and keeps him out of possession. The third lies 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. By 21. Jac. 1. c. 16. all writs of *formedon* shall be sued within twenty years next after the title or cause of action first descended or fallen, except the person intitled be at the time of the said writ first descendant, an infant, feme covert, &c. and then such person and his heirs may, notwithstanding the said twenty years be expired, bring his action within *ten years*.

F. N. B. 7.  
Co. Lit. 32.  
Wood, 568.

6. A WRIT OF DOWER lies where a woman hath received only part of her dower, and demands the residue against the same tenant in the same term, shewing the right to recover such residue. There is also a writ of dower *unde nihil habet*, where the wife hath received no part; as where a man having lands or tenements hath made no assurance thereof of any part to his wife, so that she

he is driven to sue for it against the heir or his guardian. Damages in dower are given by the Statute of *Merton*, c. 1. but it extends only to lands whereof the husband died seised. The defendant may plead to this writ, that the demandant and supposed husband "*ne unques accouple in loial matrimonie.*"

Bull. N.P. 116.  
Co. Lit. 32.  
Yelv. 112.  
2. Saund. 331.  
Robins v.  
Crutchley,  
Trin. 33. Geo.  
2.

7. A WRIT OF WASTE is also an action partly formed upon the Common Law, and partly upon 6. *Edw.* 1. c. 5. the Statute of *Gloucester*; and may be brought by him who hath the immediate estate of inheritance in reversion or remainder, against the tenant for life, tenant in dower, tenant by the courtesy, or tenant for years; and by 13. *Edw.* 1. c. 22. commonly called the Statute of *Westminster* the Second, by one tenant in common of the inheritance against another, who makes waste in the estate holden in common, which statute has been held to extend to joint-tenants, but not to coparceners.—Waste is a mixed action; partly real, so far as it recovers land; and partly personal, so far as it recovers damages; for by the Statute of *Gloucester*, the plaintiff in an action of waste is to recover the thing wasted, and treble damages; but the usual remedy for this injury is by application to the court of Chancery.

3. Bl. Com. 227.  
Finch, 29.  
Buller's N. P.  
119.  
Dyer, 19.  
5. Co. 12.  
Lutw. 1547.  
Co. Lit. 158.  
355.  
Cro. Car. 414.  
2. Inst. 403.

1. Ch. Rep. 14.  
2. Ch. Caf. 32.  
3. Bl. Com.  
438. 227.

8. ASSISE. Writs of assise are of two sorts, *novel disseisin*, and *mort d'ancestor*; and is applicable to two species of injury by ouster, *viz.* by abatement, and a recent disseisin. An assise of *mort d'ancestor*, or death of one's ancestor, lies where the abatement happened upon the death of the demandant's father or mother, brother or sister, uncle or aunt, nephew or niece; and the writ directs the sheriff to summon a jury, or assise, to view the land in question, and to recognize whether such ancestor were seised thereof on the day of his death, and whether the demandant be the next heir. An assise of *novel disseisin*, or recent disseisin, is an action of the same nature with that of *mort d'ancestor*,

Buller's N. P.  
120.  
F. N. B. 195.  
Finch. 290.  
Co. Lit. 154.  
1. Com. Dig.  
416.

Co. Lit. 153. b.  
2. Inst. 410.  
1. Com. Dig.  
406.

8. Co. 46.  
 1. Lev. 1.  
 2. Inst. 412.  
 1. Com. Dig.  
 410.

inasmuch as the demandant's possession must be shewn; but as the writ alledges the disseisin positively committed, the sheriff is commanded to re seize the land, and all the chattels thereupon, and keep the same in his custody till the arrival of the justices of assize. *Novel disseisin* must be founded upon a seisin in him who brings the writ, and therefore it is now rarely used for any thing beside the recovery of an office.

Wood's Inst.  
 566.  
 F. N. B. 32.  
 Co. Lit. 344.  
 2. Inst. 356.  
 6. Co. 49.  
 5. Com. Dig.  
 376.

3. Bl. Com. 247.  
 Buller's Nisi  
 Prius, 122.

2. Crompton's  
 Practice, 285.  
 Cro. Jac. 93.  
 Hob. 316.  
 7. Co. 25.

9. QUARE IMPEDIT is a possessory action, and lies when any one is disturbed by another in his right of advowson, to present a clerk to a church when it is void. The patron of every living is bound to present within six months after the church becomes void, or the right of presentation will lapse to the bishop; but if made within that time, the bishop is bound to admit and institute the clerk, if found sufficient, unless the church be full, or there be notice of any litigation. The patron therefore, if the delay or refusal arises from the bishop alone, as upon pretence of incapacity, or the like, brings this writ against the bishop, and he only is named in the writ; but if there be another presentation set up, then the pretended patron and his clerk are also joined in the writ; or it may be brought against the pretended patron and his clerk, leaving out the bishop; or against the patron only; but it is generally brought against all three; for if the bishop is left out, and the suit is not determined till six months are past, the bishop is entitled to present by lapse; but if he is named and made a party to the suit, no lapse can possibly accrue till the right is determined; and therefore it is always most advisable to make him a party. If the patron be left out, and the writ is only against the bishop and the clerk, the suit is of no effect, and the writ shall abate; for the right of the patron is the principal question in the cause. If the clerk be left out, and has received institution before the action brought, as is sometimes the case, the patron

patron plaintiff may recover the right of patronage, but not the present turn; for he cannot have judgment to remove the clerk, unless he be made a defendant and party to the suit, to hear what he can alledge against it; for which reason it is the safer way to insert them all three in the writ. Immediately on suing out the *quare impedit*, if the plaintiff suspects that the bishop will admit the defendant's or any other's clerk, pending the suit, he may have a prohibitory writ, called a *ne admittas*. If the bishop, after the receipt of a *ne admittas*, admit any person, even though the right of the patron presenting the person so admitted may have been found in a *jure patronatus* (which is a proceeding in the ecclesiastical court, to enquire which of two contending patrons have the right), the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by a writ of *scire facias*, and also have a special action against the bishop, called a *quare incumbavit*, to recover the presentation, and damages for the injury done him by *incumbering* the church with a clerk pending the suit. But if the bishop has incumbered the church by admitting the clerk before the *ne admittas* received, no *quare incumbavit* lies. The plaintiff in *quare impedit* must set out his title, and prove a presentation in himself, his ancestors, or those under whom he claims; and shew disturbance before action brought. The bishop and the clerk usually disclaim all title, save only, the first as ordinary to admit and institute, and the other as presentee of the patron, who is left to defend his own right; and upon failure, then the defendant must prove his right. If the right be found for the plaintiff on the trial, it must be further enquired,

1. If the church be full, and of whose presentation.
2. Of what value the living is.
3. In case of plenarty, upon an usurpation, whether fix calendar months have passed between the avoidance and the action; and if it be found that the plaintiff hath the right, and hath commenced his action in due time, he shall have judgment to re-

1. Term Rep.  
in C. B. 418.

F. N. B. 311.

F. N. B. 48.  
5. Com. Dig.  
380.

1. Term Rep.  
C. B. 376. 412.

See the Case  
of Lancaster v.  
Lowe, Cro. Jac.  
93, 94. Leach's  
ed. t. on.



3. Bl. Com. 252.  
F. N. B. 113. cover the presentation. Besides these possessory actions, there may be also had a *writ of right of advowson*, a recovery in which may be pleaded in bar to a *quare impedit*. The clerk also, when in full possession of the benefice, although he cannot have a writ of right, may have a writ in the nature of an assise, called a *juris utrum*, or the *parson's writ*, to recover glebe, rent, tithes, &c. aliened by his predecessor.

BESIDES these actions for the redress of civil injuries, there are criminal prosecutions relative to civil rights of which it will be proper to take notice.

3. Bl. Com. 256.  
Skin. 609.  
Finch, 256.  
7. St. Tr. 134. 1. BY PETITION OF RIGHT, which is used where the King is in full possession of any hereditaments or chattels, and the party suggests such a right as controverts the title of the crown; and this may be prosecuted either in the Chancery or the Exchequer.

Skin. 608.  
4. Co. 55. 2. MONSTRANS DE DROIT, which is used where the right of the party, as well as the right of the crown, appears upon record; as where on an inquest of office, intitling the King to lands, the whole matter is found by the jury specially, and entered on the record.

3. Bl. Com. 262.  
Buller, 210.  
2. Inst. 282.  
9. Co. 28. a.  
Yelv. 191.  
5. Com. Dig. 385.  
Stra. 1161.  
Ld. Ray. 1553.  
2. Burr. 869.  
Cowp. 58. 75.  
Dougl. 397.  
1. Term Rep. 1. 20. 453.  
2. Term Rep. 484. 767.  
3. Term. Rep. 300. 3. QUO WARRANTO is a writ in the nature of a writ of right for the King, against him who claims or usurps any office, franchise, or liberty; for as the crown is the fountain of all power and jurisdiction, if any person or corporation take upon them to execute any office or jurisdiction without being legally authorized so to do by the King's charter or act of parliament, the court of King's Bench will call upon them, to shew by what warrant or authority they claim to execute such office or jurisdiction. The old method of doing this was by writ of *quo warranto*, but of latter times the method has been by information in the nature of *quo warranto*; but by 4. & 5. Will. & Mary, c. 18. and 9. Ann. c. 20. such information cannot be filed without leave of the court.

4. MANDAMUS

4. **MANDAMUS** is a prerogative writ issuing out of the court of King's Bench, that court having a general superintendancy over all inferior jurisdictions and persons, to enforce obedience to acts of parliament, and to the King's charter, in which case it is demandable of right; but when the right is of a private nature, as to an office in which the public is not concerned, such as a deputy, register, &c. it is discretionary in the court to grant or to refuse it: therefore, upon every application for a *mandamus* it must be shewn to the court what the office is. This writ also, by the 9. *Ann. c. 20.* is made a most full and effectual remedy for refusing to admit any person entitled to an office in a corporation, and for wrongfully removing any person who is legally possessed.

Bull. N. P.  
199.  
3. Bl. Com.  
264.  
3. Burr. 1265.  
B. R. H. 199.  
4. Com. Dig.  
205.  
Strange, 1192.

5. **PROHIBITION** is a writ issuing properly 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 in a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a *suggestion* that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. But, if a prohibition be improperly obtained, a *consultation*, which is a writ authorising the inferior jurisdiction to proceed, shall be awarded.

3. Bl. Com.  
112.  
1. Peere Wms.  
476.  
Hob. 15.  
Palm. 523.  
2. Inst. 602.  
1. Ro. Rep. 252.  
1. Bullst. 120.  
2. Crom. Prac.  
259.  
Buller's Nisi  
Prius, 218.

6. **SCIRE FACIAS** is a judicial writ founded on some matter of record; as judgments, recognizances, and letters patent; on which it lies to enforce the execution of them, or to vacate and set them aside. This writ, however, though it be judicial or of execution, is so far in the nature of an original, that a defendant may plead to it; and in that respect it is AN ACTION. A *scire facias* lies for many purposes in law, the writ being formed according to the subject matter; but the principal use is to recover against bail after judgment had against the principal on the recognizance

Crompton's  
Practice, 70.  
Co. Lit. 290.  
F. N. B. 267.  
4. Bac. Abr.  
409.

2. Inst. 2<sup>3</sup>.  
438.  
4. Bac. Abr.  
413, 414.  
Co. Lit. 103.

forfeited; to revive a judgment by and against the same identical parties to a suit on which judgment was had; to continue a suit by or against the representatives of the parties dying before final judgment, or after judgment and before execution.

HAVING enumerated the several species of actions by which injuries are redressed, we shall proceed, in the remaining part of this section, to point out THE MODES OF PRACTICE by which an action is carried on, from the first issuing of the writ until the plaintiff obtains execution.

Termes de le  
Ley, "Brief."  
Co. Lit. 73.  
289.  
3. Bl. Com.  
273.  
Wood's Inst.  
555.  
1. Com. Dig.  
605.

1. A WRIT, *brevé* or *brevitate*, is, in its most extensive signification, a mandatory letter from the King, in parchment, sealed with his GREAT SEAL, commanding something to be done, or giving commission to have it done. Writs are of various kinds; but those we are at present to consider, are grounded on some cause of action, and are divided into *original* and *judicial*. ORIGINAL WRITS, all of which issue out of the court of Chancery, are either *optional* or *peremptory*; or, in the language of the law, they are either a *præcipe*, or a *si te fecerit securum*. The *præcipe* is in the alternative, commanding the defendant to do the thing required, or shew the reason wherefore he hath not done it; and is used where something certain is demanded; as to restore the possession of land, to pay a certain liquidated debt, or the like. A *si te fecerit securum* directs the sheriff to cause the defendant to appear in court, without any option given him, provided the plaintiff *make him secure*, to prosecute his claim; and the use of this writ is where nothing specifically is demanded, but only a satisfaction in general; as are writs of trespass, or on the case. Both these species of writs are *tested*, or witnessed, in the King's own name, "WITNESS Ourselves at Westminster," or wherever the Chancery may be held. In the court of Common Pleas all actions are commenced, or supposed to be commenced, by *original writ* issued out of Chancery, returnable in that court; on which a *capias* in trespass *quare clausum fregit*

Gilbert's  
History and  
Practice of the  
Court of Com-  
mon Pleas, 2. 9.  
120. 160.

is made out; and if the party is to be held to bail, an *ac etiam* is inserted, “*and also in a certain plea of debt, &c.*” In the King’s Bench also, actions on the case, trespass, ejection, Cromp. Prac. replevin, and debt, may be brought by *special* <sup>14</sup> *original*, the only advantage of which is, to preclude the defendant from bringing a writ of error to the Exchequer-Chamber, by virtue of the statute 27. *Eliz.* c. 8.

2. PROCESS is founded on judicial writs, and signifies all those compulsory modes made use of Wood’s Inst. 570. 573. between the commencement and determination of a suit, whence it is called *mesne process*. The most usual method of commencing an action in the King’s Bench is by *Bill of Middlesex*, so called because *Middlesex* is the county in which the court generally sits. The *Bill of Middlesex* is a kind of *capias*, directed to the sheriff of that county, and commanding him to take the defendant, and have him before Our Lord the King at *Westminster*, on a day prefixed, to answer to the plaintiff in a plea of *trespass*; and when once the defendant is in the custody of the marshal or prison-keeper of this court, for the supposed trespass, the court having an original jurisdiction over *that offence*, the plaintiff may proceed against him for any other species of injury. Crom. Prac. 7. Impey’s Instructor Clerical, 100. 106.

3. SUMMONS. This *Bill of Middlesex* must be served on the defendant by the sheriff, if he finds 27. Cromp. Prac. 7. him in that county; but if he returns “*non est inventus*,” then there issues out a writ of *latitat* 353. 1. Barnes, 222. to the sheriff of the county in which he is supposed to lie hid; and in general the *latitat* is usually sued out upon only a supposed, and not an actual *bill of Middlesex*; so that a *latitat* may be called the first process in the court of King’s Bench, as a *testatum capias* is in the Common Pleas; but if the defendant really resides in *Middlesex*, the process must be by *Bill of Middlesex* only. If the defendant cannot be served (a) with these writs before (a) See 12. Geo. 1. c. 29. 5. Geo. 2. c. 27. 21. Geo. 2. c. 3. their return, an *alias* and *pluries* may issue; and if he resides within any particular franchise, there must

**Cromp. Prac.** must be a *non omittas* sued out. Originally, the defendant might have been arrested by the writ of *latitat*, for a supposed contempt of court, in not obeying the *Bill of Middlesex*; but by 12. *Geo.* 1. c. 29. the sheriff or his officer can only serve the defendant with a *copy* of the writ or process, and with notice in writing to *appear* by his attorney in court to defend the action.

**Wood's Inst.** 4. ARREST. But if the plaintiff will make affidavit that the cause of action amounts to ten pounds, or upwards, the true cause of action shall be expressed in the writ, and the defendant may be arrested and detained until the return of the writ. The expressing the true cause of action in the body of the writ, is called inserting the *ac etiam*; the bill being to answer the plaintiff in a plea of trespass, and also to a bill of debt; the complaint of *trespass* giving cognizance to the court, and that of *debt* authorising the arrest. The sum sworn to must be indorsed on the writ, and the sheriff or his officer is then obliged to take him, and return the writ with a *cepi corpus* indorsed thereon. An arrest must be by corporal seizing or touching the defendant's body, after which the bailiff may justify breaking open the house where he is to take him; but otherwise he has no such power; for every man's house is his castle.

**See the Case of General Gan-  
lei, Cowp. 1.  
10 10.**

**Cromp. Prac.** 5. BAIL BOND. When the defendant is arrested, he must either go to prison or put in special bail to the sheriff, by entering into a bond with sureties for his appearance on the return of the writ, and this is called the bail bond; but by 12. *Geo.* 1. c. 29. the sheriff can only take bail in the sum sworn to and indorsed on the writ; and if the defendant do not put in *special bail*, in the manner after described, the plaintiff, by 4. & 5. *Ann.* c. 16. may take an assignment of the bail bond, and proceed against the sureties; or if he be dissatisfied with the bail, he may elect to rule the  
sheriff

sheriff to return the writ, and bring in the body, and proceed against him by *attachment*.

6. **APPEARANCE.** The first act of the parties *in court* is, that the defendant *appears* to the process against him, by shewing himself in court in person, or by his attorney, ready to answer to the action. This is performed by *filing common bail* in the King's Bench, and *entering appearance* in the Common Pleas, if the defendant has only been served with process; and by *putting in special bail*, or *bail above*, if he has been arrested, and given bond to the sheriff in the manner before described.

7. **COMMON BAIL** is effected by making an affidavit that the defendant, on such a day, was personally served with a true copy of the *Bill of Middlesex, latitat, alias, pluries*, or whatever the writ may be, and entering on a common bail piece the names of those imaginary but useful persons *John Doe* and *Richard Roe*, and suggesting that the defendant was delivered to them as his bail. By 5. *Geo. 2. c. 27.* the defendant must cause common bail to be filed on the return, or within eight days after such return, at which time the attorney, by 25. *Geo. 3. c. 80.* must deliver in his warrant to defend; and if this is not done, the plaintiff may file common bail for him, "according to the statute."

Crompt. Prac.,  
47.  
Barnes, 243.

8. **SPECIAL BAIL**, or as it is sometimes called **BAIL ABOVE**, must be filed within four days after the return of the writ; and this is effected by procuring a short copy of the writ, together with the sum sworn to, and entering on a special bail-piece the names of two housekeepers, who, if their responsibility should be doubted, may be obliged to **JUSTIFY**; which is nothing more than sustaining an examination by Counsel in open court, and swearing that they are housekeepers, each of them worth double the sum for which he comes to be bail, after all his debts are paid; and if this ceremony be not performed in due time, the

Crompt. Prac.  
53. 61.  
2. Bl. Rep.  
1061.

plaintiff may take an assignment of the bail bond to the sheriff in the manner before described; but if this be once effected, the bail below are completely discharged. The special bail jointly and severally undertake, that if the defendant be condemned in the action, he shall pay the costs and condemnation, or render himself to prison, or they will pay it for him; and therefore they may discharge themselves by surrendering the principal, and are at all times entitled to a warrant to apprehend him,

2. Show. 202.  
6. Mod. 231.

Doctrina  
Placitandi, 85.  
5. Com. Dig. 12.

9. PLEADINGS. When the defendant has appeared to the plaintiff's writ, the parties commence their pleadings. The first of these is,

Cromp. Prac.  
87.  
Impey's In-  
structor Cler.  
E. R. 142. to  
193.  
Wood's Inst.  
578.  
Co. Lit. 17.  
303.  
3. Bl. Com.  
493.

THE DECLARATION, *narratio* or *count*, anciently called *the tale*, in which the plaintiff sets forth the cause of his complaint at length, with the circumstances of time and place when and where the injury was committed; setting precisely forth, by proper averments, the *gist* and every thing that is of the essence of the action; and every thing is essential without which the court could have no sufficient ground to give judgment. In *local* actions, where possession of land is to be recovered, or damages for an actual trespass, the declaration must state the injury to have happened in the very county and place that it really did happen; but in *transitory* actions for injuries that might have happened any where, as debt, slander, &c. the plaintiff may declare in what county he pleases. This is called laying the *venue*, which the court will order to be changed as circumstances may make it necessary to the interests of justice. If the plaintiff neglect to declare in proper time, the action may be *nonprossed*, and the plaintiff amerced.

Impey, B. R.  
205.  
Cromp. 125.

IMPARLANCE is a proceeding which may be next adopted by the defendant; for after defence made, and before he pleads, he is entitled to one imparlance, and may have more granted by con-  
sent

sent of the plaintiff, or leave of the court. There are also many other previous steps which may be taken before he puts in his plea, according to the nature of the action and necessity of the case; as a *view, oyer, aid prayer, voucher, parol demur, and claim of cognizance*, all which will be explained at the end of the work.

PLEA. When the plaintiff has declared, it is incumbent on the defendant to make *defence* and *plead*. Pleas are of two sorts; *dilatory pleas*, and *pleas to the action*. Dilatory pleas are either to the *jurisdiction* of the court, as that it ought not to take cognizance of the matter; or to the *disability* of the plaintiff, as that he is an alien, enemy, &c.; or *in abatement*, for some defect in the writ or declaration. A plea to the action, is either confessing or denying the complaint; confession, as by entering a *cognovit actionem*; or denying, as by pleading the general issue of *not guilty, non assumpsit, nil debet, &c.* according to the nature of the action; or by a SPECIAL PLEA *in bar* of the plaintiff's demand, as a general release, accord and satisfaction, infancy, or justification, or the statutes of limitation (a). An ESTOPPEL (b) likewise may be pleaded in bar. It is a rule in pleading, that a special plea amounting only to the general issue is bad; but the defendant may state his title specially, although it amount only to a total denial of the charge, if he goes on to *give colour* to the

3. Bl. Com. 302.  
Finch, 362.  
Wood's Inst.  
580.  
Co. Lit. 128.

(b) Vide post.

(a) By 32. Hen. 8. c. 2. the time limited, beyond which no plaintiff can lay his cause of action in a WRIT OF RIGHT, is *sixty years*; in POSSESSORY ACTIONS, on the seisin of one's ancestors in lands, or on their or one's own seisin in rents, suits, and services, is *fifty years*; in ACTIONS REAL, on one's own possession, except for advowson, *thirty years*. By 21. Jac. 1. c. 2. and 9. Geo. 3. c. 16. a possession of *sixty years* is a bar against the king; and by 21. Jac. 1. c. 16. in writs of formedon and ejectment, *twenty years*. All

PERSONAL ACTIONS are limited to *six years*, except assault, battery, mayhem, and imprisonment, which must be brought within *four years*, and actions for WORDS within *two years*. By 31. Eliz. c. 5. penal actions shall be brought within *two years*, and *qui tam* actions within *one year*; and by 10. Will. 3. c. 14. no writ of error, *scire facias*, or other suit, shall be brought to reverse any judgment, fine, or recovery, for error, unless it be prosecuted within *twenty years*.

plaintiff,



plaintiff, and by that means refers the consideration of the question to the *court* instead of the *jury*; but if he do not totally deny the charge, or give colour, the plaintiff may reply.

Woods Inst.  
581.  
Co. Lit. 303.

A REPLICATION is an answer to the defendant's special plea; and this answer may be either by *traversing* the plea, or denying the whole or some material point of it; or by *confessing* the matter which the defendant has pleaded, and then *avoiding* it by some new matter consistent with the declaration. To this replication the defendant may rejoin, or put in an answer called A REJOINER; and the plaintiff may answer the rejoinder by a SUR-REJOINER; upon which the defendant may rebut by A REBUTTER; and the plaintiff surrebut by A SUR-REBUTTER.

THE most general rules with respect to pleading are the following :

Co. Lit. 303.  
Plow. 61. 81.  
Cro. Jac. 362.

1. GOOD MATTER must be pleaded in *right form*, *apt time*, and *due order*; but that which is only inducement or conveyance to the substance, need not be so certainly alledged as that which is the *gist* of the plea.

Rex v. Horne,  
Cowp. 682.

Co. Lit. 30.  
5. Co. 121.

Dougl. 158,  
159. note  
(†53).

Co. Lit. 303.  
7. Co. 40.  
Dyer, 16.  
Hob. 234.  
Latch. 186.  
4. Bac. Ab. 2.

2. THERE are three kinds of certainties in pleading: FIRST, Certainty to a certain intent in general. SECONDLY, Certainty to a common intent. THIRDLY, Certainty to a certain intent in every particular. The last is rejected in all cases, except in *estoppels*, as partaking of too much subtilty. The second is sufficient in defence, as pleas in bar. The first is required in all charges or accusations, in counts and replications, and in return to writs of *mandamus* and *habeas corpus*, and means what, upon a fair and reasonable construction, may be called certain without recurring to *possible* facts; for that which is apparent to the court, and appears from a necessary implication in the record, need not be averred.

3. EVERY

3. Every man's plea shall be taken most strongly against himself, as every person is presumed to make the most of their own case. Co. Lit. 303.

4. WHAT the parties admit by their pleadings shall be taken for granted, though the jury find otherwise. 2. Mod. 5.

5. IT is not enough for the plaintiff to destroy the defendant's title, but he must prove his own a better; for, *Melior est conditio defendentis.* Co. Lit. 303.

6. THE parties must not *depart* or vary from the title or defence they have once respectively insisted on; and therefore the *replication* must support the declaration, and the *rejoinder* must support the plea. 3. Bl. Com. 310.

7. EVERY plea must be simple, entire, connected, and confined to one single point, and not entangled with a variety of distinct independent answers to the same matter; but by the 4. & 5. Ann. c. 16. a man, with leave of the court, may plead two or more distinct matters. 3. Bl. Com. 311. Co. Lit. 285. Hob. 164.

ISSUE, *exitus*, is the end of the pleadings; for when the pleadings are brought to a point which is affirmed on the one side, and denied on the other, the parties are said to be *at issue*. An issue must, therefore, consist of an affirmative and a negative, upon which a trial may be had, and the court give judgment. Issues are of two kinds; upon *matter of law*, or upon *matter of fact*. An issue joined upon matter of law is to be determined by the judges; and this is called 3. Bl. Com. 314. Co. Lit. 126. 11. Co. 10. Finch, c. 35. Wood's Inst. 582.

A DEMURRER, which signifies an abiding in point of law, and a referring to the judgment of the court, whether the declaration or plea of the adverse party is sufficient in law to be maintained. A Demurrer is either general or special; general, where there is no cause particularly set forth; special, where by the statutes of 27. Eliz. c. 5. and 4. & 5. Finch, c. 40. Co. Lit. 72. 5. Co. 104. 3. Bl. Com. 314. Wood's Inst. 583.

4. & 5. *Ann. c. 16.* the causes in which the party apprehends the deficiencies to consist are specified.

Wood's Inst.  
583.

AN ISSUE of *fact* is where the *fact* only, and not the law, is disputed; and in this case the truth of the matters alledged must be examined by trial.

TRIAL is an examination of the truth of the point in issue, or of the question between the parties, by those means which the law has prescribed; as,

Co. Lit. 117.  
260.  
6. Co. 53.

1. TRIAL *by record*, which is, where a matter of record is pleaded in any action, as a fine, judgment, or the like, and the parties join issue upon "*nul tiel record*," or, "that there is no such record existing;" in which case the question, Whether there is such a record, or not? can only be tried by the production of *the record* itself.

9 Co. 50.  
1. Roll. Abr.  
572.  
2. Roll. Abr.  
578  
3. Bl. Com. 331.  
Wood's Inst.  
584.

2. TRIAL *by inspection*; as upon a writ of error to reverse a fine levied by an infant; or in an *audita querela* to avoid a recognizance acknowledged during a minority; or in a plea of *mayhem*, where the fact of infancy or mayhem shall be tried by the *inspection* or *examination* of the court.

3. Bl. Com. 333.  
Co. Lit. 74. 261.  
9. Co. 24. 31.  
Wood's Inst.  
584.

3. TRIAL *by certificate* is allowed where the evidence of the person certifying is the only proper criterion of the point in dispute; as questions concerning the customs of *London* shall be tried by the certificate of the LORD MAYOR, through the mouth of THE RECORDER; concerning the absence of persons with the king in his wars, by the certificate of THE MARSHAL; concerning imprisonment in a foreign country, by the certificate of THE MAYOR. Also matters of ecclesiastical jurisdiction, as marriage, general bastardy, excommunication, orders, and such like matter, shall be tried by the bishop's certificate.

4. TRIAL *by witnesses*, as in a writ of dower, where the issue is, Whether the husband be living or no? here two witnesses, at least, are requisite, because this trial is by witnesses, and not by jury.

Wood's Inst.  
584.  
3. Bl. Com.  
336.

5. TRIAL *by wager of law*. WAGER OF LAW is an oath taken by a defendant at the bar, that he oweth not the debt demanded of him upon a *simple contract*; but he must bring with him eleven of his neighbours, or so many persons as the court shall order, that will avow upon their oaths that they believe he speaks the truth. But this species of trial is in many cases abolished, and in others quite out of use.

Wood's Inst.  
584.  
3. Bl. Com.  
348.

6. TRIAL *by battle* is of great antiquity, but much disused, though still in force, if the parties chuse to abide by it. In civil matters, it can only be had upon issue joined in a *writ of right*.

Dugdale's  
Origines Juri-  
diciales, 65.  
2. Ruth. Coll.  
790.  
3. Inst. 158.

7. TRIAL *by jury*, or by twelve men, is the common method, and daily practice, by which matters of *fact* are decided, although they may also take upon themselves the knowledge of *the law*, and find a *general verdict*; but they more frequently, in matters of doubt or difficulty, find a *special verdict*. Trials by jury, in civil causes, are ordinary and extraordinary. The extraordinary trials of this kind are: 1st, By THE GRAND ASSIZE, in which a writ *de magna assisa eligenda* is directed to the sheriff to return four knights, who are to elect and chuse twelve others to be joined with them to try the matter of right. 2dly, By AN ATTAINT, which is a process commenced against a former jury for bringing in a false verdict. The jury in this case must consist of twenty-four of the best men of the county, who are called THE GRAND JURY *in the attain*, to distinguish them from the first, or PETIT JURY; and these are to hear and try the goodness of the former verdict. The ordinary trial by jury is, where an issue is joined upon a matter of fact, in the manner already described. In this case the court awards a *venire facias* to THE SHERIFF of the county in which the *venire* is laid,

Wood's Inst.  
586.  
9. Co. 24.  
Finch, 400.  
Co. Lit. 154.  
228.  
8. Co. 65.  
4. Co. 53.  
Cro. Car. 414.  
B. R. H. 23.  
5. Burr 261.  
See Mr. Har-  
grave's note  
(5), Co. Litts  
p. 155. b.

(a) And if there be a legal cause for not directing it to CORONERS, it shall be directed to ELIZORS, or persons specially elected by the court to execute the writ.

1. Duncombe's Trial per Pais, 51.

See 1. Duncombe's Trial per P. 76, 77. Staund. P. C. 156.

4. Inst. 159. 1. Bac. Abr. 608.

or if the sheriff be a party, or related to either of the parties, to THE CORONER (a), commanding him to cause TWELVE *free and lawful men* of the body of his county to appear and try the cause the last return of the same Term in which issue is joined, viz. *Hilary* or *Trinity* Terms, which, from the making up the issues therein, are usually called *issuable Terms*. But this being matter of form, the jurors names only are returned on A PANEL, or oblong piece of parchment; and they not appearing, a *habeas corpora juratorum* in the common pleas, and a *distringas* in the king's bench, issues to compel their appearance on the day appointed at *Westminster*; and the entry on the record is, that the jury is respited, through defect of jurors, until the first day of next Term, then to appear at *Westminster, nisi prius*, unless before that time the justices assigned to take assizes shall have come to the county in which the action is laid. And as the judges are sure to come and open the circuit commission on the day mentioned in the writ, the sheriff summons and returns this jury to appear at the assizes, and there the trial is had before the justices of *assize* and *nisi prius*.

THE jurors, as they come to the book to be sworn, may be challenged.

Co. Lit. 155. b. Bracton, bk. 3. p. 137. Fleta, bk. 1. c. 32. Britton, 6. 118. 1. Leon. 88. 2. Roll. Abr. 638. Plowd. 425. 2. Hale, 271.

CHALLENGES are of two sorts. CHALLENGES *to the array*, which is an exception to the whole panel, on account of some partiality or default in the sheriff; or, CHALLENGES *to the polls*, which are exceptions to particular jurors; as if a lord of parliament be impanelled; or if a juror be an alien born, or have not a sufficient estate; or if the juror be of kin to either party within the ninth degree, which is called a *principal challenge*; or if the juror be too intimate an acquaintance, or is under any other probable circumstance of suspicion, which is called a *challenge to the favor*, the validity of which must be left to the determination of the *triors*: so also a conviction of treason, felony, perjury, conspiracy, or the like, is a good cause of challenge. And if by means of these challenges,

challenges, or the non-appearance of the jurors, there are not a sufficient number left, either party may pray a *tales*, or a supply of such men as were returned upon the first panel, or a *tales de circumstantibus*, of such persons who are qualified as may be present in court.

10. Co. 102.  
105.  
Finch, 414.  
2. Ro. Ab 671.  
2. Ld. Ray.  
1170.

THE jury are then sworn to try *the issue* according to *the evidence*.

See Gilbert's Law of Evidence, 5.  
Co. Lit. 283.  
See Mr. Justice Buller's *Nisi Prius*, 5th edit. p. 221 to p. 322.

THE first and most signal rule of evidence is, that "*aman must have the utmost evidence the nature of the fact is capable of*;" for the design of the Law is to come to rigid demonstration in matters of right; and there can be no demonstration of a fact, without the best evidence that the nature of the thing is capable of: Less evidence doth create but opinion and surmise, and does not leave a man the entire satisfaction that arises from demonstration; for if it be plainly seen in the nature of the transaction, that there is some more evidence that doth not appear, *the very not producing it is a presumption that it would have detected something more than appears already*; and therefore the mind does not acquiesce in any thing lower than the utmost evidence the fact is capable of.

EVIDENCE arises from several sorts of testimony, and is either written or unwritten. Written evidence hold the first place in the scale of probability; and consists of,—1. Records. 2. Ancient deeds of thirty years standing, which prove themselves. 3. Modern deeds, and other writings, which must be attested and verified by the parol evidence of witnesses. Unwritten evidence is that which consists of proofs from the mouths of witnesses. The following are the principal general rules relating to evidence:

2. Bac. Abr. 285. 306.

1. THE *copies* of public records must be allowed in evidence; for since you cannot have the original, the best evidence that can be had of them is a true copy; but a *copy of a copy* is no evidence, for that is not the best evidence; and the farther off a thing lies from the first original truth, so much the weaker must the evidence be.

Gilbert's Law of Evid. 8.  
Bull. N.P. 223.  
1. Mod. 117.  
Salk. 285.  
2. Bac. Abr. 308.

Bull. N. P.  
229  
Skin. 623.  
Co. Lit. 225.  
3. Lev. 387.  
Cases in Crown  
Law, 23.

2. A COPY of any public record, authenticated by the person trusted for that purpose, may be given in evidence, without being proved; but a copy given out by an officer who is not trusted for that purpose, cannot be given in evidence, until it be proved to have been examined with the original.

3. Bl. Com.  
368.  
Gilbert, 95.  
3. Ark. 214.

3. IF it be positively proved, that a deed, which is written evidence of a private nature, be burned or lost, then an attested copy may be produced, or parol evidence be given of its contents.

Gilb. 95.  
5. Co. 68.  
8. Co. 155.  
2. Bac. Abr.  
309.

4. A COPY of a deed is good evidence, where the deed is in the defendant's hands, and he will not produce it; but where the effect or contents of a deed are proved, and the deed is afterwards given in evidence, and they disagree, the deed itself shall controul the other evidence.

Gilb. 119.  
2. Ark. 615.  
Bull. N. P.  
286.

Co. Lit. 6.  
Cases in  
Crown Law,  
50.  
2. Lev. 231.

5. As to parol testimony, it is a general rule, that no man can be a witness for himself, but he is the best witness that can be against himself; and from hence it follows, that husband and wife cannot be admitted to be witnesses for or against each other: But there are some exceptions to this rule; for a party interested will be admitted, for the sake of trade; or where no other evidence is reasonably to be expected; or where the possibility of interest is very remote.

Bull. N. P.  
291.  
Salk. 690.  
Cases in  
Crown Law,  
382

6. PERSONS who are stigmatized by having been convicted of treason, felony, and every *crimen falsi*, as perjury, forgery, and the like, cannot be witnesses.

3. Bl. Com.  
368  
Bull. N. P. 294.  
1. Mod. 283.

7. No evidence of discourse with another can be given in evidence; but the man himself must be produced.

Gilbert, 154.  
Bull. N. P. 298.

8. IN every issue the affirmative is to be proved; for a negative cannot regularly be proved; and one affirmative witness countervails the proof of several negatives, because the affirmative may swear true, and the negative also: but to this rule there is an exception of such cases where the law presumes the affirmative contained in the issue.

9. *Violent*

9. *Violent presumptions*, which arise from the proof of circumstances necessarily attendant on the fact; and *probable presumption*, which arises from such circumstances as usually attend the fact, when the fact itself cannot be proved, stand instead of the proofs of the facts until the contrary be proved: for, *Stabitur presumptioni donec probetur in contrarium*; but light and rash presumptions weigh nothing in the scale of evidence (a).

THE jury, after the proofs are summed up, are to consider of their verdict.

A VERDICT is either privy, public, or special.— A PRIVY VERDICT is when the judge hath left or adjourned the court, and the jury being agreed, obtain leave to give their verdict to the judge out of court; but this is of no force unless afterwards affirmed by a public verdict, given openly in court, wherein the jury may if they please vary from their privy verdict: but if the judge adjourns the court to his own lodgings, and there receives the verdict, it is a *public* and not a *privy* verdict.—A PUBLIC VERDICT is that in which the jury openly declare to have found the issue for the plaintiff or for the defendant.—A SPECIAL VERDICT is when the jury find the special matter or the fact at large, and leave it to the judges to determine what is the law that arises from the fact; but, as we have already observed, they may, if they think proper, judge both of the law and the fact, and find A GENERAL VERDICT, in the affirmative or negative, on the issue that is joined.

JUDGMENT, *judicium, quasi juris dictum*, is the determination, decree, or sentence of the court on the suit. Judgments are, upon *default*; upon *confession*; upon *demurrer*, or issue in law; and upon *verdict*, or issue in fact; and they are also either *interlocutory* or *final*.

(a) We have here noticed some of the leading points respecting evidence in civil suits; but as it is now settled, that the rule of evidence is the same both in civil and criminal proceedings, we refer to the latter part of the subsequent Section for further information on this subject.



1. Crompton's  
Practice, 280.

A JUDGMENT BY DEFAULT is that which is given for the non-appearance of the defendant in court, or for not pleading in proper time, if the plaintiff has filed appearance for him, or held him to bail according to the statute.

1. Crompton's  
Practice, 309.  
3. Burr. 1471.

A JUDGMENT BY CONFESSION is when the defendant or his attorney enters a *cognovit actionem*, or a *non sum informatus*. This is often done by consent, with a *stay of execution* till a certain time, to save charges, where the action is just, or the law furnishes no defence.

Id. Ray.  
1047.  
See 4. Ann.  
c. 16.

A JUDGMENT ON DEMURRER is when the defendant pleads an ill plea in bar, and the plaintiff demurs in law upon it, and the court gives judgment for the plaintiff to recover his debt, damages, and costs.

3. Bl. Com:  
387.  
1. Crompton's  
Practice, 323.

A JUDGMENT UPON VERDICT is the *fiat* of the court, to carry the verdict of the jury into execution; but this cannot be entered till the next Term after trial had, and that upon notice to the other party; and it may be suspended by granting a *new trial*, or arrested for error on the face of the record.

See Metcalf's  
Case, 11. Co.  
38.  
Co. Lit. 168.

INTERLOCUTORY JUDGMENTS are such as are given in the middle of a cause, upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit; as in pleas of abatement, where the judgment is *respondens oster*; or where the *right* of the plaintiff is only established, but the *quantum* of damages not ascertained, as in the cases already mentioned of default, or *nihil dicit*, *cognovit actionem*, and *non sum informatus*; in which cases A WRIT OF ENQUIRY issues to the sheriff, to summon a jury to enquire what the amount of the damages are.

1. Crompton's  
Practice, 279.

FINAL JUDGMENTS are such as at once put an end to the action, and when entered entitle the party to process of execution.

EXECUTION

EXECUTION is the obtaining actual possession of any thing acquired by judgment of law. Writs of execution are,

Wood, 602.  
Co. Lit. 154.  
2. Inst. 394.  
3. Co. 11.

1. *Habere facias seisinam*, or writ of seisin of a freehold, where the plaintiff recovers in an action real or mixed, wherein the seisin or possession of lands is awarded to him.

3. Bl. Com. 412.

2. *Habere facias possessionem*, or writ of possession of a chattel interest.

3. Bl. Com. 412.

3. *De clerico admittendo*, which is a judicial writ directed, not to the sheriff, as in the two former cases, but to the bishop or his metropolitan, requiring them to admit and institute the clerk of a plaintiff who has recovered a presentation to a benefice in a *quare impedit* or assise of *darrein presentment*.

Year Book, 43. Edw. 3. pl. 25.  
F. N. B. 89.  
Dyer, 76. 327.

4. *A special writ of execution* issues to the sheriff in all cases where the judgment is, that something special be done in order to compel the defendant to do it; as in an assise of nuisance, where the judgment is, *quod amoveatur*; or in replevin, a writ *de retorno habendo*, and the like.

Law of Executions, 43.

EXECUTIONS IN ACTIONS, where money only is recovered as a debt or damages, and not any specific chattel, are of five sorts:

1. Crompton's Practice, 336.

1. *Capias ad satisfaciendum*, the intent of which is to imprison the body of the debtor till satisfaction be made for the debt, costs, and damages; it therefore doth not lie against any privileged persons, as peers, members of parliament, executors, administrators, or such other person as could not be originally held to bail. This is a writ of the highest nature; and therefore, when once executed, no other process can be sued out against his land or goods, except, by 21. Jac. 1. c. 24, the party die in execution (a).

3. Bl. Com. 414.  
Wood, 602.  
Co. Lit. 289.  
3. Co. 11.  
5. Co. 86.  
F. N. B. 93.

C c 4

*Fieri*

(a) By 32. Geo. 2. c. 28. com<sup>o</sup> a defendant charged in execution only called the LORDS' ACT, if for any debt less than 100l. will surrender

Crompton's  
Practice, 353.

2. *Fieri-facias*, which commands the sheriff that he cause to be made of the goods and chattels of the defendant the sum or debt recovered. This writ lies against privileged persons, peers, &c. as well as common persons; and against executors and administrators, with regard to the goods of the deceased.

3. Bl. Com.  
417.  
Finch, 471.  
Bracton, 440.  
Fitz. Nat. Br.  
265.  
The Register  
of Writs, 390.  
Gilbert on  
Execut. 27.

3. A *levari facias* is a writ of execution which affects a man's goods and the profits of his lands; and by virtue of which the sheriff may seize all his goods, and receive the rents and profits of his lands till satisfaction be made to the plaintiff. This is the most antient judicial process of the law, but little use is now made of it, the remedy by *elegit*, which takes possession of the lands themselves, being much more effectual.

Gilbert's  
Execut. 33.  
2. Inst. 394.  
Crompton's  
Practice, 356.

4. *Elegit* is a judicial writ, given by the statute of West. 2. c. 18. either upon a judgment for a debt or damages, or upon the forfeiture of a recognizance taken in the king's court; for, by the Common Law, land was not liable to any debt, because the debt was contracted upon the personal security; but by this writ two things are done:—1st, The goods and chattels of the defendant, *præterea boves et afros de carrucâ*, are delivered to the plaintiff; and, 2dly, the moiety of his lands and tenements. The goods are not sold, but delivered to the plaintiff at a reasonable appraisement and price, in satisfaction of his debt; and if the goods are not sufficient, then the moiety of his freehold lands, whether held in his own name, or by any other in trust for him, are also to be delivered to the plaintiff to hold, till out of the rents and profits thereof the debt be levied, or

99. Car. 2. c. 3.

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 ten pounds), and will make oath of his punctual compliance with the statute, the prisoner may be discharged, unless

the creditor insists on detaining him; in which case he shall allow him 2s. 4d. a week, to be paid on the first day of every week; and on failure of regular payment the prisoner shall be discharged, but his goods will still be liable.

till

till the defendant's interest be expired; and during this period the plaintiff is called *TENANT by elegit*. The plaintiff cannot sue out a *capias ad satisfaciendum*, or *fieri facias*, after having sued out an *elegit*; for he hath his *election*, from whence it is called *elegit*, whether he will sue out this writ, or a *capias ad satisfaciendum*, or *fieri facias*: but if execution can only be had of the goods, because there are no lands, he may have a *ca. su.* so that the body and goods, or the land and goods, may be taken in execution; but not body and land too, except upon some prosecutions given by statute; as statutes merchant and staple, bonds to the king.

Vide ante, p.

293.

27. Edw. 3.

c. 9.

33. Hen. 8.

c. 39.

See also 13.

Eliz. c. 4. and

29. Car. 2. c. 3.

#### §, IV. Of Crimes and Misdemeanors.

HAVING described the nature of civil injuries, and given some account of the modes by which they are to be redressed, we come now to the concluding Section of this Chapter, to consider the nature of **CRIMES** and **MISDEMEANORS**.

See Hale's  
Analysis.

A **CRIME** is a positive breach, or wilful disregard, of some existing public law, and is generally taken to mean those offences which amount to felony. Crimes can have no existence prior to the resolution to do some criminal act, and are punishable only when that resolution is capable of proof.

Eden's Principles of Penal Law, 84.

Beccaria, p. 17.

4. Bl. Com. 5.

**MISDEMEANORS** are also acts committed or omitted in violation of a public law, either forbidding or commanding them; but they in general denote those offences that are under the degree of felony.

4. Bl. Com. 5.

**FELONY**, which, *ex vi termini*, signifies *quodlibet crimen felleo animo perpetratum*, in its general acceptation, comprises every species of crime which occasioned at Common Law the forfeiture of land

4. Bl. Com. 94.

99.

1. Hawk. P.C.

99. in notis.

Co. Lit. 391.

OR

or goods; and this forfeiture most frequently happens in those crimes for which a capital punishment is or was liable to be inflicted. The definition of felony therefore is, “an offence which occasions a total forfeiture either of lands or goods, or both, at the Common Law, to which capital or other punishment *may be* superadded, according to the degree of guilt.”

THE guilt of offending against any law whatsoever necessarily supposing a *wilful* disobedience, can never justly be imputed to those who are either incapable of understanding it, or of conforming themselves to it; and therefore, neither infants under the age of discretion, ideots, lunatics, nor madmen, are *prima facie* capable of guilt: but if it appear that an infant *above* the age of seven years has a capacity to discern between good and evil, he shall be capable of guilt according as his discernment appears, for *malitia supplet aetatem*; but the presumption shall be in favour of his innocence until he attains the age of fourteen years, at which period he is, as to the commission of crimes, supposed to have attained discretion, and his actions shall be subject to the same modes of construction as those of the rest of society; but within the age of seven years an infant cannot be punished for any capital offence, whatever circumstances of a mischievous disposition may appear; for, *ex presumptione juris*, he cannot have discretion; and against this presumption no averment shall be admitted.—So also, if one who has committed a capital offence becomes *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed; but he who is guilty of any crime through his voluntary drunkenness, shall be punished for it as much as if he had been sober; and he who incites a madman to commit a crime is a principal offender, and as much punishable as if he had done it himself.—A *feme covert* shall not suffer punishment for committing a bare theft, or burglary, or robbery,

1. Hawk. P. C.  
1.

1. Hale, 15.

4. Bl. Com. 21.

Puffendorf,

Bk. 8. c. 3.

Brooke Coror-  
ing, 170.

Pulton de

Pace, 125. 129.

3. Inst. 4.

Dalt. c. 147.

Co. Lit. 247.

4. Co. 124.

Hob. 224.

8. St. Tr. 322.

Doct. & Stud.

e. 26.

Cro. Jac. 466.

1. Hale, 24.

The Mirrour,

c. 4. f. 6.

Plowd. 19.

Register, 309.

Folter, 70. 113.

349.

Cowp. 222.

22. Aff. pl. 27.

Savil, 57.

Summary, 10.

1. And. 107.

3. Inst. 4. 6.

1. Hale, 34. 35.

4. St. Tr. 205.

8. St. Tr. 285.

4. Bl. Com.

24. 388.

Co. Lit. 247.

1. Hale, 32.

4. Co. 125.

1. Hale, 617.

robbery, in company with, or by coercion of, her husband ; neither shall she be deemed accessory for receiving her husband : but these exemptions do not extend to high-treason, or to any criminal act done by herself alone.—Persons also committing crimes by casualty or misfortune, by ignorance or mistake of fact, by compulsion or necessity, are not punishable ; but all these circumstances of accident, necessity, or infirmity, must be satisfactorily made out by the party who relies upon them for his excuse, unless they arise out of the evidence adduced against him.

Kelynge, 31.  
Fitzherbert's  
Corone, 199.  
1. Hale, 49.  
1. Hawk. 4.

1. Hawk. P. C.  
p. 5. *in notis.*

PERSONS guilty of crimes may be guilty either as principals in the first degree, as principals in the second degree, as accessories before the fact, or as accessories after the fact,

4. Bl. Com.  
Hale's Sum-  
mary.

A PRINCIPAL *in the first degree* is he that is the actor or absolute perpetrator of the crime.

1. Hale, 615.  
1. Hawk. 5.  
4. Bl. Com.

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 ; for there may be also a constructive presence, as where one commits a robbery or murder, and another keeps watch or guard at some convenient distance ; and indeed, wherever a person contributes to a felony, and no other person can be considered as a principal, he shall be so considered, unless he be clearly only an accessory.

34.  
1. Hale, 615.

Foster, 359.

4. Bl. Com.  
35.

AN ACCESSARY is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either before or after the fact committed,

4. Bl. Com.  
36.

2. Hawk. 439.

AN ACCESSARY *before the fact* is one who, being absent at the time of the crime committed, doth yet procure, counsel, or command, another to commit a crime ;

1. Hale, 537-615.  
2. Inst. 152.  
Plowd. 475.  
1. Hale, 537.  
2. Hawk. 445.  
Foster, 354.

a crime; and *absence* is absolutely necessary to make him an accessory; for if such procurer be *present*, he is guilty of the crime as principal.

1. Hale, 618.  
2. Hawk. 448. AN ACCESSARY *after the fact* may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists, the felon; and by 5. *Ann. c. 31.* and 4. *Geo. 1. c. 11.* receivers of stolen goods are made accessaries after the fact, and may be transported for fourteen years.

Co. Lit. 57. a.  
Co. P. C. 20.  
2. Inst. 187.  
2. Hawk. P. C. 439. IN HIGH TREASON there are no accessaries, but all are principals; so also in petty larceny, and all other crimes under the degree of felony.

1. Hale, 613.  
12. Co. 81.  
Fost. C. L. 341. HAVING described *the persons* who may be punished for being guilty of crimes, and the degrees of guilt of which they may be capable, we shall proceed to enumerate the several crimes and misdemeanors known to the Laws of *England*.

### I. Offences against God and Religion.

Apostacy. 1. APOSTACY is a total renunciation of christianity, by embracing either a false religion, or no religion at all. By 9. & 10. *Will. 3. c. 32.* to deny by writing, printing, teaching, or advised speaking, the Christian religion to be true, or the holy scriptures to be of divine authority, is punishable, for the first offence by loss of office; for the second, by being put out of the protection of the law, and three years imprisonment, except he repent within four months after his first conviction, and renounce his error in open court.

4. Bl. Com. 43.  
1. Hawk. P. C.

Heresy. 2. HERESY, which consists not in a total denial of Christianity, but of some of its essential doctrines, publicly and obstinately avowed. This offence was punishable by the writ *de heretico comburendo*; but this punishment being abolished by

4 Bl. Com. 47.  
1. Hawk. P. C.  
Burr's Justice.

by 29. *Car.* 2. c. 9. it is enacted by 9. & 10. *Will.* 3. c. 32. that if any person educated in the Christian religion shall deny one of the persons in the Holy Trinity to be God, or maintain that there are more Gods than one, he shall suffer the same penalties and incapacities as above described in the case of apostacy.

3. REVILING THE CHURCH. By 1. *Eliz.* c. 1. Reviling the Church.  
 whoever reviles the sacrament of the Lord's Supper shall be punished by fine and imprisonment. 1. Hawk. P. C. 13.  
 And by 1. *Eliz.* c. 2. if any *minister* shall speak 1. Lev. 295. Gibson, 209.  
 any thing in derogation of the Book of Common Prayer, he shall suffer six months imprisonment, 3. Burn. E. L. 220.  
 and forfeit a year's value of his benefice; AND if 3. Mod. 78. Dyer, 203.  
*any person* shall in plays, songs, or other open words, speak anything in derogation, depraving, or despising of the said book, he shall forfeit for the first offence an hundred marks; for the second, four hundred; and for the third, all his goods and chattels, and suffer imprisonment for life. 1. Leon. 295.

4. NON-CONFORMITY. Non-conformists are of two sorts:—1. Such as absent themselves from divine worship in the established church through total irreligion, and attend the service of no other persuasion; and these offenders shall forfeit one shilling to the poor every Lord's day they so absent themselves, and twenty pounds to the King if they continue such default for a month together; and if they keep any inmate thus irreligiously disposed in their houses, they forfeit ten pounds a month. The second species of non-conformists are papists and protestant dissenters; but as the penalties to which these offenders were once liable are, by the Toleration Act of 1. *Will. & Mar.* c. 18. greatly lessened with respect to dissenters, and by the 18. *Geo.* 3. c. 60. almost entirely done away with respect to Roman catholics, it is needless to particularize those which remain. 4. Bl. Com. 52. 1. Eliz. c. 2. 23. Eliz. c. 1. 3. Jac. 1. c. 4.

5. BLAS-



5. **BLASPHEMY**, by denying the being or providence of God, or by uttering contumelious reproaches of Our Saviour Christ, is punishable by fine and imprisonment.

1. Hawk. 12.  
3. Mod. 59.  
Sayer, 304.  
2. Burr. 150.

6. **PROFANE CURSING AND SWEARING**. By 19. *Geo. 2. c. 21.* if any person shall profanely curse or swear, and be convicted on the oath of one witness, or by confession, or by the hearing of one magistrate, he shall forfeit,—**FIRST**, Every day-labourer, common soldier, sailor or seaman, *one shilling*. **SECONDLY**, Every other person under the degree of a gentleman, *two shillings*. **THIRDLY**, Every person of or above the degree of a gentleman, *five shillings*. On a second conviction *double*, and for every other *treble* the sum first forfeited.

Wide Burn's  
Justice, 401.

1. Hawk. 9.  
1. Hale, P. C.  
429.

7. **WITCHCRAFT**. By 9. *Geo. 2. c. 5.* whoever shall pretend to exercise the arts of witchcraft, forcery, enchantment, or conjuration, or shall undertake to tell fortunes, or pretend by crafty science to discover stolen goods, shall be imprisoned for a year, stand four times in the pillory, and find sureties as the court shall direct. And by 17. *Geo. 2. c. 5.* all jugglers, fortune-tellers, gypsies pretending physiognomy, palmistry, or the like crafty science, shall be deemed rogues and vagabonds.

5. Bl. Com. 62.  
1. Hawk. P. C.  
10.  
1. State Trials,  
802.  
1. Sid. 168.  
1. Keb. 620.

8. **RELIGIOUS IMPOSTORS** are such as falsely pretend an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments; and are punishable by fine, imprisonment, and infamous corporal punishment.

Markets and  
feast days shall  
not be held on  
Sundays.  
Dalton, c. 46.  
Gibson, 236.

9. **SABBATH-BREAKING**, or profanation of the Lord's day. By 27. *Hen. 6. c. 5.* all manner of fairs and markets on feast days, or on Sundays, the four Sundays in harvest excepted, shall clearly cease, on pain of forfeiting the goods exposed to sale.

By

By 1. *Car. 1. c. 1.* there shall be no meetings, assemblies, or concourse of people, out of their own parishes on the Lord's day; nor any bear-baiting, bull-baiting, interludes, common plays, nor other unlawful exercises and pastimes, used by any person or persons within their own parishes, on pain of forfeiting 3s. 4d. to the poor for every offence.

No entertainments on Sundays.

4. Bl. Com. 63.  
1. Hawk. 11.

By 3. *Car. 1. c. 2.* no pack-horse, waggon, cart, wain, nor any drover with cattle, shall travel on the Lord's day, on pain of twenty shillings; nor shall any butcher kill or sell any victuals upon the Lord's day, on pain of 6s. 8d.

Common carriers shall not travel on Sunday.

1. Hawk. 11.  
Stra. 702.  
Crown Circuit Com. 372.

By 29. *Car. 2. c. 7.* no tradesman, labourer, or other person above the age of fourteen years, shall exercise any worldly business, labour, or work of their ordinary callings, on the Lord's day, works of necessity and charity only excepted, on pain of forfeiting five shillings.

Trades shall not be exercised on Sunday.

1. Hawk. 11.  
2. Burr. 785.  
11. Mod. 114.  
Cowp. 640.

By 29. *Car. 2. c. 7.* no person shall publicly cry, shew forth, or expose to sale, any wares, merchandizes, fruits, herbs, goods, or chattels whatsoever, on the Lord's day, on pain of forfeiture.

Fruits and herbs shall not be cried on Sunday.

By 29. *Car. 2. c. 7.* no drover, horse-courser, waggoner, butcher, or higler, or their servants, shall travel or come to his inn or lodging, on pain of twenty shillings.

Higlers shall not work on Sunday.

By 29. *Car. 2. c. 7.* Nor shall any person use, employ, or travel with any boat, wherry, lighter, or barge, without permission from a justice, on pain of five shillings.

Watermen shall not ply on Sunday.

By 29. *Car. 2. c. 7.* no person shall serve any process on the Lord's day, except in cases of treason or felony, but the same shall be void, and the offender liable in damages.

No civil process to be served on Sunday.

Ray. 250.  
2. Saik. 672.  
1. T. Rep. 165.

By

Shoes shall not be sold on Sunday. BY 1. *Jac.* 1. c. 22. no shoe-maker shall expose to sale any shoes, or other wares, on pain of 3s. 4d. a pair.

Game shall not be killed on Sunday. BY 13. *Geo.* 3. c. 80. no person shall, on a Sunday or Christmas-day, kill any game, or use any gun, dog, net, or engine, for that purpose, on pain of from 10l. to 20l. for the first offence, and from 20l. to 30l. for the second offence.

Debating societies or *promenades* shall not be held on Sunday. BY 21. *Geo.* 3. c. 4. every place of public entertainment or debating, opened on any part of the Lord's day, to which admittance shall be had for money or by tickets, or by charging an extraordinary price for refreshments, shall be deemed a disorderly house, and the master liable to a penalty of two hundred pounds (a).

Drunkenness. 10. DRUNKENNESS is punished by 4. *Jac.* 1. c. 5. with the forfeiture of *five shillings*, or sitting 4. Bl. Com. 64. six hours in the stocks.

Lewdness. 11. OPEN AND NOTORIOUS LEWDNESS, grossly scandalous, such as was that of those persons who exposed themselves naked to the people in a balcony in *Covent-Garden*, with abominable circumstances, is an offence indictable at Common Law, and punishable by fine and imprisonment. 1. Hawk. P. C. 40.

## II. *Offences against the Law of Nations.*

12. TRUCE BREAKING, or the violation of passports expressly granted by the King or his ambassadors to the subjects of a foreign power, in the time of mutual war, is a breach of the public faith, and was, by 2. *Hen.* 5. c. 6. declared high

(a) But mackrel may be sold on Sunday, 10. & 11. Will. 3. c. 24. Fish carriages may travel, 2. *Geo.* 3. c. 15. Forty watermen may ply on the Thames, 11. & 12. Will. 3. c. 21. Hackney coachmen and chairmen may ply, 9. *Ann.* c. 23. Meat may be dressed in June, &c. 29. *Car.* 1. c. 7. and milk may be cried morning and afternoon.

treason;

treason; but by 29. *Hen.* 6. c. 2. and 31. *Hen.* 6. c. 4. is punishable by restitution and forfeiture.

13. VIOLATING THE RIGHTS OF AMBASSADORS. By 7. *Ann.* c. 12. all proceſs whereby the perſon of any ambaffador, or his domeſtic ſervant, may be arreſted, or his goods diſtrained or ſeized, ſhall be utterly void; and all perſons proſecuting, ſoliciting, or executing ſuch proceſs, ſhall be deemed violators of the law of nations, diſturbers of the public repoſe, and ſhall ſuffer ſuch penalties and corporal puniſhment as the lord chancellor and the chief juſtice ſhall, on conviction, think fit.

To arreſt an ambaffador, or his privileged ſervant, is a high miſde-meanor.

14. PIRACY, *πειρα*, *dolus*, or deceit, is a felony againſt the goods of any other perſon, by a depredation or robbing at ſea. A pirate is ſaid to be *hoſtis humani generis*, and therefore every community hath a right to inflict that puniſhment upon him which every individual would, in a ſtate of nature, have a right to do for any invaſion of his perſon or perſonal property. This is a capital offence by the Civil Law, and therefore a pardon of all felonies doth not diſcharge it. Formerly it was only cognizable in the Admiralty courts; but by 28. *Hen.* 8. c. 15. all felonies and robberies committed upon the ſea, or in any haven, creek, river, or place where the admiral hath, or pretends to have juriſdiction, ſhall be tried in ſuch county, within *England*, as ſhall be appointed by ſpecial commiſſion; and a new juriſdiction is eſtabliſhed for this purpoſe, which we ſhall make mention of in the enſuing chapter. By 11. & 12. *Will.* 3. c. 7. if any natural-born ſubject commits any act of hoſtility upon the high ſeas againſt others of his Maſteſty's ſubjects, under colour of a commiſſion from any foreign power; this, though it would only be an act of war in an alien, ſhall be conſtrued piracy in a ſubject. And farther, any commander, or other ſeafaring perſon, betraying his truſt, and running away with any ſhip, boat, ordnance, ammunition, or goods, or yielding them

Wood. 368.  
3. Inſt. 111.  
Summary, 77.  
4. Bl. Com. 71.  
1. Hawk. 152.

them up voluntarily to a pirate; or conspiring to do these acts; or any person assaulting the commander of a vessel, to hinder him from fighting in defence of his ship, or confining him, or making or endeavouring to make a revolt on board; shall, for each of these offences, be adjudged a pirate, felon, and robber, and shall suffer death, 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 it. And the statute 4. Geo. 1. c. 11. expressly excludes the principals from the benefit of clergy. By the statute 8. Geo. 1. c. 24. the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in any wise consulting, combining, confederating, or corresponding with them; or the forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing any of the goods overboard; shall be deemed piracy: and such accessories to piracy as are described by the statute of king *William*, are declared to be principal pirates; and all pirates convicted by virtue of this act are made felons without benefit of clergy. By the same statutes also (to encourage the defence of merchant vessels against pirates), the commanders or seamen wounded, and the widows of such seamen as are slain, in any piratical engagement, shall be entitled to a bounty, to be divided among them, not exceeding one fiftieth part of the value of the cargo on board: and such wounded seamen shall be entitled to the pension of Greenwich Hospital; which no other seamen are, except only such as have served in a ship of war. And if the commander shall behave cowardly, by not defending the ship, if she carries guns or arms, or shall discharge the mariners from fighting, so that the ship falls into the hands of pirates, such commander shall forfeit all his wages, and suffer six months imprisonment.

III. *Of Offences against the Supreme Executive Power; or the King and his Government.*

1. **HIGH TREASON.** Majesty hath no prerogative against the arm of fate; but the personal protection of Majesty against the efforts of disloyalty is within the province of human foresight, and should be within the first sanctions of positive law. Many are the sleepless hours which the Sovereign must undergo for the sake of his subjects; and his preservation becomes in return the primary object of their care. Thus it is that the reciprocal duties of PROTECTION and ALLEGIANCE form the foundation and support of the political union. Justice watches like a guardian angel over the restless pillow of her defender; for every blow levelled at him is, in its consequences, levelled at the whole civil establishment. The general welfare of the people is blended in the safety of their common father and representative; nor can his life fall a sacrifice to conspiracy or faction, without involving the whole realm in popular inveteracies, blood, and desolation. Hence it follows that HIGH TREASON, which in every instance strikes ultimately at the well-being of sovereignty, is the foulest crime that can be committed, and ought therefore to be the most precisely ascertained. At the Common Law the nature of this offence was vague and undefined, but the statute of 25. *Edw.* 3. c. 2. describes what offences only, for the future, should be held to be treason.

Eden's Principles of Penal Law, 118.

4. Bl. Com. 75.

2. BY the 25. *Edw.* 3. c. 2. "When a man doth compass or imagine the death of our lord the King, of our lady his Queen, or of their eldest son and heir, and thereof be provably attainted of open deed by people of their condition, it ought to be adjudged TREASON."

To compass or imagine the death of the King, &c.

THE King here intended is, the King in possession, without any respect to his title; for it is held that a King *de facto*, and not *de jure*, is a King within the meaning of the act. The Queen regnant, as were queen *Mary* and queen *Elizabeth*, is a King within this act; but the husband of such a Queen

3. Inst. 7.  
4. Bl. Com. 77.  
1. Hale, 104.  
106.

1. Hale. 101.  
3. Inst. 7.

is not. The son of a King, admitted by act of parliament *in consortium imperii*, as was done by Henry the Second, whereby there was *rex pater* and *rex filius*, is a King within this statute. But a queen dowager, or princess dowager, or queen divorced *à vinculo matrimonii*, the wife of the King's second son, the King's eldest daughter, nor any collateral heir apparent, are within the statute.

1. Hawk. 53. THE words *compass* or *imagine* are synonymous terms, signifying the purpose or design of the mind or will; and therefore, being an internal act, must be demonstrated by some *open deed*, or, as it is usually called, *overt act*. Thus, to provide weapons or ammunition, harness or poison, or to send letters for the execution thereof, for the purpose of killing the King, is held to be a palpable overt act of treason, in imagining his death. So also, if men conspire to imprison the King by force until he hath yielded to certain demands, and for that purpose to gather company or write letters, is an overt act to prove the compassing the King's death. It has been held, that WORDS *written* is an overt act of treason, but that WORDS *spoken* cannot be construed into such an overt act; for it now seems clear, that words spoken, unless *in prosecution* of a traitorous purpose, amount only to a high misdemeanor, and no treason: neither will a mere concealment of a traitorous confederacy amount to treason; for there must be alledged and proved some act declaratory of the intention, some positive participation in the guilt, some consultation, persuasion, or means of incitement; but the least advice given in a treason, though inchoate, and never executed, will make the adviser guilty of this offence. And indeed, every thing wilfully and deliberately designed or attempted to be done, whereby the life of Majesty may be endangered, is an act of *compassing* his death; but the guilt only commences when some *measure* shall appear to have been *taken* to effectuate the guilty purpose.

To violate the chastity of the Queen or Princess. 3. BY 25. *Edw. 3. c. 2.* " If a man do violate the King's companion, or the King's eldest daughter "

“ daughter unmarried, or the wife of the King’s  
 “ eldest son and heir, and be thereof provably  
 “ attainted of open deed by people of their condi-  
 “ tion, it ought to be adjudged treason.”

VIOLATION here implies a carnal knowledge, by whatever means obtained; for if both parties be consenting, they are equally guilty of treason. By the King’s companion, is meant his wife; but no queen or princess dowager is any way within the purview of this act. Under the words “ eldest son and heir,” the son of a Queen regnant is included, and also the second son, after the death of the first, and perhaps also a collateral heir apparent.

Prin. P. L. 125.  
 1. Hale, 129.  
 Co. P. C. 2.  
 4. Bl. Com. 81.  
 1. Hawk. 53.  
 Foster’s First Discourse.

4. BY 25. Edw. 3. c. 2. “ If a man do levy war  
 “ against our lord the King in his realm, and be  
 “ thereof provably attainted of open deed by  
 “ people of their condition, it ought to be  
 “ adjudged treason.”

To levy war  
 against the  
 King.

UNDER this description a mere conspiracy to levy war, unless *directly against the King*, is not treason; but in a conspiracy for *more remote purposes*, if war be actually levied by some of the conspirators, they are all considered as principal traitors. The words of the statute seem to imply a military assemblage, or armed insurrection, not upon a private quarrel between private individuals, not in maintenance of a personal claim, or in pursuit of a particular redress; but such a rising as may in judgment of law be intended to have been against the person of the King, to seize, dethrone, or imprison him; or to oblige him by violence to alter the measures of his government, or to compel a change in the religion settled by law; or to withhold castles or fortresses by weapons offensive and invasive; or a wilful *uncompelled* joining with open rebels; or, in short, every effort of *positive rebellion*. But it has been held, that a rising with intention to kill one of the privy

Prin. P. L. 130.  
 Foster, 195.  
 216. 219.  
 1. Hale, 49.  
 139. 146. 296.  
 Moor, 621.  
 Kelynge, 75.  
 9. St. Trials,  
 57. 566.  
 Salk. 635.  
 8. St. Tr. 56.  
 4. Bl. Com.  
 30. 80.  
 1. Hale, 131.  
 Cro. Car. 583.  
 Poph. 122.  
 2. Willf. 365.  
 Dougl. 510.  
 1. Hawk. P. C.  
 54.



(a) Talbot's  
Case,  
17. Rich. 2.  
(b) Earl of  
Essex's Case.

Foster, 213.

Adhering to  
the King's  
enemies.

council (a); a tumultuary combination to compel the King to put away his ministers (b); an armed force with a *general purpose* to destroy enclosures, to deliver prisons, or to demolish bawdy-houses, or to pull down meeting-houses of dissenters, in which cases the universality of the design is construed into rebellion; and lastly, insurrections to effect redress or innovation, in which the insurgents have no *special interest*, or forcibly to render ineffectual any act of parliament or law of the realm, are all severally adjudged to be a *levying of war* within the statute.

5. BY 25. *Edw.* 3. c. 2. " If a man be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and thereof be provably attainted of open deed by people of their condition, it ought to be adjudged treason."

Prin. P.L. 136.  
Moor, 620.  
Vent. 315.  
4. St. Tr. 347.  
3. Inst. 12.  
Salk. 634.  
1. Hale, 108.  
159.  
Folt. 197. 220.  
4. Bl. Com. 82.  
1. Hawk. P.C.  
55.

BY "*enemies*" are meant *all aliens in notorious hostility*. The solemnity of a previous denunciation of war is not always necessary; for, whether the persons adhered to were the King's enemies, is a matter of fact to be averred and evidenced by its public notoriety. Furnishing money, arms, ammunition and provisions, or sending intelligence to the King's enemies, are acts of adherence, even though they should be intercepted in their passage; for the treason, though ineffective, is complete on the part of the traitor. A subject of the enemy-country continuing under the protection of *England*, and practising while in *England* to the aid and assistance of that enemy-country, comes under the words of the statute; but mere residence in a hostile kingdom is not in itself an adherence, though a refusal to return to *the mother country* upon proclamation may be evidence thereof. Other acts of *adherence* are, actual war against the King's allies; the treacherous surrendering, in collusion with the enemy, of a place of defence; a voluntary oath of fealty to the enemy-king, or cruising

Under his commission, though without any absolute act of hostility.

6. In the four preceding treasons it is required by the statute, that the offenders be "thereof *provably*" "attainted of *open deed* by people of their "condition."

"THE adverb *provably*," says SIR EDWARD COKE, "hath great force, and signifies a direct and "plain *proof*." An *overt act* is that by which the traitorous design is demonstrated, and it must not only be shewn at the trial, but must be specifically and correctly charged in the indictment, in order that the person accused may be prepared to refute, explain, or defend it. Conspiring the King's death, providing weapons to effect it, sending letters to incite others to procure it, assembling people in order to take the King into their power, and all other such like notorious facts, done in pursuance of a traitorous purpose against the King, may be alledged as *overt acts*, to prove the compassing his death.

7. By 25. *Edw.* 3. c. 2. "If a man counterfeit the King's great or privy seal, it ought to be adjudged HIGH TREASON." These words extend to the aiders and consenters to such counterfeiting, as well as to the actors; but not to the taking wax bearing the impression of the GREAT SEAL off from one patent, and fixing it to another.

8. By 25. *Edw.* 3. c. 2. "If a man counterfeit the King's money, or bring false money into the realm, counterfeit to the money of *England*, knowing the money to be false, it is HIGH TREASON." Those who coin money without the King's authority are within this act, whether they utter it or not; or having authority, if they make it of baser alloy than they ought; but the resemblance of the counterfeit money must be such

- Co. Lit. 107. as to render it passable; and only the gold and  
See the case of silver coin are the King's money within this  
the King v. statute.  
Varley, C. in C. L. 75.  
2. Bl. Rep. 682.
- Slaying the 9. BY 25. *Edw.* 3. c. 2. " If a man slay the  
judges. " 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, it is HIGH TREASON." This  
1. Hawk. P. C. does not extend to an attempt to kill, nor to  
61. actual wounding, unless death ensue; nor to any  
1. Hale, 231. other officers but those expressly named; there-  
Sec 4. Bl. fore the barons of the exchequer are not within  
Com. 84. the protection of the act.
- Forging coin. 10. BY 1. *Mary*, c. 6. " To falsely forge and  
1. Hale, 197. " counterfeit any such kind of coin, of gold or  
Jones, 233. " silver, as is not the proper coin of this realm,  
1. Hawk. 62. " but shall be current by consent of the crown,  
" is HIGH TREASON."
- Importing 11. BY 1. & 2. *Phil. & Mary*, c. 11. " To bring  
counterfeit " into the realm money counterfeited according to  
coin. " the similitude of foreign coin current here, to  
" the intent to merchandize therewith, is HIGH  
" TREASON."
- Clipping coin. 12. BY 5. *Eliz.* c. 11. s. 2. " Clipping, washing,  
" rounding, or filing, for wicked lucre or gain-  
" sake, of any the proper monies of this realm,  
" or the dominions thereof, or of other monies  
" current by proclamation, is HIGH TREASON."
- Forging 13. BY 14. *Eliz.* c. 3. " To forge or counterfeit  
foreign coin. " any such kind of coin of gold or silver as is not  
" the proper coin of this realm, nor permitted to  
" be current, is MISPRISON OF TREASON."
- Diminishing 14. BY 18. *Eliz.* c. 1. " To impair, diminish,  
coin. " falsify, scale, or lighten the proper monies of  
" this

“ this realm, or of other realms current by proclamation, is HIGH TREASON.”

15. BY 8. & 9. *Will.* 3. c. 26. “ To make or mend, Making coining moulds.  
 “ or to begin or assist in making or mending,  
 “ other than by persons employed in the Mint,  
 “ any puncheon, counter-puncheon, matrix,  
 “ stamp, die, pattern, or mould, in or upon  
 “ which there shall be, or which will make the See Cases in Crown Law, 196.  
 “ figure, stamp, resemblance, or similitude, of  
 “ both or either sides of any gold or silver coin  
 “ current within the kingdom, is HIGH TREASON.”

EVERY thing necessary to shew that the defendant Addington, P. L. 149. Annally's Rep. 371.  
 had no authority, must be negatively set out in  
 an indictment on this statute. An instrument that  
 will make the figure of only one part of the side  
 of the coin, is not within the act. A mould is an  
 instrument on which is made and impressed the  
 stamp and similitude of the current coin.

16. BY 8. & 9. *Will.* 3. c. 26. “ To make or mend, Making coining tools.  
 “ &c. any edges or edging tool, instrument, or  
 “ engine, not of common use in any trade, but  
 “ contrived for making of money round the edges,  
 “ with letters, grainings, or other marks or  
 “ figures, resembling those on the edges of the  
 “ legal coin, is HIGH TREASON.”

17. BY 8. & 9. *Will.* 3. c. 26. “ To make or mend, Making coining presses.  
 “ &c. any press for coinage, or any cutting en-  
 “ gine for cutting round blanks by force of a  
 “ screw, out of flatted bars of gold, silver, or  
 “ other metal, is HIGH TREASON.”

18. BY 8. & 9. *Will.* 3. c. 26. “ To buy or sell, Having coining instruments in one's custody.  
 “ hide or conceal, &c. or to have in their houses,  
 “ custody, or possession, any such puncheon,  
 “ counter-puncheon, matrix, stamp, die, edges,  
 “ cutting instrument, or other tool or instrument  
 “ before mentioned, is HIGH TREASON.”

19. BY 8. & 9. *Will.* 3. c. 26. “ To convey, or Stealing tools from the Mint.  
 “ assist in conveying out of the Mint, any tool  
 “ or

“ or instrument used for or about the coining of  
 “ the monies there, or any useful part of such  
 “ tool or instrument, is HIGH TREASON.”

Edging coin. 20. BY 8. & 9. *Will.* 3. c. 26. “ To mark, other-  
 “ wise than by persons employed in the Mint, on the  
 “ edges of any the current or counterfeit coin of this  
 “ kingdom, with letters or grainings, or other  
 “ marks or figures, like unto those on the edge  
 “ of money coined at the Mint, is HIGH TREASON.”

Colouring and  
 gilding coin. 21. BY 8. & 9. *Will.* 3. c. 26. f. 4. “ To colour,  
 “ gild, or case over with any gold or silver, or  
 “ with any wash or materials producing the  
 “ colour of gold or silver, any coin resembling  
 “ the current coin; or any round blanks of base  
 “ metal, or of coarse gold, or coarse silver, of a  
 “ fit size and figure to be coined into counterfeit  
 “ milled money, resembling any the gold or  
 “ silver coin of this kingdom, is HIGH TREASON.”

Colouring  
 blanks. 22. BY 8. & 9. *Will.* 3. c. 26. f. 4. “ To gild  
 “ over any silver blanks, of a fit size and figure to  
 “ be coined into pieces resembling the current  
 “ gold of this kingdom, is HIGH TREASON.”

Washing silver  
 coin to re-  
 semble gold. 23. BY 15. *Geo.* 2. c. 28. “ To wash, gild, or  
 “ colour any shilling or sixpence, or to alter the  
 “ impression, or any part of the impression of  
 “ either side of any shilling or sixpence, with in-  
 “ tent to make such shilling or sixpence resemble,  
 “ or look like, or pass for a guinea, or a half-  
 “ guinea, respectively, is HIGH TREASON.”

Altering the  
 copper coin to  
 resemble the  
 silver coin. 24. “ BY 15. *Geo.* 2. c. 28. “ To file, or anywise  
 “ alter, wash or colour, any halfpenny or far-  
 “ thing, or to add to or alter the impression  
 “ thereof, with intent to make the same resemble,  
 “ look like, or pass for a lawful shilling or six-  
 “ pence, is HIGH TREASON.”

25. BY 5. *Eliz.* c. 1. "To extol, set forth, main-  
 "tain, or defend the jurisdiction of the POPE, or <sup>Defending the</sup>  
 "to attribute any authority to the see of Rome <sup>authority of</sup>  
 "within this kingdom, is for the first offence <sup>the Pope.</sup>  
 " *præmunire*, and for the second HIGH TREASON."

26. BY 13. *Eliz.* c. 2. "To put in use any bull <sup>Popish bulls;</sup>  
 "or instrument of absolution, &c. is HIGH TREA-  
 "SON."

27. BY 5. *Eliz.* c. 1. "To refuse to observe the  
 "rites of the church of *England*, after having  
 "been admonished by the ordinary, &c. ; or to  
 "say or hear private mass, &c. or to refuse a  
 "second tender of the oaths, is HIGH TREASON."

28. BY 27. *Eliz.* c. 2. "If any popish priest, born <sup>Popish priests-</sup>  
 "in the dominion of the crown of *England*, shall  
 "come over hither from beyond the seas, or shall  
 "tarry here three days without conforming to the  
 "church, it is HIGH TREASON."

29. BY 3. *Jac.* 1. c. 4. "If any person shall <sup>Converting a</sup>  
 "pretend to have power, or shall put in <sup>protestant into</sup>  
 "practice to withdraw any subject from his natural <sup>a papist.</sup>  
 "obedience to the King, or withdraw them for  
 "that intent to the Romish religion, &c. &c.  
 "it is HIGH TREASON."

30. BY 1. *Ann.* c. 17. "To endeavour maliciously, <sup>To hinder the</sup>  
 "advisedly, and directly, to hinder any persons <sup>legal succes-</sup>  
 "who shall be next in succession to the crown, <sup>sion to the</sup>  
 "according to 1. *Will. & Mary*, c. 2. and 12. *Will.*  
 "3. c. 2. IS HIGH TREASON."

31. BY 4. *Ann.* c. 8. "To declare, maintain, and <sup>To maintain</sup>  
 "affirm, maliciously, advisedly, and directly, <sup>that the Pre-</sup>  
 "by writing or printing, that the pretended <sup>tender is King</sup>  
 "Prince of *Wales*, or any other, hath any right <sup>of England.</sup>  
 "or title to the crown, otherwise than accord-  
 "ing to the 1. *Will. & Mary*, c. 2. and 11. & 12.  
 " *Will.* 3. c. 2. IS HIGH TREASON."

BY

To hold correspondence with an enemy.

32. BY 2. & 3. *Ann. c. 20.* " If any officer or soldier shall hold correspondence with any rebel or enemy, or give them, by any means; any advice or intelligence, it is HIGH TREASON."

The sons of the Pretender found in any of the British dominions.

33. BY 17. *Geo. 2. c. 39.* " If any of the sons of the Pretender shall land, or attempt to land in this kingdom, or be found in *Great Britain* or *Ireland*, or any of the dominions belonging to the same, or if any person shall correspond with them, or remit money to their use, it is HIGH TREASON."

#### IV. Felonies injurious to the King's Prerogative.

Pollards and crockards.

1. THE COIN. BY 27. *Edw. 1. c. 3.* none shall bring *pollards* and *crockards* (which were foreign coins of base metal) into the realm, on pain of forfeiture of life and goods.

Melting sterling money.

BY 9. *Edw. 3. c. 2.* no sterling money shall be melted down, on pain of forfeiture thereof.

Forging foreign coin.

BY 14. *Eliz. c. 3.* to forge foreign coin, though not current, is misprision of treason.

Melting the current silver coin.

BY 13. & 14. *Car. 2. c. 31.* to melt down any current silver money, shall be punished with forfeiture, double value, and disfranchisement, or six months imprisonment.

Buying clippings and filings.

BY 6. & 7. *Will. 3. c. 17.* to buy or sell, or knowingly have in custody, any clippings or filings of the coin, incurs a forfeiture of the same, and a penalty of *five hundred pounds*.

Blanching copper.

BY 8. & 9. *Will. 3. c. 26.* to blanch or whiten copper for sale, or to buy or sell, or offer for sale, any malleable composition, which shall be heavier

heavier than silver, and look, touch, and wear, like gold, but be beneath the standard, is FELONY.

By 8. & 9. *Will.* 3. c. 26. to receive, pay, or put off, any counterfeit or diminished money, not being cut in pieces, at a less rate than it shall import to be of is FELONY. Uttering bad money.

By 15. & 16. *Geo.* 2. c. 28. to tender in payment any counterfeit coin, knowing it to be so, is imprisonment six months for the first offence; two years for the second offence; and for the third offence, FELONY *without clergy*. Uttering counterfeit coin.

By 15. & 16. *Geo.* 2. c. 28. to tender in payment any counterfeit money, *knowingly*, and to have at the same time more in custody, or within ten days after to tender other false money, is imprisonment for a year for the first offence, and for the second FELONY *without clergy*. Tendering bad money in payment.

By 15. *Geo.* 2. c. 28. f. 4. to make, coin, or counterfeit any brass or copper money called a halfpenny or a farthing, is punishable with two years imprisonment, &c. Counterfeiting copper coin.

By 11. *Geo.* 3. c. 40. to make, coin, or counterfeit the copper monies of the realm called a halfpenny or a farthing, is FELONY. Second offence felony.

By 11. *Geo.* 3. c. 40. to buy, sell, take, receive, pay, or put off, any copper money not melted down or cut in pieces, at or for a lower rate than the same by its denomination doth import, or was counterfeited for, is felony. Selling counterfeit copper monies.

2. FELONIES AGAINST THE KING'S COUNCIL. To kill an officer of state is felony.  
By 3. *Hen.* 7. c. 14. if any sworn servant of the King's household conspire to kill any lord or privy counsellor, it is FELONY.

By 9. *Ann.* c. 16. to assault, strike, wound, or attempt to kill, any privy counsellor in the execution of his office, is FELONY *without clergy*. Assaulting a privy counsellor.

By



Serving a foreign prince.

3. SERVING FOREIGN STATES. By 3. *Jac.* 1. c. 4. to go out of the realm into the service of a foreign prince, without taking the oaths of allegiance, &c. &c. is FELONY.

Seducing a Briton from his allegiance.

By 9, *Geo.* 2. c. 30. and 29. *Geo.* 2. c. 17. to enlist, or to procure any subject to be enlisted, in any foreign service, is FELONY *without clergy*.

By 29. *Geo.* 2. c. 17. if any subject of *England* enter into the military service of the *French King*, without licence under the sign manual, it is FELONY *without clergy*.

Embezzling Stores.  
Ld. Ray. 1104.

4. EMBEZZLING STORES. By 31. *Eliz.* c. 4. to embezzle the King's stores to the value of twenty shillings, is FELONY; and by 22. *Car.* 2. c. 5. FELONY *without clergy*.

Burning ships.

5. BURNING SHIPS. By 12. *Geo.* 3. to set on fire and burn, or otherwise to destroy, any of his Majesty's ships or vessels of war, whether on float, or building in any dock-yard or private yard, is FELONY *without clergy*.

1. Hawk. P.C. 75.

6. BURNING DOCK-YARDS. By 12. *Geo.* 3. c. 24. to set on fire and burn, or otherwise destroy, any of his Majesty's arsenals, magazines, dock-yards, rope-yards, victualling-offices, or any of the buildings erected therein, or belonging thereto, or any timber or materials there placed for building, repairing, or fitting-out, ships or vessels, is FELONY *without clergy*.

7. BURNING STORES. By 12. *Geo.* 3. c. 24. to set on fire and burn any of his Majesty's military, naval, or victualling stores, or other ammunition of war, or any place where the same shall be kept or deposited, is FELONY *without clergy*.

4. Bl. Com. 101.  
2. Inst. 86.  
6. Co. 27.

8. DESERTION. By 18. *Hen.* 6. c. 19. if any soldier or sailor, in time of war, depart from his  
Co. Lit. 71. Cro. Car. 71.

captain

captain or commander, it is, exclusive of the punishment by the Mutiny Act, FELONY.

BY 2. *Edw.* 6. c. 2. if any soldier serving the King in his wars depart without licence from his commanding officer, with booty or otherwise, it is FELONY without clergy.

1. Hawk. P. C.  
185.  
3. Inst. 86.  
6. Co. 67.

#### V. *Præmunire*.

PRÆMUNIRE was an offence whereby the papal authority was encouraged and promoted in diminution of the authority of the crown, and derives its name from the word "*forewarn*" in the writ by which the punishment was inflicted, *viz.* to be put out of the King's protection, their lands and goods forfeited to the King's use, and their bodies attached to answer the King and his council. The principal statutes of *præmunire* are the 27. *Edw.* 3. c. 1. 38. *Edw.* 3. c. 3. 16. *Rich.* 2. c. 5. 24. *Hen.* 8. c. 12. 25. *Hen.* 8. c. 19. 26. *Hen.* 8. c. 14. 5. *Eliz.* c. 1. 13. *Eliz.* c. 2. 27. *Eliz.* c. 2. and 3. *Jac.* 1. c. 5.; but these being pains of no inconsiderable consequence they have been extended, by subsequent statutes, to offences that have very little relation to that from whence the name is derived (a).

1. Hawk. P. C.  
76.  
4. Bl. Com.  
ch. 8.

c. 8. 13. *Eliz.* c. 8. 21. *Jac.* 1. c. 3. 1. *Jac.* 2. c. 8. 12. *Car.* 2. c. 24. 13. *Car.* 2. c. 1. 31. *Car.* 2. c. 2. 1. *Will. & Mar.* c. 8. 7. & 8. *Will. & Mar.* c. 24. 6. *Ann.* c. 17. 6. *Ann.* c. 23. 6. *Geo.* 1. c. 18. 12. *Geo.* 3. c. 11.

(a) 1. & 2.  
*Phil & Mar.*

#### VI. *Misprision*.

MISPRISION, from *mespris*, neglect or contempt, are generally understood to be all such high offences as are under the degree of capital treason, but nearly bordering thereon. A misprision is contained in every treason and felony; and the King may proceed against the offender for the misprision only. Misprisions may be either by *omission* or *commission*. By omission, where a person knows that another hath committed treason or felony of any kind, and does not reveal it: by commission, as in contempts and high misdemeanors; as by the mal-administration of

4. Bl. Com.  
127.  
Wood, 40.  
3. Inst. 36.  
Dalt. c. 141.  
2. Burn's Jus.  
172.  
Kelynge, 22.  
2. Hawk. P. C.  
121.  
1. Hawk. P. C.  
87. to 99.

of such officers as are in public trust and employment; neglecting to join the *posse comitatús* when required by the sheriff or justices, according to the 2. *Hen.* 5. c. 8. ; speaking or writing against the King or his government; denying, by heedless discourse, his right to the crown; striking in the King's palaces, or courts of justice; rescuing a prisoner from any court; dissuading a witness from giving his evidence; and the like.

33. *Hen.* 8.  
2-12.

### VII. Offences against Public Justice.

1. *Hawk. P.C.* 1. EMBEZZLING RECORDS. By 8. *Hen.* 6.  
277- c. 12. to take away, withdraw, or avoid any  
2. *Hale*, 646. record or proceeding in the courts of *Westminster-*  
*Co. P. C.* 71. *Hall*, by reason whereof the judgment shall be  
reversed, or not effected, is FELONY.

2. *Jones* 64. BY 21. *Jac.* 1. c. 26. to acknowledge any fine,  
1. *Hale*, 696. recovery, deed enrolled, statute, recognizance,  
7. *Hawk. P.C.* bail, or judgment, in the name of another, is  
178. FELONY *without clergy*.

4. *Bl. Com.* By 4. *Will. & Mary*, c. 4. to personate any  
28 other person as bail, before a commissioner  
1. *Hale*, 96. appointed to take bail in the country, is FELONY.  
7. *Vent.* 301.  
1. *H. W. P.C.*

1. 9. 2. DURESS OF IMPRISONMENT. By 14. *Edw.*  
1. *Hawk. P.C.* 3. c. 10. if any gaoler, by too great duress of  
194 imprisonment, makes any prisoner that he hath in  
7. *Hale*, 640. ward become an approver or appeller, it is  
FELONY.

4. *Bl. Com.* 3. OBSTRUCTING PROCESS. To obstruct an  
130- arrest upon criminal process makes the offender a  
*particeps criminis*; and by 8. & 9. *Will.* 3. c. 27.  
9. *Geo.* 1. c. 28. and 11. *Geo.* 1. c. 22. to oppose the  
execution of any process, in any pretended pri-  
vileged place within the bills of mortality, is  
FELONY.

4. ESCAPE.

4. ESCAPE. Officers who, after arrest, *negligently* <sup>2. Hawk. P. C.</sup> permit a felon to escape, are punishable by fine; <sup>1. Hale, 600.</sup> but if an officer *voluntarily* suffer a felon to escape, he becomes guilty of the same crime for which the felon was in custody.

5. BREAKING PRISON. To break prison when <sup>2. Hawk. P. C.</sup> lawfully committed for any treason or felony, is <sup>4. Bl. Cont.</sup> FELONY; and when confined on any inferior charge, is a misdemeanor.

6. RESCUE. To rescue a person apprehended <sup>2. Hawk. P. C.</sup> for felony, is FELONY; for treason, TREASON; and for a misdemeanor, a MISDEMEANOR. By 16. *Geo. 2. c. 31.* to assist a prisoner in custody for treason or felony, with any arms, instruments of escape, or disguise, is FELONY, *transportable for seven years.*

By 25. *Geo. 2. c. 37.* to rescue, or attempt to <sup>2. Hawk. 659.</sup> rescue, any person committed for murder, or for any of the offences enumerated in the 27. *Geo. 2. c. 15.* or 9. *Geo. 1. c. 22.* is FELONY *without CLERGY.*

7. RETURNING FROM TRANSPORTATION. By <sup>1. Hawk. P. C.</sup> 4. *Geo. 1. c. 11.* 16. *Geo. 2. c. 15.* 8. *Geo. 3. c. 15.* <sup>244.</sup> if any offender ordered to be transported to *America*, or by 19. *Geo. 3.* to any parts beyond the seas, shall return into any part of *Great Britain* or *Ireland*, by 6. *Geo. 1. c. 23.* without some lawful cause, before the end of the term for which he was transported, it is FELONY *without clergy.*

THE daily book of the prison, in which the commitments and discharges are entered, is evidence to prove the time at which the prisoner was transported. <sup>Affle's Case; Old Bailey, September Session 1785.</sup>

NECESSITY, sickness, having performed the <sup>1. Hawk. P. C.</sup> conditions precedent to the king's pardon, may, <sup>247. in notis.</sup> under certain circumstances, become lawful cause,

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for

for being at large, and in such case the prisoner shall be remitted to his former sentence.

4. Bl. Com.

153.

1 Hawk. P. C.

252.

1. Hale, 619.

8. THEFTBOTE, which is where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute, and is punishable by the Common Law with fine and imprisonment.

BY 25. *Geo.* 2. c. 36. to advertise a reward for the return of things stolen, with no questions asked, subjects the advertiser and printer to a forfeiture of fifty pounds each.

BY 4. *Geo.* 1. c. 11. to take a reward, under pretence of helping any one to stolen goods, makes the offender guilty of the same crime as the felon who stole them, unless he cause such principal felon to be apprehended and brought to trial, and shall also give evidence against him.

Jonathan  
Wild's Case,  
Old Bailey,  
May Session  
1725.

A PERSON may be indicted and convicted upon this statute, although he was liable as a principal felon, under 10. & 11. *Will.* 3. c. 23. by aiding and assisting in the commission of the felony by which the goods, for the restoration of which he had taken a reward, were stolen.

Drinkwater's  
Case, Old  
Bailey, Octob.  
Session 1740.

Cases in  
Crown Law,  
18.

BUT an offender under this act cannot be indicted, until the principal felon be convicted; for, as he is made guilty of the *same offence*, it cannot till conviction be known, whether he has been guilty of petty larceny, grand larceny, or a capital offence.

1. Hawk. P. C.  
231.

9. RECEIVING STOLEN GOODS. This offence is only a misdemeanor at Common Law. But by 3. & 4. *Will. & Mary*, c. 9. and 5. *Ann.* c. 31. to buy or receive any goods or chattels that shall be feloniously taken or stolen, knowing the same to have been stolen, makes the offender an accessory after the fact to the felony committed, for which,  
by

by 4. *Geo. 1. c. 11.* he shall be TRANSPORTED for fourteen years.

By 1. *Ann. c. 9.* and 5. *Ann. c. 31.* receivers may be prosecuted for *the misdemeanor*, although the principal felon be not taken.

By 29. *Geo. 2. c. 30.* whoever shall buy or receive any stolen lead, iron, copper, brass, bell metal, or folder, may be indicted for this offence, although the principal felon has not been convicted.

By 2. *Geo. 3. c. 28.* if any person buy or receive any part of the cargo of any ship or vessel in the river Thames, knowing the same to be stolen, he may be tried before the principal.

By 10. *Geo. 3. c. 48.* whoever shall knowingly buy or receive any jewels, plate, or watches, the stealing of which was accompanied with a burglary or robbery on the highway, is triable before the principal, whether such principal be in or out of custody.

By 21. *Geo. 3. c. 69.* buyers or receivers of any pewter pot, or other vessel, or any pewter in any shape, may be tried before the principal is convicted, and TRANSPORTED for seven years, or kept TO HARD LABOUR for three years; and

By 22. *Geo. 3. c. 58.* in all cases whatsoever, where any goods and chattels (except lead, iron, copper, brass, bell metal, and folder) are stolen, the receiver may be punished for *the misdemeanor*, whether the principal be amenable to justice or not, except the principal has been convicted of grand larceny, or some greater offence, in stealing the same.—In an indictment on this act, the principal felons may give evidence against the receiver. Cases in Crown Law, p. 353.

20. BARRATRY is the offence of frequently exciting and stirring up suits and quarrels between

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his  
1. Hawk. 524.  
Dalt. p. 38.  
Co. Lit. 368.  
8. Co. 36.  
Cro. Jac. 527.

his Majesty's subjects, either at law or otherwise; the punishment of which is by fine, imprisonment, and surety for future good behaviour; but if the offender be indicted at the sessions, the imprisonment is restrained, by 8. *Eliz.* c. 2. to six months, and treble damages to the party injured.

1. Hawk. P.C.  
536.  
Co. Lit. 368.  
2. Inst. 202.

11. MAINTENANCE, *manutentio*, from *manu tenere*, a taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right. Maintenance is, FIRST, *ruralis*, or in the country; as where one assists another in his pretensions to certain lands, by taking or holding the possession of them from him by force or subtlety; or where one stirs up quarrels and suits in the country, in relation to matters wherein he is no way concerned; and this kind of maintenance is punishable by fine and imprisonment. SECONDLY, *curialis*, or in a court 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; and this is also punishable by the Common Law by fine and imprisonment, to which the statute 32. *Hen.* 8. c. 9. has added a forfeiture of ten pounds.

4. Bl. Com.  
135.  
1. Hawk. P.C.  
545.

12. CHAMPERTY is a species of maintenance, and punished in the same manner, being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expence.

2. Hawk. P.C.  
397.  
4. Bl. Com.  
335.

13. COMPOUNDING INFORMATIONS. By 18. *Eliz.* c. 5. if any person, informing under pretence of any penal law, makes any composition without leave of the Court, or take any money or promise from the defendant to excuse him, he shall forfeit ten pounds, stand two hours in the pillory, and be  
for

for ever disabled to sue on any popular or penal statute.

14. CONSPIRACY, strictly taken, is an agreement betwixt two or more to appeal or indict an innocent man of felony, falsely and maliciously, without any probable cause, who is accordingly appealed or indicted, and afterwards lawfully acquitted. The party grieved may in this case punish the offenders, for there must be two at least to form a conspiracy, either by writ of conspiracy, or by indictment.

Wood's Inst.  
414. 559.  
1. Hawk. P.C.  
346.  
1. Burn's Just.  
389.

15. PERJURY is defined to be a crime committed by wilful false swearing in any judicial proceeding, in a matter material to the issue or point in question, on a lawful oath administered by some person of competent authority. SUBORNATION OF PERJURY is the offence of procuring another to take such false oath as constitutes perjury in the principal. The punishment for these offences is fine and imprisonment, and never more to be capable of bearing testimony. By 5. *Eliz.* c. 9. whoever shall procure another to commit wilful and corrupt perjury shall forfeit forty pounds, or suffer one year's imprisonment, and stand on the pillory, and never from thenceforth be received as a witness in any court of record. And by 2. *Geo.* 2. c. 25. besides the punishment already to be inflicted for so great crimes, the offender may be sent to some house of correction, or transported for seven years. To constitute perjury, the falsehood of the oath must be wilful, from a perverse mind and deliberate intention, and not happening through unavoidable haste, inadvertency, or weakness. The import of the oath may be true, and yet the swearing may be false; for if a person swears to a truth, yet if he could not possibly know the fact, he is as much perjured as if it had been false. The oath must be administered by some person having competent authority for that purpose; for all extra-judicial oaths are illegal; and although a

1. Hawk. P.C.  
318.  
4. Bl. Com.  
136.  
Co. P. C. 164.  
3. Burn's  
Justice, 284.



person may be *forsworn*, he cannot be *perjured*; and therefore it must also be in some judicial proceeding. It need not, however, be absolute; for a man may be perjured in swearing that he *thinks* or *believes* a fact to be true which he must know to be false; but the fact must be in some degree *material*, or no injury is done; and if it be material, it is of no consequence whether it be believed or not.

4. Bl. Com. 139.  
1. Hawk. P.C. 311.  
16. BRIBERY is where a Judge or other person concerned in the administration of justice takes any undue reward to influence his behaviour in his office.

By 7. & 8. Will. 3. c. 7. all contracts and securities given to procure the return of a member of parliament are void, and the maker or giver of the same is liable to a penalty of three hundred pounds.

1. Bl. Rep. 524.  
3. Burr. 1335.  
By 2. Geo. 2. c. 24. if any voter shall ask, receive, or take any money, or other reward, by way of gift, loan, or other device, or agree or contract for the same to give his vote, or to refuse or forbear to give his vote at the election of any member of parliament, he shall forfeit five hundred pounds, and be afterwards disabled to vote, or to hold any corporate office.

1. Hawk. P.C. 548.  
17. EMBRACERY is an attempt to influence a jury corruptly to one side, by promises, persuasions, entreaties, money, entertainment, or the like; for which both parties may be fined and imprisoned.

7. Hawk. P.C. 316.  
Co. Lit. 368.  
10. Co. 102.  
3. Inst. 149.  
Cro. Car. 438.  
4. Mod. 80.  
137.  
Salk. 382.  
18. EXTORTION, in a large sense, signifies any oppression under colour of right; but in a strict sense, it is the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due. It is punishable by fine and imprisonment.

VIII. *Offences against the Public Peace.*

1. RIOTS, ROUTS, and UNLAWFUL ASSEMBLIES.—A RIOT is a tumultuous disturbance of the peace, by three persons or more assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprize of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful.—A ROUT is a disturbance of the peace, by persons assembling together with an intention to do a thing, which if it be executed will make them rioters, and actually making a motion towards the execution thereof.—AN UNLAWFUL ASSEMBLY is a disturbance of the peace, by persons barely assembling together with an intention to do a thing, which if it were executed would make them rioters, but neither actually executing it, nor making a motion towards the execution of it; and indeed any meeting whatsoever, of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the king's subjects, seems to be an unlawful assembly. These offences are in general punished as trespasses by fine and imprisonment, and sometimes by pillory.

1. Hawk. P. C. 293.  
2. Mod. 51c.  
Pulton, 25.  
Ld. Ray. 484.

1. Hawk. P. C. 297.  
Pulton, 25.  
Cromp. 61,  
Dalton, 85.

1. Hawk. P. C. 298.  
2. Roll. Abr. 208.

BY 1. Geo. 1. c. 5. if any twelve persons are unlawfully assembled, to the disturbance of the public peace, and any one justice of the peace, sheriff, under sheriff, or mayor of a town, shall think proper to command them by proclamation to disperse, and they contemn his orders, and continue together for one hour afterwards, such contempt is FELONY *without clergy*.

BY 1. Geo. 1. c. 5. s. 2. and if the reading of the proclamation be by force opposed, or the reader

be in any manner wilfully hindered from the reading it, such opposers and hinderers are **FELONS without clergy**.

1. *Will. & Mary, c. 18.*

By 1. *Geo. 1. c. 5.* if any persons, unlawfully, notoriously, and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully, and with force, demolish or pull down, or begin to demolish or pull down, any church, chapel, or building for religious worship, certified and registered pursuant to the Toleration Act, or any dwelling house, barn, stable, or other out-house, they shall be adjudged **FELONS without clergy**.

By 9. *Geo. 3. c. 29.* the above statute of 1. *Geo. 1. c. 5.* is extended to "any wind saw-mill, or other windmill, or any water-mill or other mill, and the works thereto respectively belonging.

By 13. *Car. 2. c. 5.* not more than twenty names shall be signed to any petition to the King, or either House of Parliament, for any alteration in Church or State, unless signed by three justices, or the majority of the grand jury, or, in *London*, by the lord mayor, aldermen, and common council.

1. *Hawk. P. C. 225.*  
 Crown Circuit Companion, 153.  
 1. *Burn's Justice, 293.*  
 4. *Hale, 567.*

2. **THREATENING LETTERS.** By 9. *Geo. 1. c. 22.* commonly called **THE BLACK ACT**, if any person shall knowingly *send* any letter without any name subscribed thereto, or signed with a fictitious name, demanding money, venison, or other valuable thing, he shall be guilty of **FELONY without clergy**.

By 27. *Geo. 2. c. 15.* to *send* any such letters threatening to kill or murder any of his Majesty's subjects, or to burn their houses, out-houses, barns, stacks of corn or grain, hay or straw, though no money or venison, or other valuable thing, shall be demanded, is **FELONY without clergy**.

By

By 30. *Geo.* 2. c. 24. whoever shall *send* or *deliver* Comp. 24. Cases in Crown Law, 143. 385. any letter or writing, with or without a name, threatening to accuse any person of any crime punishable by death, transportation, or pillory, with a view or intent to extort or gain money, goods, wares, or merchandise, from the person so threatened to be accused, shall be punished by pillory, or public whipping, or fine and imprisonment, or transportation not exceeding seven years.

3. UNLAWFUL HUNTING. By 9. *Geo.* 1. c. 22. 1. Hawk. P.C. 186. to appear armed in any open place, by day or night, with faces blacked or otherways disguised, or, being so disguised, to hunt, wound, kill, or steal, any deer, or to rob a warren, or steal fish, is FELONY *without clergy*.

4. AFFRAYS, from *affraier* to terrify, are the fighting of two or more persons, in some public place, to the terror of his majesty's subjects; for if 1. Hawk. P.C. 265. 4. Bl. Com. 145. the fighting be in private, it is no affray but an assault. Affrays may be suppressed by any private person present; but the constable, who is bound to keep the peace, may break open doors to suppress an affray, or apprehend the affrayers. The punishment for common affrays is by fine and imprisonment.

By 9. *Ann.* c. 14. s. 8. to challenge or provoke any person to fight, on account of money won at play, incurs a forfeiture of goods and chattels, and two years imprisonment.

By the 1. *Mary*, c. 3. to disturb any lawful priest during divine worship, incurs an imprisonment for three months.

By 1. *Will. & Mary*, c. 18. to disturb any congregation permitted by the Toleration Act, incurs a penalty of fifty pounds, &c,

By

4. Bl. Com.  
245.

By 5. & 6. *Edw.* 6. c. 4. if any person shall by words only quarrel, chide, or brawl in a church or church-yard, the ordinary shall suspend him if a layman *ab ingressu ecclesie*; and if a clerk in orders from the ministration of his office during pleasure: and if any person, in such church or church-yard, proceed to smite or lay violent hands upon another, he shall be excommunicated *ipso facto*; or, if he strike him with a weapon, with intent to strike, he shall besides excommunication, on being convicted by a jury, have one of his ears cut off; or, having no ears, be branded in his cheek.

1. Hawk. P. C.  
274.  
Lamb. 135.  
Dalt. 76.  
Crompt. 70.  
Co. Lit. 134.

5. FORCIBLE ENTRY OF DETAINER. At Common Law, a man disseised of lands or tenements might lawfully regain possession by force, unless his right of entry was gone by neglecting to enter in proper time; but this being found by experience to be very prejudicial to the public peace, it was thought necessary to restrain all persons from the use of such violent methods of doing themselves justice, so that the only entry now allowed by law is a peaceable one. By 5. *Rich.* 2. c. 8. all forcible entries are punished with imprisonment and ransom. And by 8. *Hen.* 6. c. 9. 31. *Eliz.* c. 11. and 21. *Jac.* 1. c. 15. upon any forcible entry, or forcible detainer after peaceable entry, a justice of the peace may record the force on his own view and commit the offender, or may summon a jury to try the fact, and restore the possession.

1. Hawk. P. C.  
266.  
4. Bl. Com.  
149.  
Potter's Anti-  
quities, bk. 1.  
ch. 26.

6. RIDING ARMED. By 2. *Edw.* 3. c. 3. no man, great or small, shall go or ride armed, by night or by day, with dangerous or unusual weapons, terrifying the good people of the land.

2. Inst. 226.  
Co. P. C. 198.  
4. Bl. Com.  
149.  
1. Hawk. P. C.  
92.  
Cro. Jac. 38.

7. SPREADING FALSE NEWS, to make discord between the King and nobility, or concerning any great man in the realm, is punishable by fine and imprisonment.

8. FALSE

8. FALSE PROPHECIES. The 5. *Eliz.* c. 15. ordains, that if any person do advisedly and directly advance, publish, and set forth, by writing or open speech or deed, any *fond, fantastical, or false prophecy*, upon or by occasion of any cognizances or signets, or upon or by any time, year, day, name, bloodshed, or war, to the intent to make rebellion or disturbance in the realm, he shall pay a fine of 100*l.* and suffer a year's imprisonment, for the first offence ; and forfeit, for the second, all his goods and chattels, and suffer imprisonment for life.

9. A CHALLENGE TO FIGHT, although not an actual breach of the peace, yet, as it tends to provoke and excite others to break it, is an indictable offence, and punishable by fine and imprisonment.

10. LIBELS also tend to a breach of the peace by stirring up the objects of them to revenge, and perhaps to bloodshed, and are therefore indictable. A libel, in its strict sense, is taken for a malicious defamation, expressed either in printing or in writing, or by signs or pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. The communication of a libel to any one person is a publication in the eye of the law ; and upon an *information* or *indictment*, it is immaterial whether the matter of it be true or false ; but in a *civil action* the defendant may plead the truth by way of justification. This offence may be punished by fine, imprisonment, and pillory.

4. Bl. Com.  
150.  
1. Hawk. P. C.  
352.  
5. Co. 125.  
Salk. 418.  
Ld. Ray. 416.  
2. Willf. 403.  
2. Burr. 980.

### IX. Offences against Public Trade.

1. OWLING, so called from the offence being carried on in the night, is the offence of transporting wool or sheep out of the kingdom, to the detriment

4. Bl. Com.  
154.

detriment of its staple manufacture. By 28. *Geo.* 3. c. 38. all the statutes relating to the exportation or carrying coastwise of sheep, wool, woolfells, &c. are repealed, except so much of 9. & 10. *Will.* 3. c. 40. as relates to wool shorn, laid up within ten miles of the sea, in the counties of *Kent* and *Suffex*; and the exportation of sheep and wool restrained under a great variety of circumstances and pretences.

1. *Hawk. P.C.* 227.  
4. *Bac. Abr.* 523.  
2. SMUGGLING. By 19. *Geo.* 2. c. 34. " All forcible acts of smuggling, carried on in defiance of the laws, or even in disguise to evade them, is FELONY *without clergy.*"

3. *Inst.* 151.  
2. *Stra.* 816.  
1243.  
*Wood's Inst.* 425.  
4. *Bl. Com.* 156.  
3. USURY, *usus æris*, is the gain of any thing by contract, above the principal or thing lent, exacted only in consideration of the loan of it, or for the forbearance of the demand of it; but according to the modern acceptation, it is " an unlawful contract upon the loan of money, to receive the same again, with exorbitant increase."

By 12. *Ann.* c. 16. " No person shall upon any contract take, directly or indirectly, for the loan of any money, wares, or merchandize, or other commodity, above the value of *five pounds* for the forbearance of *one hundred pounds* for a year, and so after that rate for a greater or a lesser term; or for a longer or a shorter time; and all bonds, contracts, or assurances whatsoever, for payment of any principal or money lent or covenanted to be performed upon, or for any money whereby or whereupon there shall be reserved or taken above the rate of five pounds in the hundred, as aforesaid, shall be utterly void."

By 12. *Ann.* c. 16. s. 2. " Every person who shall upon any contract take, accept, and receive, by way or means of any corrupt bargain, loan, exchange, chevifance, shift, or interest, of any wares, merchandize, or other things;

“ things ; or by any deceitful ways or means, or  
 “ by any covin, engine, or deceitful convey-  
 “ ance, for the forbearing or giving day of pay-  
 “ ment for one whole year, of and for their  
 “ money, or other thing, above the sum of five  
 “ pounds for the forbearance of one hundred  
 “ pounds for a year, and so after that rate for a  
 “ greater or lesser sum, or for a longer or  
 “ shorter time, shall forfeit and lose for every  
 “ such offence the treble value of the money,  
 “ ware, merchandize, or other thing so lent,  
 “ bargained, exchanged, or thifted.”

ALSO, “ If any scrivener or broker take more  
 “ than five shillings *per cent.* procuration money,  
 “ or more than twelve pence for making a bond,  
 “ he shall forfeit twenty pounds, with costs, and  
 “ shall suffer imprisonment for half-a-year.

4. CHEATING, as it was understood at Common  
 Law, may in general be described to be deceitful  
 practices, in defrauding another of his known right,  
 by means of some artful contrivance, of a nature to  
 affect the public interest, and so subtle and con-  
 cealed, that the common prudence and caution of  
 mankind is not sufficient to elude the effect of it.  
 But there being many species of fraud which could  
 not, in strictness of law, be comprehended with-  
 in this definition, the 33. *Hen.* 8. c. 1. enacts,  
 “ that if any person shall falsely and deceitfully  
 “ obtain any money or goods, by colour and means  
 “ of any *false privy token*, or counterfeit letter  
 “ made in another man’s name to a special friend  
 “ or acquaintance, for the obtaining of money or  
 “ goods from such person, he shall suffer any  
 “ corporal pains short of death that the Court in  
 “ its discretion shall think proper.” But this  
 statute not affecting those frauds against  
 which the common prudence of mankind was  
 thought sufficient to guard, the 30. *Geo.* 1. c. 24.  
 introduces a *new offence*, and enacts, “ that all  
 “ persons who knowingly and designedly, by *false*  
 “ pretences, shall obtain from any person money,  
 “ goods,

1. Hawk. 344.  
 Black. Rep.  
 273.  
 Burr. Rep.  
 1125.  
 3. Term Rep.  
 104, 105.

1. Hale, 506.  
 2. Sess. Car. 27.  
 Stra. 866.  
 Salk. 379.  
 6. Mod. 105.

O. B. 1785.  
 No. 989.  
 Addington’s  
 Penal Statutes,  
 p. 272.  
 Cowper, 24.  
 3. Term Rep.  
 204.



“ goods, wares, or merchandizes, with intent to  
 “ cheat and defraud any person of the same, shall  
 “ be put in the pillory, or publicly whipped, or  
 “ fined and imprisoned, or transported, not ex-  
 “ ceeding seven years, as the Court in its discre-  
 “ tion shall think fit.”

2. Eq. Caf. Ab. 184.  
 1. Sid. 344.  
 1. Lev. 244.  
 1. d. Ray. 69.  
 4. Com. Dig. 70.

By 16. *Car.* 2. c. 7. “ If any person shall by any fraud, unlawful device, or other ill practice in playing at cards, dice, or other pastimes or games, win any sum or other valuable thing, he shall forfeit treble the value.”

Strange, 1048.  
 1. Hawk. 345.  
 Burn's Justice, p.

By 9. *Ann.* c. 14. “ If any person shall by any shift, cozenage, circumvention, deceit, or unlawful device, or ill practice whatsoever in playing at cards, dice, tennis, bowls, or any the games aforesaid, or bearing a share in the stakes, or betting on the sides of such as do play, win any sum of money or other valuable thing, he shall forfeit five times the value, be deemed infamous, and suffer corporal punishment as in cases of perjury.”

Wood's Inst. 374.  
 1. Hawk. P.C. 202.  
 3. Burr. 1419.  
 Cooke's Ban. Laws, 104.106.

5. FRAUDULENT BANKRUPTCY. By 5. *Geo.* 2. c. 30. “ If any bankrupt shall not surrender himself, or shall embezzle any part of his estate or effects to the value of twenty pounds, or any books of account, papers, or writings relating thereto, with intent to defraud his creditors, he shall suffer as a FELON *without clergy*.”

1. Hawk. P.C. 20.

6. FRAUDULENT INSOLVENCY. By 32. *Geo.* 2. c. 28. “ If a prisoner charged in execution for any debt under 100l. neglects or refuses on demand to discover and deliver up his effects for the benefit of his creditors, it is FELONY, punishable with *transportation for seven years*.”

1. Hawk. P.C. 470.  
 3. Inst. 181.  
 Noy, 182.  
 4. Bl. Com. 159.  
 Skin. 269.

7. MONOPOLIZING. A monopoly is an allowance by the King to any person of the sole buying, selling, making, working, or using of any thing,

thing, and only differs from *INGROSSING*, the statutes relative to which are repealed by 12. *Geo.* 3. c. 71. in this, that the one is by patent from the King, and the other is the act of the subject. By 21. *Jac.* 1. c. 3. all monopolies are declared contrary to law, and void, except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions.

By 8. *Ann.* c. 19. authors and their assigns shall have the sole right of printing their books for the term of fourteen years; and, if assigned, the right, after the expiration of the fourteen years, shall return to the authors thereof for another fourteen years. And by 8. *Geo.* 2. c. 13. the same right is given to the inventors of engravings.

1. Hawk. 477.  
Cowp. 623.  
Brownl. Rep. 83.  
Loft. 775.  
5. Com. Dig. 570.  
4. Burr. 2303.

8. *APPRENTICESHIPS.* By 5. *Eliz.* c. 4. to exercise a *trade* in any town without having previously served as an apprentice for seven years, incurs a penalty of forty shillings by the month.

4. Bl. Com. 160.

9. *SEDUCING ARTIFICERS.* By 5. *Geo.* 1. c. 27. to seduce or entice any artificers in wool, iron, steel, brass, or any other metal, clock or watch-maker, or any other artificers, to go out of *Great Britain* into any foreign country, incurs a penalty of 100l. and three months imprisonment for the first offence; and for the second, fine at discretion, and twelve months imprisonment.

By 23. *Geo.* 2. c. 13. to entice any artificer in wool, mohair, cotton, or silk, incurs a forfeiture of five hundred pounds, &c. for the first offence, and one thousand pounds for the second.

4. Burr. 2026.

By 22. *Geo.* 3. c. 60. to entice or seduce any artificer in callico-printing, incurs the like penalties.

1. Hawk. P.C. 560.

By

1. Hawk. P. C. 560. BY 25. Geo. 3. c. 67. to entice or seduce any artificers in the iron or steel manufactories, also incurs the like penalties.

X. *Offences against the Public Health, and Public Police, or Economy.*

1. Hawk. P. C. 241. I. QUARANTINE. By 1. Jac. 1. c. 31. if any person infected with the plague, or dwelling in any infected house, be commanded by the mayor or constables to keep his house, and disobey such command, he shall be punished as a vagabond if he go abroad and has no plague-fore upon him, and if he has he shall be guilty of FELONY. By 26. Geo. 2. c. 6. and 29. Geo. 2. c. 8. captains of ships arriving from infected places, and not performing *quarantine* in the manner described by these acts, or escaping from the *lazarets*, are guilty of FELONY *without clergy*.

1. Hawk. 173.  
4. Bl. Com. 167.  
Salk. 121. 2. CLANDESTINE MARRIAGE. By 26. Geo. 2. c. 33. to solemnize marriage in any other place besides a church, or public chapel wherein banns have been usually published, except by license from the archbishop—and to solemnize marriage in such church or chapel without due publication of banns, or license obtained from proper authority, do both of them not only render the marriage void, but subject the persons solemnizing it to FELONY, punished by *transportation for fourteen years*.

Dougl. 659.  
1. Hawk. 173.  
Burr. 2230.  
Salk. 18. 29. BY 26. Geo. 2. c. 33. s. 16. to insert in any parish register any false entry of any matter of thing relating to any marriage, or to make, alter, forge, or counterfeit any such entry in such register, or any such marriage license, or to destroy any register book of marriage, is FELONY *without clergy*.

3. IM-

3 IMPROVIDENT MARRIAGE. By 4. & 5. *Phil. & Mary*, c. 8. whoever, above the age of fourteen years, by flattery, trifling gifts, and fair promises, shall allure and take any woman child unmarried, within the age of sixteen, from and against the consent of her guardians, shall suffer two years imprisonment, and fine at discretion; and if the offender deflower or marry her, five years imprisonment; and if any such female shall consent to unlawful matrimony, she shall forfeit her land to the next of kin.

1. Hawk. P.C. 172.  
3. Mod. 84.  
2. Mod. 128.  
6. Mod. 168.  
Stra. 1162.  
4. Mod. 145.  
2. Lev. 179.  
Stiles, 162.  
3. Mod. 24.  
Vaugh. 177.  
5. Mod. 221.

4. FORCIBLE MARRIAGE. By 3. *Hen. 7.* c. 2. to take, for lucre, any maid, widow, or wife, having any real or personal estate, against her will, or to receive a woman so taken, is FELONY; and by 39. *Eliz.* c. 9. principals, procurers, or accessories before the fact, are excluded from the benefit of clergy.

5. St. Tr. 450.  
1. Hawk. 171.  
1. Hale, 660.  
Hob. 182.  
12. Co. 20. 110.  
Cro. Car. 485.  
4. St. Tr. 455.

5. POLYGAMY, or, as it is corruptly called, BIGAMY, is another felonious offence with regard to matrimony. By 1. *Jac. 1.* c. 11. if any person, being married; do marry any person, the former husband or wife being alive, he or she shall be guilty of FELONY. But it is provided, that this penalty shall not extend to the following cases:

5. St. Tr. 450.  
1. Hawk. 174.  
1. Hale, 692.  
3. Inst. 89.  
Cro. Car. 461.  
4. Bl. Com. 164.  
11. St. Tr. 262.

I. WHERE the husband or wife shall be continually remaining beyond the seas by the space of seven years together.

II. WHERE the husband or wife shall absent him or herself the one from the other by the space of seven years together in any parts within his Majesty's dominions, the one of them not knowing the other to be living within that time.

III. WHERE the parties, at the time of such marriage, shall be divorced by sentence in the ecclesiastical court, or the former marriage declared null and void.

F f

IV. WHERE

IV. WHERE the former marriage was had or made within the age of consent.

1 Hawk.P.C. 360.  
2. Ro. Ab. 83.  
Burn's Justice. 6. COMMON NUSANCES. A common nuisance may be defined to be an offence against the public, either by doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires. All annoyances in highways, bridges, and public rivers, either by obstruction or for want of repair, are nuisances. All disorderly inns, ale-houses, bawdy-houses, gaming-houses, stage-plays unlicensed, and booths for rope-dancers, are public nuisances. Eaves-droppers, and common scolds, are nuisances.

See also 9. & 10. Will. 3. c. 7.

4. Burn's Justice, p. 355.  
4. Bl. Com. 170. 7. VAGRANTS. By 17. Geo. 2. c. 5. vagrants are divided into three classes.—1st, Idle and disorderly persons, who are punishable with one month's imprisonment in the house of correction. 2dly, Rogues and vagabonds, who are punishable with whipping and imprisonment, not exceeding six months. 3dly, Incurable rogues, who may be whipped and imprisoned for any time not exceeding two years. And if an idle and disorderly person, or a rogue and vagabond, break from his confinement, he shall be deemed an incurable rogue; and if such incurable rogue break prison, he shall be deemed a FELON liable to be transported for seven years.

2. Vent. 175.  
Ld. Ray. 1035.  
6. Mod. 129.  
Cowp. 38.  
1. Lev. 33.  
2. Ro. Ab. 78.  
Mirrour, 18. 8. GAMING is not restrained by the Common Law, unless it is so practised as to become injurious to the public œconomy; but the Legislature has, in many instances, laid it under particular restraints. A wager or bet is a contract entered into, without colour or fraud, between two or more persons, for a good consideration, and upon mutual promises to pay a stipulated sum of money or to deliver some other thing to each other, according as some prefixed and equally uncertain

contingency shall happen within the terms upon which the contract is made (a).

(a) See the  
Case of Good  
wagers was

7. Elliot, Trinity Term 30. Geo. 3. where the whole law respecting  
fully considered. 3. Term. Rep. 693.

COMMON GAMBLERS who conspire with false dice to cheat the King's subjects may be indicted and set on the pillory for such offence. 3. Keb. 510.

BY 33. *Hen.* 8. c. 9. s. 11. no person, of what degree, quality or condition soever, shall by himself or agent, for his gain, lucre, or living, keep any house or place for playing at any game prohibited by any statute, or any new unlawful game afterwards invented, on pain of forty shillings a day, and 6s. 8d. for every person frequenting such gaming-house. Dalt. c. 46.  
10. Mod. 336.  
3. Keb. 510.

BY 16. *Car.* 2. c. 7. if any person shall play at any game or pastime whatsoever (other than for ready money), or bet on the sides of such as shall play, and shall lose above one hundred pounds at any one time or meeting, upon tick or credit, or otherwise, the winner shall forfeit treble the value. Salk. 344.  
Stra. 1159.  
1. Vent. 253.  
4. Burr. 2433.  
2. Willf. 306.  
1. Willf. 227.  
Cowp. 282.

BY 9. *Ann.* c. 14. if any one shall, at any one sitting, lose more than ten pounds, and shall pay the same or any part thereof, he may recover it back from the winner; and by 18. *Geo.* 2. c. 34. s. 3. such winner shall be forced to discover the fact upon oath. All securities for money lent at the time to play with, are void; and if any person win more than ten pounds unfairly, he shall forfeit five times the value. Stra. 1079.  
And. 7c.  
12. Mod. 295.  
4. Burr. 2022.  
Black. Rep. 1226.  
2. Willf. 40.

BY 13. *Geo.* 2. c. 19. no person shall run a horse for any plate or match, unless such horse shall be his own property, and the stake run for of the value of fifty pounds. 1. Vern. 489.  
2. Vern. 71.  
4. Burr. 2452.

BY 10. & 11. *Will.* 3. c. 17. all pretended lotteries are suppressed on pain of 500l. See also  
12. Geo. 2. c. 28.

By 9. *Geo.* 1. c. 19. if any person shall, by colour of any grant from any foreign prince, set up any lottery, or undertaking in the nature of a lottery, &c. he shall forfeit 200l.

4. *Bl. Com.* 173. By 10. *Ann.* c. 26. f. 109. no person shall keep any office or place for making insurances on marriages, births, christenings, &c. on pain of 500l.

*Cowp.* 790.  
2. *Bl. Rep.* 1073. By 22. *Geo.* 3. c. 47. f. 13. no person shall sell the chance of any ticket in the state lottery for a day, or less time than the whole time of drawing any such lottery, or shall insure in the manner described.

2. *Bl. Rep.* 1075. By 7. *Geo.* 2. c. 8. all wagers relating to the present or future price of stocks, are deemed illegal and void.

#### XI. *Offences against the Persons, the Habitations, and the Property of Individuals.*

I. HOMICIDE, or the killing of any human creature, is of three kinds: *justifiable, excusable, and felonious.*

1. *Hale*, 478.  
494.  
2. *Hawk.* 105.  
*Dalt.* 150.  
*Co. Lit.* 283.  
10. *Co.* 76.  
4. *Bl. Com.* 178.  
*Co. P. C.* 48.  
5. *Co.* 106.  
*Cro. Car.* 98. JUSTIFIABLE HOMICIDE has no share of guilt at all, as it must be occasioned by some unavoidable necessity, and without any inadvertence or negligence in the party killing; as by virtue of such an office as obliges one in the execution of public justice to put a malefactor to death, who has forfeited his life by the laws and verdict of his country; or where an officer in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him.

1. *Hawk. P. C.* 111.  
1. *Hale*, 38.  
41. 393. 492. EXCUSABLE HOMICIDE is either *per infortunium*, by misadventure; or *se defendendo*, in self defence.  
*Stra.* 462. *Prin. P. L.* 214. *Co. P. C.* 36. *Foster*, 258.

Homicide

Homicide *per infortunium* is where a man doing a *lawful act*, without any intention of hurt, unfortunately kills another; as where a man is at work with a hatchet, and the head thereof flies off and kills a bystander. Homicide *se defendendo*, is where a man, to protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, happens to kill him who assaults him; and this is frequently called *chance medley*, as proceeding from a casual affray. To excuse this species of homicide, it must appear that the slayer had no possible means of escaping from his assailant.

FELONIOUS HOMICIDE is the killing of a human creature, of any age or sex, without *justification* or *excuse*, and consists either in *self-murder*, *manslaughter*, *murder*, or *petit treason*.

1. Hawk. P. C. 115.  
4. Bl. Com. 186. 191.  
Prin. P. L. 215.

SELF-MURDER. A *felo de se* is he that deliberately puts an end to his existence, or commits any unlawful malicious act, the consequence of which is his own death. The party must be of years of discretion, and in his senses, else it is no crime. The punishment for this offence is an ignominious burial in the highway, with a stake driven through his body; and all his goods and chattels are forfeited to the King.

4. Bl. Com. 189.  
Potter's Antiq. bk. 1. ch. 26.  
1. Hale, 413.

MANSLAUGHTER arises from the sudden heat of the passions, and is defined to be the unlawful killing of another, without malice, either express or implied. The offence may be committed either on a sudden quarrel, as if upon a sudden quarrel two persons fight, and one of them kill the other; or in the commission of an unlawful act, as if two persons play at sword and buckler, unless by the King's command, and one of them kill the other. As it must be done without premeditation, or any deliberate intention of doing mischief, there can be no accessaries to this offence before the fact.—The punishment for manslaughter is, by 18. *Eliz. c. 7.* imprisonment not exceeding

Co. P. C. 56.  
1. Hawk. P. C. 115.  
Potter, 290.  
2. Bl. Com. 192.  
Kelynge, 40.

1. Hawk. P. C. 115.



one year. But by 1. *Jac.* 1. c. 8. where any person shall stab or thrust another that has not then any weapon drawn, or that hath not then first stricken the party which shall so stab or thrust, so as the person or persons so stabbed or thrust shall thereof die within the space of six months then next following, although it cannot be proved that the same was done of malice aforethought, shall suffer death without the benefit of clergy.

MURDER arises from the deliberate wickedness of the heart, and is defined to be, “when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the King’s peace, with malice aforethought, either express or implied.”

MALICE is the great criterion by which murder is distinguished from every other kind of homicide; for, as we have already shewn, homicide may be founded in the dispensations of public justice, occasioned by mere accident, done for self-preservation, arise from a sudden transport of passion, or, lastly, be committed in malice. EXPRESS MALICE is that deliberate intention to take away the life of a fellow-creature which is manifested by external circumstances capable of proof; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. IMPLIED MALICE is that inference which arises from the nature of the act, though no particular malice can be proved; as when a man suddenly kills another without any apparent provocation; when he gives poison to another without any known inducement; when he wilfully suffers a beast, notoriously mischievous, to wander abroad, and it kills a man. The punishment of murder and manslaughter were formerly the same, but now by 23. *Hen.* 8. c. 1. and 1. *Edw.* 6. c. 12. the benefit of clergy is taken away from murder through malice prepense.

2. MAY-

2. **MAYHEM** is the depriving another of the use of such of his members as may be useful to him in fight; and, as we have already mentioned it as a civil injury, we shall only say here, that the law considers it an atrocious breach of the peace, for which the offender may be punished by fine and imprisonment.

1. Hawk. P. C. 175.  
4. Bl. Com. 205.  
Fleta, bk. 1. ch. 40.  
Britton, bk. 1. ch. 25.  
Brafton, 144.  
S. P. C. 3.  
Stra. 1100.

By 37. Hen. 8. c. 6. to cut off the ear or ears of another, otherwise than by authority of law, or mischance, incurs a forfeiture of treble damages, &c.

By 22. & 23. Car. 1. commonly called **THE COVENTRY ACT**, if any person shall on purpose and of malice aforethought, and by lying in wait, unlawfully 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 subject, with intent in so doing to maim or disfigure in any of the manners before mentioned, it is **FELONY without clergy (a)**.

1. Hawk. P. C. 176.

3. **MALICIOUS SHOOTING.** By 9. Geo. 1. c. 22. if any person or persons shall wilfully and maliciously shoot at any person, in any dwelling-house or other place, he shall be adjudged guilty of **FELONY without clergy**.

1. Hawk. P. C. 225.  
8. St. Tr. 290.

4. **RAPE** is an offence in having unlawful and carnal knowledge of a woman by force, against her will; but an assault in order to ravish her, however shameless and outrageous it may be, if it proceed not to some degree of penetration, and also of emission, cannot amount to rape. This offence is by 18. Eliz. c. 7. excluded from clergy;

1. Hawk. P. C. 169.  
4. Bl. Com. 212.  
Co. Lit. 123.  
4. Co. 39.  
1. Hale, 628.

(a) See the case of Coke and Woodburn, 6. State Trials, 212. where it was determined, that if a man attack another of malice aforethought, in order to kill him, with a bill or any other such like instrument, which cannot but endanger the maiming him, and in such attack happen not to kill but only to maim, it may be left to the jury whether there was a design to murder by maiming.

and in the case of abusing any woman-child under the age of ten years, the consent or non-consent is immaterial.

## XII. Offences against the Habitations of Individuals,

1. Hawk. P. C.  
165.

1. Hale, 556.  
Co. P. C. 66.

Stanf. P. C. 36.

4. Bl. Com. 220.

1. Hale, 567.  
Co. P. C. 69.  
1. Hawk. P. C.  
165.

4. Bl. Com.  
220.

4. Co. 20.  
Cro. Car. 377.  
Foster, 116.

1. ARSON is the malicious and voluntary burning the house of another by night or by day.— By 9. *Geo.* 1. c. 22. to set fire to any house, barn, out-house, hovel, cock, mow, or stack of corn, hay, or wood, is **FELONY without clergy**. This statute makes no alteration in the nature of the offence of ARSON, as it stood at Common Law, but was intended only to oust it more clearly of clergy. The attempt to set fire to a house, unless it absolutely burns, is not within the description of this offence; for the indictment must charge that the offender did set fire to and burn, *incendit et combussit* the house of another; and even the burning *the frame* of a house is not accounted arson, because it cannot come under the word *domus*. The house must be the house of another, and therefore any one seised in fee, or but possessed for years, cannot commit this felony by burning the same; but if a man so seised or possessed set fire to his own house, and by that means burn his neighbour's, he then burns the house of another, and is guilty of arson: and if a man set fire even to his own house in a town, it is a high misdemeanor, punishable by fine and imprisonment, pillory, and perpetual sureties for his good behaviour.

By 43. *Eliz.* c. 13. whoever shall wilfully and of malice burn, or cause to be burned, any barn, or stack of corn, or grain, within the four northern counties, shall be guilty of **FELONY without clergy**.

By 22. & 23. *Car.* 2. c. 7. if any person shall in the night-time maliciously burn, or cause to be burned

burned or destroyed, any ricks or stacks of corn, hay, or grain, barns, or other houses or buildings, or kilns, he shall suffer as in *cases of felony*.—But by 9. *Geo.* 1. c. 22. above-recited, which is considered an extension of the provisions of this statute, it is *FELONY without clergy*.

BY 1. *Geo.* 1. c. 48. maliciously to set on fire or burn any wood, underwood, or coppice, or any part thereof, is *FELONY*.

BY 10. *Geo.* 2. c. 32. wilfully and maliciously to set on fire, or cause to be set on fire, any mine, pit, or delph of coal, is *FELONY without clergy*.

BY 9. *Geo.* 3. c. 29. to burn or set fire to, any wind saw-mill, or other windmill, or any water-mill, or other mill, is *FELONY without clergy*.

2. BURGLARY is the breaking and entering the mansion-house of another, to the intent to commit some felony within the same, whether the felonious intent be executed or not.—There must be both a *breaking* and an *entering*, to constitute this offence; and it seems that they ought to be such as will enable the burglar to commit the intended felony. To enter a house by a door or window which is left open, or through a hole made before by another person, is not a sufficient breaking; but to shove up a window, to lift up the latch of a door, or the like, is such a breaking in the eye of the law as will satisfy the offence; and any the least entry, as by putting a foot over the threshold, or a hook into a window, is also sufficient. And by 12. *Ann.* c. 7. if the entry be obtained without breaking, and the burglar in the night-time break out of the house, it is such a breaking and entry as will amount to this offence. A house wherein a man dwells but for part of the year, or which one has hired to live in, and brought part of his goods to, but has not yet lodged in it, or a chamber in one of the inns of court, and even a common lodging-room, if the  
landlord

1. Hawk. P. C.

159.

Pulton, 132.

1. Hale, 549.

4. Bl. Com.

223.

Cro. Eliz. 583.

Dyer, 99.

Kelynge, 67.

Foster, 107.

Co. P. C. 64.

landlord do not sleep under the same roof, are all of them the mansion-houses of those who dwell therein; and even part of a house which is divided, and has an outer door of its own to the street. All out-buildings, as barns, stables, dairy-houses, shops, workshops, &c. &c. which either adjoin to the house, or are within what is called the *curtilage*, or in which the owner or any part of his family sleep, are considered as part of the house. The felony intended to be committed may be either a felony at Common Law or by statute; but the indictment must state, and the verdict find, an intention to commit some *felony*; for if it appear that the offender meant only to commit a *trespass*, he is not guilty of burglary.—By 18. *Eliz.* c. 7. burglary is declared to be FELONY *without clergy*.

### XIII. *Offences against Private Property.*

1. LARCENY is either *simple* or *mixed*. Simple larceny is also distinguished into *grand* and *petit*.

GRAND LARCENY is where the goods amount to more than the value of twelve-pence, and are not taken violently from the person of the owner, nor out of his house.

PETIT LARCENY is where the goods so taken are of or under the value of twelve-pence.

MIXED or COMPOUND LARCENY is a felonious taking of the goods of another, either from his person or his house, and includes the crimes of ROBBERY and HOUSEBREAKING.

LARCENY, or *theft*, is the felonious taking and carrying away of the personal goods of another, above the value of twelve-pence, against the will of the owner; or, as it is defined by BRACTON and BRITTON, it is “*fraudulenta contractatio rei*” “*alienæ cum animo furandi invito domino cujus res*” “*illa fuerit.*”

EVERY

EVERY larceny must include a *trespass*; and if the party be guilty of no *trespass* in *taking* the goods, he cannot be guilty of felony in *carrying them away*. Thus if a person find goods, and convert them *animo furandi* to his own use, or obtain the actual delivery of them from the owner for a special purpose, as a carrier to convey them to a certain place, or a taylor to make them into clothes, and afterwards converts them, yet neither the finder, the carrier, nor the taylor, can be guilty of larceny; but if the goods were not lost, or the carrier or taylor pretended to convey them, or to make them up, with a dishonest or fraudulent intent to carry them feloniously away, in such case the Law will consider them, notwithstanding the delivery, as constructively remaining in the *possession* of the owner; and being taken from his *possession*, the parties carrying them away will be guilty of larceny. To constitute larceny, the property must be taken from the *possession* of the owner; and therefore, where a man intending to go a distant journey hires a horse fairly and *bond fide* for that purpose, and evidences the truth of such intention by actually proceeding on his way, and afterwards rides off with the horse, it is no theft, because the felonious design was hatched subsequent to the delivery; and the delivery having been obtained without fraud or design, the owner parted with his *possession*, as well as his *property* (*a*), and thereby gave the hirer complete dominion over the horse, upon trust that he would return him when the journey was performed (*b*): but where one *Peares* hired a horse to go a few miles from town, but, instead of going, immediately sold the horse, and the jury found that he had hired it with a fraudulent view and intention to convert it to his own use, the Judges held it to be felony; and many cases of a similar nature have received the like determination (*c*). A person also who has the bare charge or special use of goods, but not the possession, as a shepherd who looks after sheep, a butler who takes care of plate, may be guilty of felony in taking them away.

1. Hale, 504.  
4. Bl. Com.  
230.  
Co. P. C. 107.  
Kelynge, 24.  
1. Hawk. P. C.  
134.

(a) Morrow's  
Case, Old Bai-  
ley October  
Session 1784.

(b) Charle-  
wood's Case,  
Old Bailey  
February  
Session 1786.

(c) Cases in  
Crown Law,  
213. 231. 242.  
267. 291. 297.  
349. 356. 401.  
1. Hawk. P. C.  
135. *in notis*.

THE

1. Hawk. P. C. 141.  
3. Inst. 108.  
2. Vent. 215.  
1. Hale, 508.

THE bare removal from the place in which the goods are taken, although the thief do not quite make off with them, is a sufficient asportation or carrying away; as when a guest having taken the sheets from his bed had removed them into the hall, but was detected before he got out of the house.

1. Hawk. P. C. 144.

THE goods taken must be personal goods of some intrinsic value; for larceny cannot be committed of things fixed to the freehold, or favouring of the realty, or where their whole value is derived from the relation they bear to some other thing, as bonds, deeds, and other securities. So also they ought not to be things of a base nature, as dogs, cats, bears, and the like; but of wild animals, as fish in a river, deer, hares, or conies, in a park, field, or warren, if they be restrained or appropriated, or reduced to tameness, larceny may be committed.

BY 4. *Geo. I. c. 11.* and 6. *Geo. I. c. 23.* if any persons be convicted of grand or petit larceny, and are entitled to the benefit of clergy, the court may order them to be transported for seven years.

1. Hale, 667.  
Dyer, 5.  
3. Inst. 105.  
Dalt. 102.

2. SERVANTS ROBBING MASTERS. By 21. *Hen. 8. c. 7.* servants above eighteen years of age, and not apprentices, to whom any goods have been entrusted by their masters or mistresses, who shall go away with the same, with an intent to steal them, or shall embezzle any property during their service, if above the value of forty shillings, shall be guilty of FELONY: and by 12. *Ann. c. 7.* whosoever shall feloniously steal to the value of forty shillings or more, in any dwelling-house, shall be guilty of FELONY *without clergy.*

This act does not extend to apprentices under fifteen years of age.

1. Hawk P.C. 137. *in nota*, for constructions on this statute.

3. ROBBING LODGINGS. By 3. & 4. *Will. & Mar. c. 9.* if any person shall take away, with intent to steal, embezzle, or purloin, any chattel, bedding, or furniture, which by contract or agreement

ment

ment he was to use, or shall be let to him in or with such lodgings, he shall be guilty of FELONY.

4. SERVANTS OF THE BANK. By 15. Geo. 2. r. Hawk. P.C. c. 13. f. 12. if any officer or servant of the Bank of <sup>138.</sup> *England*, being entrusted with any note, bill, dividend, warrant, bond, deed, or any security, money, or other effects belonging to the Company, or deposited with them, shall secrete, embezzle, or run away with the same, he shall be guilty of FELONY *without clergy*.

5. SERVANTS OF THE POST OFFICE. By 1. Hawk. P.C. 5. Geo. 3. c. 25. f. 17. and 7. Geo. 3. c. 50. if any <sup>138.</sup> deputy, clerk, agent, letter-carrier, post-boy, or rider, or any other officer or person whatsoever employed in receiving, stamping, sorting, charging, carrying, conveying, or delivering, letters or packets, or in any other business relating to the Post Office, shall secrete, embezzle, or destroy, any letter, packet, bag of letters, which he shall be intrusted with, containing any Bank-note, Bank post-bill, bill of exchange, Exchequer bill, &c. &c. or any security whatever for the payment of money, or shall steal and take the same out of any letter or packet that shall come to his possession, he shall suffer DEATH *without clergy*.

6. STEALING A CHOSE IN ACTION. By 1. Hawk. P.C. 2. Geo. 2. c. 25. f. 3. “Whoever shall steal, or <sup>142.</sup> take by robbery, any exchequer orders or tallies, <sup>Made perpetual by 9. Geo. 2. c. 18.</sup> or other orders intitling any other person to any annuity or share in any parliamentary fund, or any Exchequer bills, Bank notes, South Sea bonds, East India bonds, dividend warrants of the Bank, South Sea Company, East India Company, or any other Company, Society or Corporation, bills of exchange, navy bills or debentures, goldsmiths notes for the payment of money, or other bonds or warrants, bills or promissory notes for the payment of any money, being the property of any other person or of  
“ any



“ any Corporation, notwithstanding any of the  
 “ said particulars are termed in law a *chose in action*,  
 “ shall be deemed guilty of felony of the same  
 “ nature and in the same degree, and with or  
 “ without the benefit of clergy, in the same  
 “ manner as it would have been, if the offender  
 “ had stolen, or taken by robbery, any other goods  
 “ of like value, with the money due on such  
 “ orders, tallies, bills, bonds, warrants, debentures  
 “ or notes, or secured thereby, and remain-  
 “ ing unsatisfied; and such offender shall suffer  
 “ such punishment as if he had stolen other goods  
 “ of the like value, with the monies due on such  
 “ orders, tallies, bonds, bills, warrants, debentures,  
 “ or notes respectively, or secured thereby, and  
 “ remaining unsatisfied.”

1. Hawk. P. C.  
142.

Vide Old Bai-  
ley 1785.  
No. 253.

7. ROBBING THE MAIL. By 5. Geo. 3. c. 25.  
 f. 17. and 7. Geo. 3. c. 50. f. 2. “ Whoever shall  
 “ rob any mail in which letters are sent or con-  
 “ veyed by the post, of any letter, packet, or bag  
 “ of letters, or shall steal and take from any such  
 “ mail, or from any bag of letters sent or con-  
 “ veyed by the post, or from or out of any post-  
 “ office, or house or place for the receipt or deli-  
 “ very of letters or packets sent, or to be sent by  
 “ the post, any letter or packet, although such  
 “ robbery, stealing, or taking, shall not appear  
 “ or be proved to be a taking from the person,  
 “ or upon the King’s highway, or to be a rob-  
 “ bery committed in any dwelling-house or any  
 “ coach-house, stable, barn, or any out-house  
 “ belonging to a dwelling-house; and although  
 “ it should not appear that any persons were put  
 “ in fear by such robbery, stealing, or taking,  
 “ yet such offenders shall be deemed guilty of  
 “ felony, and suffer death without the benefit of  
 “ clergy.”

Burn’s Justice,  
p. 513.

8. STEALING DOGS. By 10. Geo. 3. c. 18. “ If  
 “ any person shall steal any dog or dogs of any  
 “ kind or sort whatsoever from the owner thereof,  
 “ or

“ or from any person entrusted by the owner  
 “ therewith, or shall knowingly sell, buy, receive,  
 “ harbour, keep or detain any such dog or dogs,  
 “ on conviction by one witness, or on confession  
 “ before two justices, they shall forfeit, for the  
 “ first offence, not exceeding 30*l.* nor less than  
 “ 20*l.* together with the charges previous to and  
 “ attending such conviction; on default to be  
 “ committed to the house of correction for not  
 “ more than twelve, nor less than six months,  
 “ unless the penalty be sooner paid.” For the  
 second offence, not exceeding 50*l.* nor less than  
 30*l.* and from twelve to eighteen months imprisonment, &c. One justice, on information, may grant a warrant to search, &c. and if any such dog, or the skin of such dog, be found, the possessor, if privy, &c. is liable to the penalties aforesaid. On fourteen days notice, and entering into a recognizance, persons aggrieved may appeal to the quarter sessions, but no *certiorari* shall be allowed (a).

9. ROBBING ORCHARDS. By 43. *Eliz.* c. 7. 15. *Car.* 2. c. 2. to rob any orchards or gardens, to steal any fruit-trees, or destroy any fences therein growing or placed, incurs the corporal punishment of whipping, and compensation for the damage done. 1. Hawk. P. C. 214. Sayer, 204. Salk. 181. Comyns, 135.

10. STEALING HEDGE WOODS. By 6. *Geo.* 1. c. 16. to steal, destroy, or damage, any wood, sprigs, trees, poles, underwoods, thorns, or quicksets, incurs the punishment inflicted by 1. *Geo.* 1. c. 48. for barking trees.

11. STEALING TREES. By 6. *Geo.* 3. c. 36. 1. Hawk. P. C. 215. whoever shall in the *night-time* steal, damage, or destroy, any oak, beach, ash, elm, fir, chestnut, asp (13. *Geo.* 3. c. 33.), poplar, alder, maple,

(a) Mr. Burn has pointed out several inaccuracies in this statute, and doubts very much whether, from the special wording of it, it is penal to steal a bitch. Vol. i. 515. It is also said, that the particular sort of dog stolen must be described. Addingt. P. S. 221. larch,

larch, hornbeam, or any tree likely to become timber, shall be transported for seven years.

By 6. *Geo.* 3. c. 48. to steal, damage, or destroy, any timber-tree, *viz.* oak, beech, walnut, ash, elm, cedar, fir, asp, lime, fycamore, and birch, or the lops or tops thereof, subjects the offender to pecuniary penalties; in proportion to the number of offences.

By 9. *Geo.* 1. c. 22. whoever shall cut down, or otherwise destroy, any trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, shelter, or profit, shall suffer DEATH *without clergy.*

1. Hawk. P. C. 215. II. STEALING SHRUBS. By 6. *Geo.* 3. c. 36. whoever shall in the *night-time* steal, damage, or destroy, any root, shrub, or plant, of the value of five shillings, growing in any garden or nursery-ground, shall be transported for seven years.

By 6. *Geo.* 3. c. 48. to steal, damage, or destroy, any root, shrub, or plant, in any field, nurseries, garden, or garden-grounds, shall forfeit for the first offence not exceeding *forty shillings*, and for the second not exceeding five pounds, &c. (a).

1. Hawk. P. C. 217. 12. STEALING VEGETABLES. By 13. *Geo.* 3. c. 32. "Whoever shall steal and take away, or  
" maliciously pull up and destroy any turnips,  
" potatoes, cabbages, parsnips, pease, or carrots

(a) At the *Old Bailey*, in *January* Session 1788, *William Howe* was convicted of *felony*, on the 6. *Geo.* 3. c. 36. for stealing five *sweet bay trees*, of the value of 5s.; but a doubt arose whether the statute was not virtually repealed by 6. *Geo.* 3. c. 48. making the offence a *misdemeanor*. But, on a case reserved, THE TWELVE JUDGES were of opinion, that it was not repealed, but

to be considered in *pari materia*; and when taken together their provisions will stand thus: If the property be of the value of five shillings, and be taken in the night, it is felony; if under five shillings, and taken either by night or by day, it is a misdemeanor; if above five shillings and under forty shillings, if taken in the day, a misdemeanor. Cases in *Crown Law*, 417, 418.

" growing

“ growing or being in any garden, lands, or  
 “ grounds, open or inclosed, on conviction within  
 “ thirty days, by confession, or on the oath of one  
 “ witness, before one justice, shall forfeit, not  
 “ exceeding ten shillings over and above the value  
 “ of the goods stolen, to be distributed between,  
 “ or wholly given to, the owner and the poor ;  
 “ and on default of payment to be committed to  
 “ the house of correction not exceeding one  
 “ month, unless sooner paid : and the owner, or  
 “ any inhabitant, may be a witness ; but if the  
 “ conviction be upon the oath of the owner, the  
 “ whole penalty shall go to the poor.” And by  
 31. *Geo. 2. c. 35. s. 5.* “ the same punishment is  
 “ inflicted upon the stealing of madder roots.”

13. STEALING BLACK LEAD. By 25. *Geo. 2. 1. Hawk. P.C.*  
 c. 10. “ Whoever shall unlawfully break, or by <sup>218.</sup>  
 “ force enter into any mine, wad-hole of wad, or  
 “ black cawke, commonly called black lead, or  
 “ into any pit, shaft, adit or vein of wad, black  
 “ cawke, or black lead, with an intent to take  
 “ and carry away from thence any wad, black  
 “ cawke, or black lead ; or shall unlawfully from  
 “ thence take and carry away any wad, black  
 “ cawke, or black lead, although such mine,  
 “ wad-hole, pit, shaft, adit, or vein be not  
 “ actually broke, or by force entered into by  
 “ such offender ; or shall aid, abet, assist, hire,  
 “ or command any person or persons to commit  
 “ such offences as aforesaid, such offenders shall  
 “ be guilty of felony, and may be committed to  
 “ the county gaol or house of correction for any  
 “ time not exceeding a year, and publicly  
 “ whipped ; or transported for a term not ex-  
 “ ceeding seven years.”

14. STEALING LEAD. By 4. *Geo. 2. c. 32.*  
 “ Whoever shall steal, rip, cut or break, with intent  
 “ to steal, any lead, iron bar, iron grate, iron  
 “ palisadoes, or iron rail whatsoever, being fixed  
 “ to any dwelling-house, out-house, coach-house,  
 “ stable,

“ stable, or other building used or occupied with  
 “ such dwelling-house, or thereunto belonging,  
 “ or to any building whatsoever, or fixed in any  
 “ garden, orchard, court-yard, fence, or outlet  
 “ belonging to any dwelling-house or other  
 “ building; their aiders, abettors, and assisters;  
 “ or whoever shall knowingly buy or receive the  
 “ same; shall be guilty of felony, and the court is  
 “ empowered to transport such felons for the  
 “ space of seven years.”

By 21. Geo. 3. c. 68. “ Whoever shall rip, cut,  
 “ break or remove, with intent to steal, any cop-  
 “ per, brass, bell-metal, utensil or fixture, being  
 “ fixed to any dwelling-house, out-house, coach-  
 “ house, stable, or other building used or occupied  
 “ with such dwelling-house, or thereunto belong-  
 “ ing, or to any other building whatsoever, or  
 “ fixed in any garden, orchard, court-yard, fence  
 “ or outlet belonging to any dwelling-house or  
 “ other building, or any iron rails or fencing set  
 “ up or fixed in any square, court, or other place  
 “ (such person having no title or claim of title  
 “ thereto); or whoever shall be aiding, abetting,  
 “ or assisting therein, or shall knowingly buy or  
 “ receive the same, although the principal felon  
 “ has not been convicted of stealing the same, shall  
 “ be guilty of felony, and the court have power to  
 “ transport such offender for seven years, or to  
 “ order him or them to be detained in prison,  
 “ and therein kept to hard labour for any time  
 “ not exceeding three years, nor less than one  
 “ year; and, within that time, if the court shall  
 “ think fit, he shall be once, or oftener, but not  
 “ more than three times, publicly whipped.”

r. Hawk. P.C. 219, 220. 15. STEALING FROM SHIPWRECKS. By 12.  
 Ann. c. 18. justices, on information that any ship  
 is in distress, are authorized and required to summon  
 and employ revenue officers and others for the  
 preservation of the cargo; and if any person shall  
 make a hole in such ship, or steal her pump, it is  
 FELONY *without clergy*.

BY

By 26. *Geo.* 2. c. 19. to plunder, steal, take away, or destroy, any shipwrecked goods that are there, or to beat or wound any person endeavouring to save his life from the wreck, or to hold out false lights, so as to bring any ship into danger, is FELONY *without clergy*.—But if the goods stolen be of small value, and no barbarity used in taking them, the offender may be prosecuted for petit larceny (*a*).

16. STEALING FISH. By 5. *Eliz.* c. 21. to break down the dam of any store-pond, with intent to steal the fish, is three months imprisonment, compensation to the party grieved, and security for good behaviour for seven years.

By 4. & 5. *Will.* 3. c. 23. none but the owners or occupiers of fisheries shall keep nets or other engines on pain of seizure.

By 22. & 23. *Car.* 2. c. 25. to fish in a private or several fishery, whether with nets or lines, without the owner's consent, incurs a penalty of ten shillings.

By 9. *Geo.* 1. c. 22. if any persons, *armed and disguised*, shall steal fish out of any river or pond, it is FELONY *without clergy*.

By 5. *Geo.* 3. c. 14. to enter into any park, paddock, garden, orchard, yard, belonging to any dwelling-house, in and through which park, paddock, garden, orchard, and yard, any river or stream shall run or be, and by any device to steal fish bred, kept, or preserved therein, or to receive or buy such fish, is TRANSPORTATION *for seven years*.—And to take fish in any inclosed private ground, not being a park, &c. belonging to a dwelling-house, incurs a penalty of five pounds (*b*).

(*a*) Offences against this act committed in *Wales* may be tried in the next *English* county; and *Salop* is the next *English* county to *Anglesey*, and not *Cheshire*.—*Cases in Crown Law*, 111.

(*b*) In both these cases it must appear, that the river was private

property, and who was the owner of it; that the offender had not a special right to fish in the fishery of another; that he meant to steal the fish; and that he took them without the owner's consent.—

2. *Burr.* 682. 4. *Burr.* 2282.

2. Hawk. P.C. 17. PRIVATELY STEALING *from the person*.  
490. By 8. Eliz. c. 4. the felonious taking of any money, goods, or chattels, from the person of any other, *privily without his knowledge*, in any place whatsoever, is FELONY *without clergy*.

Caf. Cro. Law, 3. THIS act does not extend to accessaries after the fact.

Caf. Cro. Law, 233. IF the larceny is in the slightest degree discovered at the time it is committing, the offender shall have the benefit of his clergy; for in such case it is not taken *privily, without the knowledge* of the prosecutor.

Caf. Cro. Law, 382. IF a person who is deprived of knowledge by intoxication, be robbed without perceiving it, the offender shall have his clergy.

Caf. Cro. Law, 384. BUT an offender who steals any thing privily from the person of another, while such person is deprived of consciousness by the powers of sleep, is guilty of the capital part of the offence.

2. Hawk. P.C. 18. PRIVATELY STEALING *from the shop*. By 10. & 11. Will. 3. c. 23. all persons who by night or day shall, in any shop, warehouse, coach-house, or stable, *privately* and feloniously steal any goods, wares, or merchandizes, of the value of *five shillings* or more, or shall assist, hire, or command, any person to commit such offence, shall be guilty of FELONY *without clergy*.

1. Peer. Wms. 267. THE property stolen must be such as is common to, and usually kept in, the places mentioned in the act, and not any other valuable thing which may happen to be put there; and therefore it has been thought, that only bridles, saddles, and the like, and not the coachman's box coat or other livery, are the proper furniture of a stable. It has also been solemnly determined, that "money

3. Peer. Wms. 112.  
Foster, 78.  
Caf. Cro. Law, 48. 262. 277.

is not comprehended within the words "goods, wares, and merchandizes."

19. HORSE STEALERS. By 1. *Edw. 6. c. 12.* <sup>2. Hawk. P. C.</sup> and 2. & 3. *Edw. 6. c. 33.* to take or steal any <sup>490.</sup> horse, gelding, or mare, is FELONY *without clergy.* <sup>2. Hale, 364.</sup>

By 31. *Eliz. c. 12. f. 5.* all accessaries before the fact, and all accessaries after the fact, in *horse-stealing*, shall be deemed guilty of FELONY *without clergy.*

BUT at the time the statute of the 31. *Eliz. c. 12.* <sup>Foster, 373.</sup> was passed, an accessary was only guilty for receiving the *felon*, not for receiving the *goods*. But now by 3. & 4. *Will. & Mary, c. 9.* those who receive stolen horses are included in the description of receivers of stolen goods, and liable to be transported for fourteen years.

20. STEALING FROM TENTERS. By 22. *Car. 2.* <sup>2. Hawk. P. C.</sup> c. 5. to cut or steal any cloth or woollen manufactures from the rack or tenter in the night-time, is FELONY *without clergy.*

21. STEALING FROM BLEACH GREENS. By <sup>2. Hawk. P. C.</sup> 18. *Geo. 2. c. 27.* to steal, by day or by night, any linen, fustian, callico, cotton, cloth made of cotton or linen yarn mixed, or any thread, linen, or cotton yarn, linen or cotton tape, incle, filletting, laces, or any goods whatsoever, exposed to be printed, bleached, bowked, or dried, in any printing or bleaching ground, or in any of the shops, lofts, or places, thereto belonging, to the value of ten shillings, or to assist in so doing, is FELONY *without clergy*; but the Judge has a discretionary power to transport for fourteen years.

22. STEALING CATTLE. By 14. *Geo. 2. c. 6.* <sup>1. Hawk. P. C.</sup> and 15. *Geo. 2. c. 34.* to steal any bull, cow, ox, <sup>179.</sup> steer, bullock, heifer, calf, sheep, or lamb, or to <sup>2. Hawk. P. C.</sup> kill them with a felonious intent to steal the <sup>493.</sup> carcase, <sup>Bl. Rep. p. 722</sup> <sup>Caf. Cro. Law</sup> <sup>71.</sup>



carcase, or any part thereof, is FELONY *without clergy*.

2. Hawk. P.C.  
393.  
Cas. Cro. Law,  
56. 294.  
Folter, 79.

23. STEALING ON NAVIGABLE RIVERS. By 24. *Geo. 2. c. 45.* to steal any goods, to the value of *forty shillings*, in any ship, barge, lighter, boat, or other vessel or craft, upon any navigable river, or in any port or creek belonging to any navigable river in *Great Britain*, or from any wharf or key adjacent to any navigable river, is FELONY *without clergy*.

2. Hawk. P.C.  
494.

24. STEALING FROM A CHURCH. By 23. *Hen. 8. c. 1.* and 25. *Hen. 8. c. 3.* to steal, take, or carry away, any goods and chattels from any church, chapel, or other holy place, is FELONY *without clergy*.

Dyer, 224.  
Kelynge, 58.  
69.  
2. Hale, 233.

BUT no *sacrilege* is within these statutes which is not accompanied with the actual breaking of the church or chapel from which the goods are stolen.—But by 1. *Edw. 6. c. 12.* to steal goods out of any parish church, or other church or chapel, is FELONY *without clergy*.

3. Hawk. P.C.  
147.  
Sum. 71.  
3. Inst. 68.  
7. Hale, 531.

25. ROBBERY, the *rapina* of the civilians, is the forcible and felonious taking from the person of another, of goods or money to any value, by putting him in fear.—There must be a *forcible* taking, otherwise it is no robbery; for it must be laid to have been done *violenter et contra voluntatem*; but any the least degree of force which may inspire the mind with fear, is sufficient; and therefore where a person kept *fast hold* of a basket on his head until it was *wrenched* from him by the thief, or to snatch an ear-ring from a lady's ear, have been held to be robbery; and it seems that he who receives money by my delivery, either whilst I am under the terror of his assault, or afterwards, while I think myself bound in conscience to give it him, by an oath for that purpose, which in my fear I was compelled by him to take,  
may;

may, in the eye of the law, as properly be said to take it from me, as he who actually takes it out of my pocket with his own hands (a); neither can he who has once actually completed the offence, by taking my goods in such a manner into his possession, afterwards purge it by any re-delivery (b).—

2. It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery.—3. It must be a taking from the person; as a horse whereon a man is actually riding, or money out of his pocket: or else openly and before his face; as if a thief, having first assaulted me, take away the horse that is standing by me, or having put me in fear drive my cattle, in my presence, out of my pasture, or takes up my purse, which in my fright I had cast into a bush; for these things being immediately under my personal care and protection may properly enough be said to be a taking from the person: but if the fear excited by the menaces of the thief be subsequent to the taking, then it is larceny and not robbery.—4. It must be with some degree of violence, or by putting in fear; but the law does not require, in this case, proof of an actual violence to the person, or an existing fear in the mind; for if a man with a cutlass under his arm, or a pistol in his hand, feloniously demand and obtain the money of another, without touching his person, yet it is robbery, although no actual violence is used. So also if a man threaten another to accuse him of having been guilty of an unnatural crime, or any other offence of a deep and atrocious dye, and by that means obtain money, it is robbery, although from conscious innocence the party threatened with such an imputation may not feel any existing fear in his mind. The fact of fear need not be alledged in the indictment; it is sufficient to charge that the offence was committed *violenter et contra voluntatem*; and if it appear upon the evidence to have been attended with those circumstances of violence or terror which in common experience are likely to induce a man to part with his money or goods against his will, either

(a) See Donally's Case, for robbing the Hon. C. Fielding. Caf. Cro. Law, p. 199 in print; and Hickman's Case, *ibid.* p. 257.

(b) See "Peat's Case," Caf. Cro. Law, in point. 4. Bl. Com. 242. S. P. C. 27. Crom. 34. Dalt. 10. Sum. 73.

1. Hale, 533. Stiles, 156. Salk. 613. Carth. 145. B. R. H. 107. Stra. 1015. Dougl. 197. 2. Roll. 154. 1. Hale, 535. 1. Hawk. P.C. 148 in *notis*.

Caf. Cro. Law, 204. Folter, 128.

Caf. Cro. Law, 206. 257. 260. 264. 365.

1. Hawk. P.C. 149. in *notis*. Folter, 128. 4 Bl. Com. 242.

Donally's Case, Old Bailey 1778.

Moor, 16.  
1. Hale, 535.  
1. Hawk. 150.  
in notis.

for the safety of his person, or for the preservation of his character and good name, it will amount to robbery. By 23. *Hen. 8. c. 1.* 4. *Phil. & Mary, c. 4.* 3. & 4. *Will. & Mary, c. 9.* principals, accessaries before the fact, and accessaries after the fact, who are guilty of robbery, whether *in or near the King's highway*, or in any other place, are FELONS *without clergy*.—By 4. *Will. & Mary, c. 8.* a reward of forty pounds is given to those who shall apprehend and convict any person, for a robbery committed in or upon any *highway, passage, field or open place*; and by 6. *Geo. 1. c. 23. s. 8.* *streets* are deemed to be within the act,

2. Hawk. P. C.  
497.

26. ROBBERY IN A DWELLING-HOUSE, *persons being therein.* By 23. *Hen. 8. c. 1.* and 25. *Hen. 8. c. 3.* to rob any person or persons in their dwelling-house or dwelling-place, the owner or dweller in the same house, his wife, his children, or servants being then within, and put in fear and dread by the same, is FELONY *without clergy*,

2. Hawk. 497.

By 1. *Edw. 6. c. 12. s. 10.* to break a house burglariously, if in the night, or to break a house and commit a felony therein, if in the day, *any person* being then in the same house where the same breaking shall be, and thereby put in fear and dread, is FELONY *without clergy*,

Kelynge, 58.  
Foster, 108.

THERE must be an *actual* breaking of *the house* or some part of it, as of a cupboard or door, to oust the offender of his clergy by this statute.

2. Hawk. R. C.  
498.  
2. Hale, 355.  
Pop. 84.  
11. Co. 36.  
Kelynge, 27.  
Staunford, 129.

By 5. & 6. *Edw. 6. c. 9.* to rob any person in any part or parcel of their dwelling-house, or in any place within the precincts of the same, the owner, his wife, children, or servants being in the same house or place at the time, whether the owner, his wife, or children, shall be sleeping or waking, is FELONY *without clergy*.

27. ROBBERY IN A DWELLING-HOUSE, *no person being therein*. By 39. Eliz. c. 15. to take away in the day-time any money, goods, or chattels, being of the value of *five shillings* or upwards, in any dwelling-house or houses, or any part thereof, or any out-house or out-houses belonging to and used with any dwelling-house or houses, at the time such larceny committed, is FELONY *without clergy*. 2. Hawk. P.C. 500.  
2. Hale, 356.  
Kelynge, 30.  
11. Co. 36.  
Cro. Car. 473.  
1. Jones, 394.  
Cowp. 5.  
Foster, 357.  
Salk 542.  
Ld. Ray. 842.

28. ROBBERY IN A BOOTH OR TENT. By 5. & 6. Edw. 6. c. 9. to *rob* any person in any booth or tent, in any fair or market, the owner, his wife, his children, or servant or servants then being within the booth or tent, whether they shall at the time be sleeping or waking, is FELONY *without clergy*. 2. Hawk. P.C. 498.  
Hale's Summary, 236.  
2. Hale, P.C. 355.  
Poph. 84.  
Hetley, 64.

29. HOUSEBREAKING. By 3. & 4. Will. & Mary, c. 9. to *rob* any dwelling-house in the day-time, any person being therein, and put in fear, or to comfort, aid, abet, assist, counsel, hire, or command any person to commit such offence, is FELONY *without clergy*. 2. Hawk. P.C. 497.  
Kelynge, 58.  
Foster, 108.

ALTHOUGH this part of the statute does not expressly signify that *breaking and entering* the house is necessary to constitute the crime, yet as the word *rob*, in a legal construction, always includes the idea of *force and violence*, it is held, that the ingredients of *breaking and entering* are *ex vi termini* included in, and implied by, the term *rob*; and it is settled in a variety of determinations upon the statutes relating to this subject, that the breaking must be of a dwelling-house, in the same way as it would be necessary to constitute *burglary* at Common Law. Trapshaw's Case, Cases in Crown Law, p. 364.

By 3. & 4. Will. & Mary, c. 9. to break any dwelling-house, shop, or warehouse thereunto belonging, or used therewith, in the day-time, and feloniously to take away any money, goods, or chattels, of the value of *five shillings* or upwards, therein being, although no person shall be with-  
in

in such dwelling-house, shop, or warehouse; or to comfort, aid, abet, assist, counsel, hire, or command any person to commit such offence, is *FELONY without clergy*.

2.Hawk.P.C.

491.

4.Bl.Com.240

30. **STEALING IN A DWELLING-HOUSE.** By 12. *Ann.* c. 7. to steal any money, goods or chattels, wares or merchandizes, of the value of *forty shillings* or more, being in a dwelling-house or out-house thereunto belonging, although such house or out-house be not actually broken by such offender, and although the owner of such goods, or any other person, be or be not in such out-house; or to assist or aid any person to commit such offence, is *FELONY without clergy*.—But this act shall not extend to apprentices under the age of fifteen years, who rob their masters in the manner above described.

1.Hawk.P.C.

250\*

31. **ASSAULTING WITH INTENT TO ROB.** By 7. *Geo.* 2. c. 22. “ If any person, with any offensive weapon, shall assault, or by menaces, or by any forcible or violent manner, demand any money or goods of or from any other person, with a felonious intent to rob such person, he shall be transported for seven years.”—There must be both an assault or menace and a demand to complete this offence, and both of them must be on the person intended to be robbed; but a demand may be by action as well as words; as if a dumb man put a pistol and his hat into a coach. The assault must be made with an offensive weapon, and it must be proved to have been of the same kind as laid.

#### XIV. *Malicious Mischief.*

4. Bl. Com.

243.

**MALICIOUS MISCHIEF**, or damage, is a species of injury to *private property*, which the law considers as a *public crime*,

1. Burn's Just.

228.

2. Bl. Rep. 722.

1. Hawk.P.C.

180. *in notis*,

1. **WOUNDING CATTLE.** By 22. & 23. *Car.* 2. c. 7. to kill or destroy any horses, sheep, or other cattle in the night-time, is *FELONY*.

BY

By 9. *Geo. 1. c. 1.* to kill, maim, or wound any cattle maliciously, whether by night or by day, is FELONY *without clergy* (a).

(a) The malice must be conceived against the owner of the cattle; for if it appear to be against the cattle only, and not against the owner, it has been held, that the offender is not within the penalty of the act. *Pearce's Case, Gloucester Assizes 1789, coram HEATH, Justice.*

By 37. *Hen. 8. c. 6.* to cut out, or cause to be cut out, the tongue of any tame beast alive, belonging to another person, incurs treble damages to the party, and a fine of ten pounds to the King.

2. SLAUGHTERING HORSES. By 26. *Geo. 3. c. 71.* no person shall use any place for slaughtering cattle, not to be killed for butcher's meat, without a license from the quarter sessions, on a certificate from the minister and churchwardens, that the party is a fit person to be licensed: and if such person slaughter any cattle without such license, or giving notice as the act directs, he shall be guilty of FELONY.—And if he destroy, burn, or rub with lime or other corrosive matter, the skin or hide of any beast slaughtered by him, he is guilty of a MISDEMEANOR.

3. SINKING SHIPS. By 22. & 23. *Car. 2. c. 11.* 1. *Hawk. P.C.* 219. *Geo. 1. c. 12.* and 11. *Geo. 1. c. 29.* if any captain, master, mariner, or other officer belonging to any ship, shall wilfully cast away, burn, or otherwise destroy the ship to which he belongs, or procure the same to be done, to the prejudice of the owners, of any merchant, or the underwriter of any policy thereon, it is FELONY *without clergy.* *Prim. P. L. 79.*

4. DESTROYING TURNPIKES. By 1. *Geo. 2. c. 19.* and 8. *Geo. 2. c. 20.* to break down, cut down, pluck up, level, or destroy any turnpike gate, or any posts, rails, wall, or other fence thereto belonging; or any chain, bar, or fence, of any kind whatsoever, set up or erected by act of parliament, to prevent passengers passing without paying toll, is FELONY *without clergy.*

BUT

BUT by 13. *Geo.* 3. c. 84. f. 42. to commit any of the offences aforesaid, or to destroy any crane, or machine, or engine, erected on any turnpike road by authority of parliament for weighing carriages, is TRANSPORTATION for seven years, or imprisonment at the discretion of the court.

5. LEVYING DYKES. By 13. *Edw.* 1. c. 46. to overthrow a hedge or dyke in the night-time, subjects the offender by 3. & 4. *Edw.* 6. c. 6. to treble damages, &c.

By 6. *Geo.* 1. c. 16. to break down, throw down, level, or destroy, any hedges, gates, posts, styles, railing, walls, fences, dykes, ditches, banks, or other inclosures of woods, parks, coppices, or plantations, incurs by 6. *Geo.* 1. c. 48. three months imprisonment and whipping, with remedy and satisfaction according to 13. *Edw.* 1. c. 46.

By 16. *Geo.* 3. c. 30. to destroy the paleings or inclosure of any park or place where deer are kept, is 30l. for the first offence, and for the second, TRANSPORTATION for seven years.

By 9. *Geo.* 3. c. 29. f. 3. to destroy or damage any fence for dividing or inclosing any common, waste, or other lands or grounds, divided by authority of parliament, is FELONY.

1. Hawk. P.C.  
194

6. DAMAGING BRIDGES. By 9. *Geo.* 1. c. 29. f. 6. to damage or destroy *Westminster-bridge*, or any part thereof, is FELONY without clergy.—And the same is enacted by 31. *Geo.* 2. c. 10. f. 6. respecting *London-bridge*. And by 12. *Geo.* 1. c. 36. f. 3. respecting *Fulham-bridge*. But by 20. *Geo.* 2. c. 22. the distinction of *Walton-bridge*; by 23. *Geo.* 2. c. 37. of *Hampton-court-bridge*; by 24. *Geo.* 2. c. 36. of *Ribble-bridge*; by 28. *Geo.* 2. c. 45. of *Sandwich-bridge*; by 29. *Geo.* 2. c. 86. of *Blackfriars-bridge*; by 29. *Geo.* 2. c. 73. of *Urse-bridge*; by 30. *Geo.* 2. c. 59. of *Jeremiah's ferry*; by 30. *Geo.* 2.

30. *Geo. 2. c. 63.* and 31. *Geo. 2. c. 48.* of *Old Brentford-bridge*, and by 31. *Geo. 2. c. 59.* of *Trent-bridge*, is made single felony, and within the benefit of clergy.

7. CUTTING POWDIKE. By 22. *Hen 8. c. 11.* <sup>1. Hawk. P.C.</sup> perversely and maliciously to cut down or destroy <sup>198.</sup> the powdike in the fens of *Norfolk* and *Ely*, is <sup>4. Bl. Com.</sup> <sup>243.</sup> FELONY.

8. OPENING SLUICES. By 1. *Geo. 1. c. 19.* <sup>1. Hawk. P.C.</sup> and 8. *Geo. 2. c. 20.* to pull down, pluck up, level, <sup>200.</sup> or destroy, any lock, sluice, flood-gate, or other works, on any river made navigable by authority of parliament, is FELONY *without clergy*.

By 8. *Geo. 2. c. 20.* to pull up any flood-gate fixed in any wear or lock, in or upon any navigable river, for preserving the navigation thereof, is punishable by one month's hard labour in the house of correction, and the hundred liable to a penalty of twenty pounds.

By 10. *Geo. 2.* to remove and carry away any piles, chalk, or other materials, driven into the ground, or used for securing any marsh, or sea-walls, or banks, to prevent the lands from being overflowed, incurs a penalty of twenty pounds.

By 6. *Geo. 2. c. 37.* to break down the banks of any river, or any sea bank, whereby the lands are overflowed or damaged, is FELONY *without clergy*.

By 27. *Geo. 2. c. 19.* to destroy any erection made for the purpose of benefiting the *Bedford-Level*, is FELONY *without clergy*.

BUT by the 4. *Geo. 3. c. 12. f. 5.* which recites, that the laws in being were not sufficient to prevent these mischiefs, it is enacted, that whoever shall wilfully and maliciously damage or destroy  
any



any banks, flood-gates, sluices, or other works, or shall open or draw up any flood-gate, or do any other wilful hurt or mischief to any navigation erected by authority of parliament, so as to obstruct or hinder the carrying on such navigation, may be transported for seven years.

4. Bl. Com.  
342.

9. MOSS TROOPING. By 13. & 14. Car. 2. c. 22. and 18. Car. 2. c. 3. great, known, and notorious thieves and *spoil-takers*, in *Northumberland* and *Cumberland*, for theft done within the same, are declared guilty of FELONY *without clergy*.—But discretion is given to Justices of assize to TRANSPORT them *for life*.

2. Hawk.P.C.  
238.  
See Fielding's  
Penal Law, p.  
147.

10. CUTTING GARMENTS. By 6. Geo. 1. c. 23. f. 11: if any person shall wilfully and maliciously assault any person in the public streets or highways, with an intent to tear, spoil, cut, burn or deface, and shall tear, spoil, cut, burn or deface the garments or clothes of such person, he shall be guilty of FELONY, and be transported for seven years (*a*).

2. Hawk.P.C.  
238.

11. SPOILING HOP BINDS. By 6. Geo. 2. c. 37. f. 6. to cut any hop binds growing on poles, in any plantation of hops, is FELONY *without clergy*.

2. Hawk.P.C.  
238.

12. DEMOLISHING MINE ENGINES. By 9. Geo. 3. c. 29 to destroy or damage any engine for drawing coals from coal mines, or for drawing water from any mine of coal, lead, tin, copper, or other mineral; or any bridge, waggon-way, or

(*a*) *Renwick Williams*, the supposed MONSTER, was tried on this statute before MR. JUSTICE BULLER, at the Old Bailey in May Sessions 1790, for cutting the garments of *Sophia Porter*. It appeared very clearly that his intention was to injure her person, and he in fact, with some sharp instrument, cut through her silk

gown, and several petticoats, and made a wound near four inches deep and six long, just below the hip bone. The jury found, that in carrying this intention against her person into execution, he had also an intention to cut her garments; but it was reserved for the Judges to decide, whether this case was within the meaning of the act.

trunk,

trunk, belonging to the same, is **FELONY**, and transportation for seven years.

13. **INJURING LOOMS.** By 4. *Geo.* 3. c. 37. <sup>1.Hawk.P.C. 239.</sup> f. 16. and 22. *Geo.* 3. c. 40. to break or enter with force into any house, shop, or place, with intent to cut or destroy any linen yarn, linen cloth, serge, or other woollen goods, velvet, wrought silk, or other silk manufacture; cotton, callico, or other cotton or linen manufacture; or any the tools, implements, or utensils used in manufacturing the same, is **FELONY without clergy**.

14. **BREAKING GRANARIES.** By 11. *Geo.* 2. c. 22. <sup>1.Hawk P.C.</sup> to beat or wound any person, with intent to deter <sup>243.</sup> or hinder him from purchasing any corn at market; or to stop or seize any waggon or carriage loaded with meal or grain, is punishable by three months imprisonment for the first offence, and for the second, **FELONY without clergy**.

By 11. *Geo.* 2. c. 22. f. 2. maliciously to destroy any storehouse or granary, ship or barge, &c. where corn shall be kept in order to be exported, or to enter such place and carry away any corn, flour, meal or grain therefrom, is **FELONY without clergy**.

15. **FORGERY**, or the *crimen falsi*, is “the <sup>1.Hawk.P.C. 335.</sup> fraudulent making or altering of a writing, to <sup>4. Bl. Com. Co. P. C. 169.</sup> the prejudice of another man’s right;” for <sup>Pulton, 46.</sup> which, by the Common Law, the offender may suffer fine, imprisonment, and pillory. By 5. *Eliz.* c. 14. to forge, make, or knowingly to publish, or give in evidence, any forged *deed, court-roll, or will*, with intent to affect the right of real property, either freehold or copyhold, is punished by a forfeiture to the party grieved of double costs and damages; by standing on the pillory, and having both his ears cut off, and his nostrils slit and seared; by forfeiture to the crown of the profits of his lands; and by perpetual imprisonment.

ment. For any forgery relating to a *term of years or annuity, bond, obligation, acquittance, release, or discharge of any personal debt or demand*, the same forfeiture is given to the party grieved; and on the offender is inflicted the pillory, loss of one of his ears, and half-a-year's imprisonment. The second offence in both cases is FELONY *without clergy*.

1-Hawk. P.C.  
210.

BY 2. Geo. 2. c. 25. and the 7. Geo. 2. c. 22.  
 "Whoever shall falsely make, forge, or counterfeit, or shall cause or procure to be falsely made, forged, or counterfeited, or shall wilfully act or assist in falsely making, forging, or counterfeiting, any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for the payment of money, indorsement or assignment of any bill of exchange or promissory note for the payment of money; or any acquittance or receipt, either for money or goods; or any acceptance of any bill of exchange; or the number or principal sum of any accountable receipt, for any note, bill, or other security for the payment of money; or any warrant or order for payment of money or delivery of goods, with intention to defraud any *person* whatsoever; and by 31. Geo. 2. c. 22. § 78. and 18. Geo. 3. c. 18. with intent to defraud any *corporation* whatsoever; or shall with the like intent knowingly utter or publish the same as true, he shall SUFFER DEATH *without clergy*(a)."

(a) Besides these general acts, a multitude of others have inflicted capital punishment on the forging of BANK NOTES, BANK BILLS, &c. 8. & 9. Will. 3. c. 20. f. 36. 11. Geo. 1. c. 9. 12. Geo. 1. c. 32. 15. Geo. 2. c. 13. 13. Geo. 3. c. 79. EXCHEQUER BILLS, 9. Geo. 1. c. 12. 25. Geo. 3. c. 2. STAMPS, 5. Will. & Mary, c. 21. to 30. Geo. 3. c. 17. SOUTH SEA BONDS, 9. Ann. c. 27. 8. Geo. 1. c. 22. LOTTERY ORDERS, 25. Geo. 3.

c. 57. the SEAL of the LONDON and EXCHANGE ASSURANCES, 6. Geo. 1. c. 18. 14. Geo. 2. c. 37. MEDITERRANEAN PASSES, 4. Geo. 2. c. 18. MARRIAGE REGISTERS, 26. Geo. 2. c. 33. SEAMENS TICKETS, 9. Geo. 3. c. 50. TRANSFERS OF STOCK, 31. Geo. 2. c. 22. 4. Geo. 3. c. 25. all of which are collected and arranged in the first volume of the sixth edition of HAWKINS'S PLEAS OF THE CROWN, p. 204. to 213.

BY

BY 13. *Geo.* 3. c. 79. to make or use, or have in one's custody or possession, any frame, mould, or instrument for the making of paper with the words BANK OF ENGLAND visible in the substance of the paper, or to make or assist in making any such paper, is FELONY *without clergy*.

BY 13. *Geo.* 3. c. 79. s. 2. to engrave in mezzotinto upon any plate any promissory note, bill, &c. containing the words BANK OF ENGLAND, or BANK POST BILL, or any words expressing the sum or amount in whole letters or figures on a black ground, or to have any plate in one's custody for such purpose, shall be punished with six months imprisonment.

BY 11. *Geo.* 1. c. 9. s. 6. to erase any Bank of England note, or alter the same, or any indorsement thereon, or to tender such altered or erased note in payment, is FELONY: 1. *Strange*. 18.  
3. *Peer. Wms.*  
419.  
1. *Hawk.P.C.*  
205. *in notis.*

BY 31. *Geo.* 2. c. 10. s. 24. to personate the name or character of any person entitled to wages or prize-money for services on board a King's ship, or the executor or administrator of such person, in order to receive any of the monies so due to such person; or to forge any letter of attorney, bill, ticket, certificate, assignment, last-will; or any other power or authority whatsoever, in order to receive the monies due to such person for the services aforesaid; or to take a false oath to obtain the probate of any will, or letters of administration, in order to receive such monies, or to procure such offence to be committed, is FELONY *without clergy*. 1. *Strange*. 481. 671.  
703.  
1. *Willf.* 75.  
11. *St. Tr.* 213.  
219. 233.  
1. *Vezey*, 119.  
284.  
1. *Hawk.P.C.*  
212.

BY 31. *Geo.* 2. c. 22. s. 77. to forge any letter of attorney to transfer stock, or to receive any dividend thereon; or to forge the name of any proprietor, and demand by virtue thereof to receive any stock or dividend; or to personate any proprietor of stock, and thereby endeavour to

H h

receive

See Parr's Case  
Old Bailey,  
January Session  
1789.

receive the money of such proprietor, as if such offender were the true and lawful owner thereof; or to procure or aid the commission of any of the said offences, is FELONY *without clergy*.

Forging  
franks.

BY 4. *Geo.* 3. c. 24. s. 8. to counterfeit the hand-writing of any person whatsoever, in the superscription of any letter or packet to be sent by the post, is TRANSPORTATION *for seven years*.

HAVING described, in as ample a manner as the limits of our volume would admit, the several crimes and misdemeanors of which offenders may be guilty, we shall proceed to give a summary account of the manner by which they are brought to justice, and made to undergo the sentence of the Law.

4. Hawk. P. C.  
215.  
Co. P. C. 53.  
133.  
1. Hale, 448.  
2. Inst. 52.  
3. Bl. Com.  
561.

I. ARREST is the apprehending or restraining one's person, in order to be forthcoming to answer an alledged or supposed crime. Arrests may be made, 1st, By warrant; 2dly, By an officer without a warrant; 3dly, By a private person without a warrant; and, 4thly, By hue and cry.—FIRST, A warrant is a precept, under the hand and seal of some magistrate, issued on some charge made upon oath, setting forth the time and place of making it, and the cause for which it is made, to bring an offender before a magistrate, for the purpose of examining into the truth of the charge. A justice of the peace may issue a warrant to apprehend a person accused of felony, or any other offence; and, if properly penned, will, by 24. *Geo.* 2. c. 44. indemnify the officer who executes it. Formerly there ought to have been a fresh warrant for every county; but the practice of backing warrants had long prevailed without law, and was at last authorised by the 23. *Geo.* 2. c. 26. and 24. *Geo.* 2. c. 55.—SECONDLY, A justice of peace, or a constable, may apprehend a person for felony or breach of the peace in his own view, without

without warrant. The sheriff and coroner may apprehend any person within the county without a warrant. Watchmen may apprehend all offenders, particularly night-walkers, and commit them to custody till morning.—THIRDLY, Any private person that is present when a felony is committed is bound, on pain of fine and imprisonment, to arrest the offender.—FOURTHLY, By the 3. *Edw. 1. c. 9.* 4. *Edw. 1. c. 13.* *Edw. 1. c. 1. & 4. 27.* *Eliz. c. 13.* and 8. *Geo. 2. c. 16.* the constable, on information given him, according to the directions of those statutes, is bound to make HUE AND CRY.

2. COMMITMENT AND BAIL: When a delin-<sup>2. Hawk. P. C. 140. 179.</sup>  
quent is arrested he must be carried before a magis-<sup>2. Hale, 120.</sup>  
trate, where he must be either bailed or committed, <sup>Dalton, 114.</sup>  
unless it manifestly appear that he is not guilty of <sup>1. Burn's Justa 369.</sup>  
the crime laid to his charge, in which case only it  
is lawful to discharge him without bail.—By 2. & 3.  
*Phil. & Mary, c. 10.* every justice, beforewhom any  
person shall be brought for manslaughter or for  
felony, or for suspicion thereof, shall take the  
examination of such prisoner, and information of  
them that bring him of the fact and circumstances  
thereof, and shall put the same into writing, and  
bind over the witnesses to appear at the next general  
gaol delivery; and if the charge be made out, the  
prisoner must be committed or admitted to bail.—  
A COMMITMENT must be in writing, under the  
hand and seal of the person by whom it is made,  
expressing his office or authority, the time and  
place at which it is made, and be directed to the  
gaoler. But though the charge be made out, if  
the offence be bailable, the justice must admit the  
prisoner to bail.—No justice of the peace can bail,  
1st, Upon an accusation of treason: nor, 2dly, Of  
murder: nor, 3dly, In case of manslaughter, if the  
prisoner be clearly the slayer, and not barely  
suspected to be so, or if any indictment be  
found against him: nor, 4. Such as, being  
committed for felony, have broken prison;  
H h 2 because

because it not only carries a presumption of guilt, but is also superadding one felony to another : 5. Persons outlawed : 6. Such as have abjured the realm : 7. Approvers, of whom we have spoken in the preceding part of this work, and persons by them accused : 8. Persons taken in the mainour, or in the act of felony : 9. Persons charged with arson : 10. Excommunicated persons, taken by writ *de excommunicato capiendo* : all which are clearly not admissible to bail by the justices. Others are of a dubious nature; as, 11. Thieves openly defamed and known : 12. Persons charged with other felonies, or manifest and enormous offences, not being of good fame : and, 13. Accessaries to felony, who labour under the same want of reputation. These seem to be in the discretion of the justices, whetherailable or not. The last class are such as must be bailed upon offering sufficient surety ; as, 14. Persons of good fame charged with a bare suspicion of manslaughter, or other inferior homicide : 15. Such persons being charged with petit larceny, or any felony not before specified : or, 16. with being accessary to any felony. Lastly, it is agreed that the court of King's Bench (or any Judge thereof in the time of the vacation), may bail for any crime whatsoever, be it treason (a), murder (b), or any other offence, according to the circumstance of the case.

2. Inst. 189.  
Litch. 12.  
Vaugh. 157.  
Comb. 111. 298.  
1. Comyn's  
Dig. 497.  
Skin. 683.  
Salk. 105.  
Stra. 911.  
1. Comyn's  
Dig. 497.

THE next step towards the punishment of offenders is their prosecution ; and this is generally by,

Wood's Inst. 618.  
Co. Lit. 126.  
West's Symb. 3. pl. 61.  
Bacon, 19.  
Kely. 8.  
4. Bl. Com. 299.

3. INDICTMENT, from *Indictari*, to accuse, is a bill or accusation drawn up in writing, at the suit of the King, for some offence either criminal or

(a) In the reign of Queen Elizabeth it was the unanimous opinion of the Judges, that no court could bail upon a commitment for a charge of high treason by any of the Queen's privy council. (1. Anderl. 298.)

(b) *In omnibus placitis de feloniam solet accusatus per plegios dimitti, præterquam in placito de homicidio.* (Glanv. l. 14. c. 1.) *Sciendum tamen quod in hoc placito non solet accusatus per plegios dimitti, nisi ex regie potestatis beneficio.* (Ibid. c. 3.)

penal,

penal, and preferred to A GRAND JURY of twelve men or more, upon their oaths, and found by them to be true. But when such accusation is found by a grand jury without any bill brought before them, it is called A PRESENTMENT: and where it is found by jurors returned to enquire of that particular offence only, it is called AN INQUISITION. Indictment must have precise and sufficient certainty. By 1. Hen. 5. c. 5. they must set forth the christian name, surname, and addition of the state and degree, mystery, town or place, and the county of the offender. The day and township also, in which the fact was committed, must be named. The offence itself, also, must be set forth with clearness and certainty; and the value of the thing which is the subject or instrument of the offence, must sometimes be expressed (a). When the indictment is found against an offender, the prosecutor is entitled to,

2. Hawk. P.C.

299.

2. Hale, 153.

Lamb. bk. 4.

ch. 3.

4. PROCESS. The proper process on an indictment for any petty misdemeanor, or on a penal statute, is a *venire facias*, which is in the nature of a summons, and upon default of appearance a *distress in fine* shall issue. But if the sheriff return, that the defendant has no lands, then a *capias* shall issue to take his body. But on indictment for treason or felony, a *capias* is the first process.—And now in the case of misdemeanors, it is the usual practice, on a certificate of an indictment being found, for any Judge to award a *capias* immediately, in order to bring in the defendant.

4. Bl. Com.

(a) Besides the mode of proceeding by INDICTMENT, there are, according to the nature of the subject, modes of proceeding by INFORMATION. Informations are of three sorts, viz. *qui tam*, or *ex officio*, or by the Master of the Crown Office: the first is grounded on penal statutes, where the party demands something, as well for the King as himself; the second

are those which are filed by the Attorney General; and the third, such as, under the statutes of the 4. & 5. Will. & Mary, c. 18. and 9. Ann. c. 20. may, by leave of the court, be filed in particular cases by THE MASTER.—There are also proceedings in nature of APPEALS, but they are too obsolete to be treated of.

H h 3

5. ARRAIGN-



2. Hale, 216.  
4. Bl. Com. 317.  
2. Hawk. P. C.  
436.

5. **ARRAIGNMENT.** To arraign is nothing more than to call the prisoner to the bar of the court, to answer the matter charged upon him by the indictment. By 37. *Edw.* 3. c. 15. every arraignment must be in *English*, and the prisoner ought to be used with all the humanity and gentleness which is consistent with his situation,

THE prisoner, upon his arraignment, may either *confess*, *stand mute*, or *plead to issue*.

2. Hawk. P. C.  
469.  
Straund. P. C.  
142.  
Kely. 11.  
Cro. Eliz. 144.  
2. Jones, 156.

6. **A CONFESSION** is either express or implied. An express confession is where a person directly confesses the crime with which he is charged; which is the highest conviction that can be, and may be received, notwithstanding its repugnancy, after the plea of not guilty recorded. An implied confession is where a defendant, in a case not capital, does 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.

2. Hawk. P. C.  
ch. 30.

7. **STANDING MUTE.** A prisoner is said to stand mute when, being arraigned for treason or felony, he either makes no answer at all, or answers foreign to the purpose, or, having pleaded not guilty, refuses to put himself upon the country. If he make no answer at all, a jury is to be returned *instanter*, to try whether he stands mute of malice, or by the visitation of God; and if it be found of malice, it shall by the 12. *Geo.* 3. c. 20. in cases of felony and piracy, amount to a conviction; but if he be found mute *ex visitatione Dei*, the court shall proceed in the trial, and examine all points as if he had pleaded not guilty; and if found guilty, he may be *transported* (a); but whether judgment of death can be given against such prisoner, is a point yet undetermined (b). If he answer foreign to the purpose, or refuse to put himself upon his trial, if the plea is found against him, it shall amount to a conviction (c).

(a) Cases in  
Crown Law,  
394.  
(b) 2. Hale,  
317.

(c) 2. Hawk.  
P. C. 461.

8. PLEA AND ISSUE. A plea is the defensive matter alledged by a prisoner on his arraignment; and it may be either,—1. To the jurisdiction: 2. A demurrer: 3. A plea in abatement: 4. A special plea in bar: or, 5. The general issue.

9. A PLEA TO THE JURISDICTION is when an indictment is taken before a court that has no cognizance of the offence; as if a man be indicted for a rape at the sheriff's tourn.

10. A DEMURRER is when the fact, as alledged, is allowed to be true, but it is insisted that it is no crime; but as the same advantage may be taken on the plea of not guilty, or in arrest of judgment, demurrers are seldom taken.

11. A PLEA IN ABATEMENT is principally for a *misnomer*, or wrong name, or a false addition of the prisoner; as if *James Allen, Gentleman*, be indicted by the name of *John Allen, Esquire*, it may be pleaded that his name is *James* and not *John*, and that he is a gentleman, and not an esquire; and if either fact be found by a jury, the indictment shall abate.

12. A SPECIAL PLEA IN BAR gives a reason why the prisoner should not answer at all, and is of four kinds:—1. *Autrefois acquit*: 2. *Autrefois convict*: 3. *Autrefois attain*: 4. A pardon.

13. AUTREFOIS ACQUIT, or a former acquittal, is grounded on this universal maxim of the Common Law of England, That no man is to be brought into jeopardy of his life more than once for the same offence: and therefore where a man is once found not guilty on an indictment, free from error, and well commenced before any court which hath jurisdiction of the cause, he may, by the Common Law, in all cases whatsoever, plead such acquittal in bar of any subsequent indictment for the same crime.

4. Bl. Com. 329.  
2. Hawk. P. C. 524.  
Staunf. P. C. 105.  
4. Co. 40.  
Crompt. 111.  
2. Hale, 241.  
Co. Lit. 128.

2. Hawk.P.C.  
 §34.  
 4. Co. 39.  
 2. Leon. 83.  
 Cromp. 113.  
 Kely. 94.  
 1. Saik. 62.  
 Cro. Car. 147.

14. AUTREFOIS CONVICT is a plea depending on the same principle as the former: thus, a conviction of manslaughter is a good bar to an indictment of murder for the same fact; but a conviction of one felony cannot be pleaded in bar of another; and by 8. *Eliz.* c. 4. and 18. *Eliz.* c. 7. a person admitted to his clergy for any felony shall not, in respect thereof, bar a subsequent prosecution for another felony not within the benefit of clergy.

4. Bl. Com.  
 §31.  
 2. Hale, 251.  
 Staund. 107.  
 12. Co. 100.  
 6. Co. 13.  
 Co. P. C. 213.  
 2. Hawk.P.C.  
 §32.

15. AUTREFOIS ATTAINT, or a former attainder, may be pleaded in bar, whether it be for the same felony or any other; because the party being dead in law by the first attainder, and having forfeited all that he can forfeit, it is as absurd to attaint him a second time as to kill one that is dead: but where this reason fails; as where the first attainder is reversed for error, or pardoned; or where the attainder is for *felony*, and the prosecution *high treason*; or where the attainder is for one felony, and the party is indicted for another, together with accessaries; the plea of *autrefois attaint* cannot be pleaded; nor, indeed, in any case but where the second trial would be quite superfluous: and therefore it cannot be pleaded to a personal action, for a person attainted is as liable to answer a personal action as if he had never been attainted.

4. Bl. Com.  
 §31.  
 2. Hawk.P.C.  
 §61.  
 1. State Trials,  
 578.  
 1. Bl. Rep. 479.  
 Cro. Eliz. 125.  
 2. Bl. Rep. 797.

16. PARDON may also be pleaded in bar, whether it be granted generally under an act of parliament, or particularly to the person who pleads it; but it must be pleaded, for the court cannot *ex officio* take notice of it. Neither the sign manual, nor article of surrender, importing a pardon, can be pleaded in bar; for a pardon must be under the great seal. A pardon, allowed before sentence, stops the judgment, and of course prevents the attainder and corruption of blood, which nothing but an act of parliament can restore,

store. But if none of these pleas be pleaded, or be over-ruled by judgment of *respondeat ouster*, the prisoner must then rely upon,

17. THE GENERAL ISSUE, or plea of *not guilty*, 4. Bl. Com. upon which plea alone the prisoner can receive his <sup>332</sup> final judgment of death. To the plea of not guilty the clerk of assize, or clerk of the arraigns, joins issue *viva voce* on the part of the crown, and the prisoner is asked how he will be tried; for antiently he might chuse the *ordeal*, the *consigned* by *battle*, or by JURY *per patriam*. To this he generally answers, "By God and the country;" and the clerk replies, "God send thee a good deliverance." If a prisoner refuse to put himself upon the inquest in the usual form, the indictment is taken *pro confesso*; if for treason, by the Common Law; if for felony or piracy, by the 12. Geo. 3. c. 30.; but if the issue be regularly joined, the immediate consequence is,

18. THE TRIAL. The trial of a peer of the 4. Bl. Com. realm must be *per pares*, or by his peers. 1. The <sup>342</sup> peers need not all agree in their verdict, but the <sup>Wood's Inst.</sup> greater number, consisting of *twelve at least*, will <sup>634</sup> conclude and bind the minority. 2. The trial <sup>Co. Lit. 156</sup> may be in any county in *England*. 3. The peers <sup>294</sup> are not sworn upon their trial, but give their <sup>2. Inst. 49</sup> judgment upon their honour, *seriatim*, beginning <sup>Co. P. C. 28</sup> with the youngest peer. 4. The prisoner cannot <sup>4. Inst. 23</sup> challenge any of his peers. 5. They give <sup>Kely. 54</sup> their verdict in the absence of the prisoner. <sup>Staund. P. C.</sup> 6. In case of high treason, all the judgment is <sup>bk. 3. and see</sup> usually pardoned except the beheading. 7. In <sup>2. Hawk. P. C.</sup> the case of murder, the judgment must be ac- <sup>59</sup> cording to the provision of the 25. Geo. 2. c. (a). (a) By all the <sup>Judges in the</sup> 8. If the day appointed for execution should <sup>case of Earl</sup> lapse before execution done, a new time may be <sup>Ferrers.</sup> appointed by the High Court of Parliament before <sup>Foster, 139</sup> which such peer shall have been attainted, or by the court of King's Bench, if the Parliament be not then sitting

Earl Ferrers' Case, Foster, 140.

(a) 9. Hen. 3. c. 29.

fitting (b). THE TRIAL *by jury*, or the country, *per patriam*, is that trial by the *peers* of every *Englishman*, which is secured to him by the GREAT CHARTER (a). When, therefore, a prisoner on his arraignment has pleaded not guilty, and put himself on his country, the sheriff must return a *jury*, who are sworn well and truly to try the matter according to the *evidence*, and to give a true *verdict* thereon; but if any question of law should arise, the prisoner may have *counsel assigned*, and in some cases a *copy of the indictment*.

6. Mod, 247.

19. THE JURY. The sheriff of the county must return a panel of jurors, *liberos et legales homines de vicineto*; that is, freeholders without just exception, and of the *visne* or neighbourhood. For this purpose, if the proceedings be in the King's Bench, a *venire facias* issues to the sheriff, as in civil cases; and the trial of a *misdemeanor* is had at *nisi prius*, unless a *trial at bar* be applied for and allowed; and in every capital offence the trial must be at bar, unless the Attorney-general consents to the granting a *nisi prius*. But if the proceedings be before a court of oyer and terminer and gaol delivery, the Justices direct a general precept to the sheriff, who returns *forty-eight jurors* to try all *felons* during the session. The jurors are to be sworn as they appear, to the number of *twelve*, unless they are challenged. Challenges may be made, as in civil cases, to the whole array, or to the separate polls, either *propter honoris respectum*, *propter defectum*, *propter affectum*, or *propter delictum*. These are styled CHALLENGES *for cause*, and may be made without stint; but the prisoner is also entitled to *peremptory challenges*, without assigning any cause, which in treason may be to the number of *thirty-five*, and in felony to *twenty*. This privilege of challenging peremptorily cannot be exercised on the part of the King, and he must wait until the panel be gone through before  
he

he can assign his cause. When the jury are sworn, the next stage is to adduce

20. THE EVIDENCE. Evidence, so far as it more particularly concerns *criminal cases*, may be comprized under the following leading points :

(1.) IN cases of life, no evidence is to be given against a prisoner but in his presence, 1. St. Tr. 277.

(2.) THAT no bill of exception, which is given by the statute *West. 2. c. 3.* is grantable on any indictment of treason or felony, or, as some Reporters say, in any criminal cases whatever, 1. St. Tr. 238.  
1. Sid. 85.  
1. Keb. 384.  
1. Lev. 68.  
Kely. 15.  
2. Hawk. 602.

(3.) IN all cases of high treason, petit treason, and misprision of treason, by statutes *1. Edw. 6. c. 12.* and *5. & 6. Edw. 6. c. 11.* two lawful witnesses are required to convict a prisoner, unless he shall willingly and without violence confess the same; and by *7. Will. 3. c. 3.* the confession of the prisoner shall not countervail the necessity of two witnesses, unless such confession be made in open court. But this does not extend to treasons relating to the coin, 10. Mod. 244.  
Hale's Summary, 262.  
2. St. Tr. 108.  
144.  
4. St. Tr. 40.  
Folter, 235.  
4. Bl. Com.  
357.  
2. Hawk. 603.

(4.) THESE two witnesses must be to the same overt act, or one witness to one overt act, and another witness to another overt act, of the same kind of treason, Ray. 407.  
2. Hawk. 603.  
7. Will. 3.  
c. 3. s. 2.

(5.) THE confession of the prisoner, whether taken before the magistrate on his examination, or in discourse with private persons, may be given in evidence against the party confessing, but not against others, except the confession was unduly obtained, under threats of punishment or promises of favour; but wherever a man's confession

is made use of against him, it must be taken all together, and not by parcels.

*Cases in Crown Law*, 249.  
2. *Hawk.* 604.  
*in notis.*

(6.) ALL acts and facts done, although in consequence of a confession unduly obtained, may be given in evidence, although the confession itself cannot.

*Kely.* 55.  
1. *Lev.* 180.  
*Salk.* 281.  
2. *Keb.* 19.  
*Q. Eliz.* 501.  
3. *St. Tr.* 941.  
1. *Hale*, 305.  
2. *Hale*, 284.  
*Folter*, 337.  
2. *Hawk.* 605.  
*Bull. N.P.* 239.

(7.) THE deposition of an informer, taken upon oath, and subscribed by him before a magistrate, in the presence of the prisoner, 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 out of the way by the prisoner's procurement.

2. *St. Tr.* 529.  
802.  
1. *Hale*. 285.  
2. *Hawk.* 607.

(8.) HEARSAY evidence is not admissible, either for or against a prisoner, not only because it is not upon oath, but also because the other side hath no opportunity of a cross-examination; but what the prisoner may have been heard to say, may be given in evidence against him, but not for him; he may, however, cross-examine the witnesses for the prosecution as to any thing which they may have heard him say relating to the fact he is charged with. But though hearsay be not allowed as direct evidence, yet it has been admitted in corroboration of a witness's testimony, to shew that he affirmed the same thing on other occasions, and that he is still constant to himself; or it may be made use of by way of inducement or illustration of what is properly evidence. But clearly it is not evidence in chief, and it seems doubtful whether it is so in reply or not.

*Bull. N.P.* 294.  
1. *Mod.* 283.

2. *St. Tr.* 325.  
2. *Hawk.* 606.

*Haliday v. Sweeting*,  
*Mich.* 16. *Geo.*  
5.

*Bull. N.P.* 296.

(9.) THE prosecutor, except in the case of barratry, cannot enter into the prisoner's character, unless the prisoner enable him so to do, by calling witnesses in support of it; and even then the prosecutor cannot examine to *particular facts*,  
the

the general character of the prisoner not being put in issue, but coming in collaterally. For the same reason, if you would impeach the credit of a witness, you can only examine to his *general character*, and not to particular facts: every man is supposed capable of supporting the one, but it is not likely he should be prepared to answer the other without notice; and unless his general character and behaviour be in issue, he has no notice: but other witnesses may be called to impeach his credit respecting any matter relative to the issue; for whatever is material to the issue, each party must come prepared to support or deny.

(10.) A PARTY never shall be permitted to produce general evidence to discredit his own witness; but if a witness prove facts which make against the party who called him, yet the party may call other witnesses to prove that these facts were otherwise.

Buller's Nisi  
Prius, 295-298.

(11.) COMPARISON of hands is no evidence of a man's hand-writing in criminal cases; but papers found in the custody of a prisoner may be read in evidence against him; otherwise they must be proved to be his hand-writing by persons who have *seen* him write.

Ld. Ray. 39.  
2. Viner, 204.  
Skin. 579.  
4. St. Tr. 440.  
447.  
6. St. Tr. 478.  
1. Burr. 644.  
2. Hawk. 607.  
Bull. N.P. 297.

(12.) THE husband and wife, being as one and the same person in affection and interest, can no more give evidence for one another, in any case, than for themselves; nor shall the one be admitted to give evidence against the other. Yet some exceptions have been allowed to this general rule, in cases of evident necessity.

Co. Lit. 6.  
2. Ro. Ab. 686.  
1. Hale, 301.  
2. Hale, 297.  
Hutt. 116.  
Ray. 1.  
Saik. 289.  
2. Hawk. 602.

(13.) THE Judge, or one of the jurors, in a criminal case, may be a witness, but he cannot return again to try the cause.

Keiv. 12.  
Sid. 133.

(14.) AN



1. Hale, 303.  
2. Hawk. 608.  
Cases in  
Crown Law,  
14-119. 159.  
412.

(14.) An accomplice in the crime charged against the prisoner, may be a witness against him or for him; and it hath been determined, that the prisoner may be convicted on the single unsupported testimony of such a witness: but the court seldom calls an accomplice to give his evidence until some fair and unpolluted testimony be given of the fact charged against the prisoner; and where he stands unconfirmed, the jury will never give sufficient credit to a witness who swears in hopes of pardon, so as to convict a prisoner on his single uncorroborated testimony.

Bull. N.P. 283.  
Co. Lit. 6.  
1. Sid. 237.  
1. Keb. 836.  
1. Hale, 302.  
2. Hale, 279.  
2. Hawk. 610.

(15.) It is a general rule, that no person interested in the question can be a witness. The strict notion of the objection to the competency of a witness is upon a *voir dire*, that is, upon being examined upon oath whether he is to get or lose by the event of the cause. But this interest must be a present interest, for a future contingent interest will not be sufficient to prevent him from being a witness. An interest is, where there is a certain benefit or advantage to the witness attending the determination of the cause one way; therefore, a naked trust does not exclude a man from being a witness: but of this rule there are some exceptions. 1. The person to whose damage the criminal proceeding concludes, is a good witness to prove the fact. 2. A party interested will be admitted for the sake of trade, or the common usage of business. 3. A party interested will be admitted where no other evidence is reasonably to be expected. 4. A party interested will be admitted where he acquires the interest by his own act after the party who calls him to be a witness, has a right to his evidence. 5. A party interested will be admitted where the probability of interest is very remote.

Salk. 283.  
Cases in  
Crown Law.  
Sed vide  
3. St. Tr. 253.  
1. Peer. Wms.  
259.  
Bull. N.P. 284.

Bull. N.P. 288.  
2. Hawk. 611.

5 Mod. 16. 74.  
Kely. 33.  
Ray. 369. Co. Lit. 6. 2. Hawk. 609. Bull. N.P. 292. 1. Hale, 306. Cases in  
Crown Law, 382.

(16.) THERE are several crimes which so blemish reputation, that the party is ever after unfit to

be

be a witness; as treason, felony, and every *crimen falsi*, as perjury, forgery, and the like; for where a man is convicted of these glaring crimes, his oath is of no weight. But the burning in the hand, or benefit of clergy, is a statute pardon, and like other pardons restores a convict to his competency. Petty larceny, however, not being within the benefit of clergy, a convict for this offence can only be restored to his competency by the King's pardon.

(17.) INFIDELS cannot be witnesses; that is, such who profess no religion that can bind their consciences to speak truth. But where any man professes a religion that will be a tie upon him, he shall be admitted a witness, and sworn according to the ceremonies of his own religion; and therefore, a MAHOMEDAN may be sworn on the Alcoran, a Jew on the Old Testament, and a Scotch Covenanter by holding up his hand. But the affirmation of a Quaker is excluded in *criminal cases*, by the statute 7. & 8. Will. 3. c. 34. s. 6.

Co. Lit. 6.  
2. Hale, 279.  
4. St. Tr. 132.  
1. Atk. 44.  
Stra. 1104.  
2. Hawk. 612.  
Bull. N.P. 292.  
Cases in  
Crown Law,  
368.

(18.) PERSONS excommunicated cannot be witnesses, because, being excluded out of the church, they are supposed not to be under the influence of any religion; and the same law is said to hold place as to popish recusants; but it is thought that this construction is over severe.

Bull. N.P. 292.  
2. Bull. 153.  
1. Hawk. 612.

(19.) PERSONS outlawed may be witnesses, because they are punished in their properties, and not in their reputation; and the outlawry has no manner of influence on their credibility.

Co. Lit. 6.

(20.) THE want of natural understanding, or not possessing competent discretion, are good objections to a witness; and therefore infants, idiots, &c. under these disabilities, cannot be received. There seems to be no precise time fixed wherein *children* are excluded from giving evidence, but it will depend on the sense and understanding they appear

Bull. N.P. 292.  
2. Hawk. 612.  
Co. Lit. 6.  
2. Hale, 278.  
1. Brown, 47.

appear to possess on being examined by the court; but it has been determined by all the Judges, that a child of any age, although capable, cannot be examined without being sworn.

Cases in  
Crown Law,  
347.  
2. Hawk. 612.

(21.) A MAN deaf and dumb, with whom communication can be made by signs, may be sworn and give evidence on a criminal prosecution.

2. Hawk. P.C.  
622.  
Co. Lit. 227.  
Co. P. C. 110.  
2. Hale, 294.  
Sum. 267.  
4. Co. 43.  
Co. Car. 332.

21. THE VERDICT. A jury cannot in a criminal case give a privy verdict; but an open verdict may be either GENERAL, as *guilty* or *not guilty*; or SPECIAL, setting forth all the circumstances of the case. A verdict of *guilty* may be set aside, and a new trial granted; but there has yet been no instance of granting a second trial, when the prisoner was *acquitted* on the first. If the jury find a verdict of *not guilty*, the prisoner is for ever quit and discharged of the accusation; but if he be *convicted*, the judgment of the court regularly follows, unless suspended by

2. Hawk. P.C.  
471. 473.  
Staund. P. C.  
108.  
4. Bl. Com.  
327. 358.  
2. Hale, 323.

22. THE BENEFIT OF CLERGY; which was an ancient privilege of the Church, where one in orders claimed to be delivered to his ordinary, to purge himself of a felony; and after much contention between the ecclesiastical and temporal courts, it was at length agreed, that all *clerks* (among whom were reckoned *every person who could read*) who were indicted for any felony should first be arraigned in the secular jurisdiction, and then claim his benefit of clergy, either by way of declinatory plea, or in arrest of judgment. When this claim was allowed, the clerk was delivered to the ordinary to make his *purgation*, which was done by exculpating himself on his own oath, and the oaths of twelve *compurgators*; and by this purgation, as it was called, the party easily obtained his liberty. By the 4. Hen. 7. c. 13. persons convicted of felony, not being in *holy orders*, shall be burned in the brawn of the left thumb, before he is delivered to the ordinary, and not be admitted

mitted to clergy a second time. But by 18. *Eliz.* c. 7 instead of being delivered to the ordinary, he shall be discharged or detained in prison at discretion, not longer than *one year*. By 5. *Ann.* c. 6. the necessity of being able to read, in order to entitle a person to claim the benefit of clergy, is taken away; and if his clergy be allowed for any *theft* or *larceny*, he shall, besides being burned in the hand, be confined to hard labour, not less than six months, nor more than two years. But by 4. *Geo.* 1. c. 11. and 6. *Geo.* 1. c. 23. when any person is convicted of any larceny, whether petit, grand, or compound larceny, who is entitled to clergy, and only liable to burning in the hand, or whipping, the court, *instead* of such punishment, may transport the offender for seven years. By 19. *Geo.* 3 c. 74. the practice of burning in the hand is abolished, and instead thereof, except in the case of *manslaughter*, the court may order the offender to be whipped in the manner the act directs.

23. JUDGMENT. In describing the benefit of clergy, we have pointed out the judgment which those offenders may receive to whom the benefit of clergy is allowed; but upon a capital charge, where the benefit of clergy is taken away, when the jury have brought in their verdict "GUILTY," in the presence of the prisoner, he is either immediately, or at a convenient time soon after, asked by the court if he has any thing to offer, why judgment should not be awarded against him; and in this stage of the proceeding it is that motion must be made in arrest of judgment, either by pointing out some blemish upon the face of the record, praying benefit of clergy, or pleading a pardon; but if all these resources fail, the court proceeds to judgment<sup>(a)</sup>.

1. Hawk. P. C. 629.  
Co. P. C. 140.  
12. Co. 71.  
2. Hale, 397.

(a) Judgment may be reversed by writ of error.

THE JUDGMENT in *high treason* not relating to the coin is, "That he be carried back to the place from whence he came, and from thence

Co. P. C. 210.  
2. Hawk. P. C. 630.

“ be drawn to the place of execution, and be  
 “ there hanged by the neck, and cut down alive,  
 “ 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.”

JUDGMENT in *high treason relating to the coin*,  
 or for PETIT TREASON, is, “ that he shall be  
 “ drawn to the place of execution, and there  
 “ hanged by the neck till he be dead.”

WOMEN, in the case of high treason, were formerly  
 burned, but now by the 30. *Geo.* 3. c. 48. it is enact-  
 ed, “ That the judgment to be given and awarded  
 “ against any woman or women convicted of the  
 “ crime of high treason, or of the crime of petit  
 “ treason, or of abetting, procuring, or coun-  
 “ selling any petit treason, shall not be, that  
 “ such woman or women shall be severally drawn  
 “ to the place of execution, and be there burned  
 “ to death; but that such woman or women,  
 “ being so convicted as aforesaid, shall be seve-  
 “ rally drawn to the place of execution, and be  
 “ there hanged by the neck until she or they be  
 “ severally dead; any law or usage to the con-  
 “ trary thereof in any wise notwithstanding.

2. Hawk. P.C.  
 650.  
 Foster’s Crown  
 Law, 107.

“ AND that if any woman or women shall be  
 “ convicted of the crime of petit treason, or of  
 “ abetting, procuring, or counselling any petit  
 “ treason, then, and in every such case, such wo-  
 “ man or women shall be subject and liable to such  
 “ further pains and penalties as are particularly  
 “ specified and declared with respect to persons  
 “ convicted of wilful murder, in 25. *Geo.* 2. c. 37.  
 “ and the court before whom any such woman or  
 “ women shall be convicted, shall pass sentence  
 “ at such time, and shall give such orders with  
 “ respect to the time of execution, the disposal of  
 “ the convict’s body after execution, and all such  
 “ other matters and things as are directed to be  
 “ given by the said act with respect to persons  
 “ convicted of wilful murder.

“ That

“ That whenever any woman or women shall  
 “ be convicted of the crime of high treason, or  
 “ of the crime of petit treason, or of abetting,  
 “ procuring, or counselling any petit treason,  
 “ and judgment shall be given thereon according  
 “ to the directions of this act, then, and in every  
 “ such case, such woman or women, being so  
 “ attainted of such crimes respectively, shall be  
 “ subject and liable to such and the like for-  
 “ feitures, and corruption of blood, as they  
 “ severally would have been in case they had been  
 “ severally attainted of the like crimes before  
 “ the passing of this act.”

JUDGMENT for *præmunire* is, “ That he shall <sup>2. Hawk. P.C.</sup>  
 “ be out of the king’s protection, and that his <sup>631.</sup>  
 “ lands, tenements, goods and chattels shall be <sup>Co. Lit. 129.</sup>  
 “ forfeited to the King, and that his body shall  
 “ remain in prison at the King’s pleasure.”

JUDGMENT for *misprison of treason* is, “ That he <sup>2. Hawk. P.C.</sup>  
 “ shall be imprisoned during his life, and forfeit <sup>632.</sup>  
 “ all his goods and the profits of his lands.”

JUDGMENT in *murder* is, “ That you be taken  
 “ from hence to the place from whence you came,  
 “ and from thence on *Monday* (a) next to the place  
 “ of execution, there to be hanged by the neck  
 “ until you be dead, and your body to be after-  
 “ wards delivered to the surgeons to be dissected  
 “ and anatomised, pursuant to the statute; and  
 “ the Lord have mercy on your soul.”—Hang- <sup>Foster, 107.</sup>  
 ing in chains is no part of the judgment in mur-  
 der, but the judge may afterwards direct it by  
 special order to the sheriff.

THE consequences of judgment are forfeiture  
 and corruption of blood.

(a) The 25. Geo. 2. c. 37. the next day but one, the warrant  
 directs execution on the next day is of course made for the next  
 but one after sentence passed; *Monday*; by which means the re-  
 murderers therefore are generally *spite* of a day is obtained.  
 tried on a *Friday*, and *Sunday* being

4. Bl. Com. 370. 374. 416.  
2. Hawk. 636.  
3. Co. 2.  
Co. 1. C. 19.  
Co. Lit. 392.  
1. Hale, 242.

24. FORFEITURE. By attainder in HIGH TREASON the offender forfeits all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry on lands and tenements, which he had at the time of the offence committed, or at any time afterwards, to the crown forever: and also, the profits of all lands and tenements which he had in his own right for life or years, so long as such interest shall subsist; but a wife's *jointure* is not forfeited, although her *dower* is. This forfeiture relates back to the time of the offence committed. In PETIT TREASON and FELONY, the offender forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life, and after his death all his lands and tenements in fee-simple, but not them in fee-tail, to the crown for a year and a day; and the King may commit therein what waste he pleases. These forfeitures also relate back to the time of the offence committed.—A FELO DE SE forfeits no lands of inheritance or freehold, for he never is *attainted* as a felon.—The forfeiture of goods and chattels accrues in high treason, misprision of treason, petit treason, felonies of all sorts (whether clergyable or not), self-murder, petty larceny, and striking in *Westminster-hall*. Lands, therefore, are forfeited upon *attainder*, and not before; but goods and chattels are forfeited upon *conviction*, *standing mute*, or *flight-found*. In outlawry for treason or felony, land is forfeited only by the *judgment*, but goods and chattels by the *exigent*.—The forfeiture of goods and chattels only relates to the time of *conviction*, except in the case of *felo de se*, when it shall relate to the act done which was the cause of the death.

2. Hawk. P. C. 647.  
2. Bl. Com. 251.  
4. Bl. Com. 381.  
Co. P. C. 211.  
Staund. 195.

25. CORRUPTION OF BLOOD is another unavoidable consequence of attainder, so that an attainted person can neither inherit lands or hereditaments from his ancestor, or transmit them to any heir; for the person attainted shall obstruct all *descents*,  
Co. Lit. 41. 391.

where

where they are obliged to derive a title through him to a remote ancestor.

26. REPRIEVE. A reprieve, from *reprendre*, <sup>2.Hawk.P.C. 656.</sup> to take back, is the withdrawing of a sentence for an interval of time, whereby the execution is suspended. <sup>4.Bl.Com. 387.</sup> The causes for reprieve are various; as where the judges are not satisfied with the verdict, or the evidence is suspicious, or the indictment insufficient; or where a woman between judgment and execution proves to be with child; or if an offender become *non compos*: or if a pardon is granted: but if no reprieve be granted, then follows the last office of,

27. EXECUTION. In all cases, as well capital <sup>2.Hawk.P.C. 659.</sup> as otherwise, execution must be performed by the legal officer, the sheriff, or his deputy. <sup>4.Bl.Com. 396.</sup> The usage is, in the country, for the judge to sign the calendar, or list of the prisoners names, marking <sup>Co. P. C. 247.</sup> opposite to each the punishment he is to receive. <sup>Wood's Inst. 655.</sup> Upon the receipt of this *warrant*, for it is the only one the sheriff has, he is to do execution in a convenient time. In *London* the Recorder reports to the King in person the case of the several prisoners, and, receiving the royal pleasure, issues *his* warrant to the sheriff, directing execution on the day and at the place assigned. By 25. *Geo. 2. c. 37.* in murder execution must be done on the next day but one after sentence passed. The sheriff cannot alter the manner of execution, nor can the King change the punishment of the law.



## CHAPTER THE SEVENTH,

*Courts of Justice.*

Co. Lit. 58. a.

2. Hawkins's  
Pleas of the  
Crown, ch. 1.

**A** COURT is a place where justice is judicially administered; and is derived, according to SIR EDWARD COKE, *à cura, quia curiis publicis curas gerebant*. The King being the supreme magistrate of the kingdom, and intrusted with the whole executive power of the law, no court whatever can have any jurisdiction unless it some way or other derive it from the crown. The only methods by which any court of judicature can exist, are either by act of parliament, by letters patent, or by prescription; in the two former of which the King's consent is expressly given, and in the latter it is implied. In contemplation of law, the King is always present in his courts; but as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative. Of the variety of courts which the law hath appointed for the more speedy, universal, and impartial administration of justice, some are constituted to enquire only, others to hear and determine; some to determine in the first instance, others upon appeal, and by way of review; but there is one distinction runs throughout them all, *viz.* that some of them are courts of record, others *not of record*. They are also divided into superior and inferior courts; and are further distinguished, according to the kind of jurisdictions they respectively possess, by the appellation of the *civil, ecclesiastical, military, maritime, special, and criminal* courts.

1. Inst. 117. b.

260. a.

2. Inst. 311.

3. Inst. 71.

**A COURT OF RECORD** is that which hath power to hold plea, according to the course of the

3. Rep. Pref. 4. Rep. 52. 2. Roll. Ab. 574.

Common

Common Law, of real, personal, and mixed actions, in cases where the debt or damage may be 40s. or above; and of plea of trespasses *vi et armis*; and whose acts, memorials, or the proceedings in the court are recorded or enrolled in parchment. These rolls, being the memorials of the judges, are of such uncontrollable credit, that they admit of no proof to the contrary, insomuch that they are to be tried only by themselves; for otherwise there would be no end of controversies. But yet, during the Term wherein any judicial act is done, the roll is alterable in that Term, as the judges shall direct. When the Term is past, then the record admitteth no alteration, or proof that it is false in any instance. To a grant by letters patents under the Great Seal, you cannot plead that there is *no such record*; but as it is a conveyance, one may deny the operation of it, or say that there is no such grant, or that the King had nothing in the thing granted, &c. If the judges do err, a writ of error lieth only from a court of record.

A COURT *not of record* is, either where it cannot hold plea of debt or trespass, if the debt or damages amount to 40s. or of trespasses *vi et armis*; or where the proceedings are not according to the course of the Common Law, and where the acts of the court are not enrolled in parchment; as in the county court, hundred court, court baron, ecclesiastical court. Here the proceedings may be denied, and tried by a jury; and upon the judgments of such courts a writ of error lieth not, but a writ of *false judgment*, or an *appeal*.

NOTE, That a court that is not of record cannot impose a fine, or imprison.

Co. Lit. 117. b.  
118. a. 260. a.  
2. Inst. 311, 312.

8. Co. 38. 43.  
11. Co. 43.

SOME courts may fine, but not imprison; as the leet. Some may imprison, but not fine; as the constables at the petit sessions, for an affray made

in disturbance of the court. Some courts cannot fine or imprison, but amerce; as the county court, hundred court, court baron, &c. Some courts cannot fine, imprison, or amerce; as the ecclesiastical courts. But the courts of record at *Westminster, &c.* may fine, imprison, and amerce, as the case requires.

4. Inst. Pref.

SOME jurisdictions are ecclesiastical, some temporal. Of these, some may be primitive, or without commission; some derivative and delegated by commission; some to enquire, hear, and determine; some to enquire only; and some are guided by one law, and some by another.

IN treating of this subject we shall consider,—  
 1. The public courts of Common Law: 2. The Ecclesiastical Courts: 3. The Military Courts: 4. The Maritime Courts: 5. Courts of a special Jurisdiction: 6. Courts of Equity: and lastly, Courts of a Criminal Jurisdiction.

THE public courts of Common Law are, to begin with the lowest of them,

2. Bac. Ab. 567.  
 3. Bl. Com. 32.  
 4. Inst. 272.  
 Keilw. 99.  
 Cro. Eliz. 773.

6. Co. 12.  
 2. Bull. 23.  
 1. Ro. Ab. 545.  
 Cro. Jac. 313.  
 2. Inst. 272.

Keilw. 99.  
 Moor, 459.

1. THE COURT OF PIEPOWDRE. This court is incident to every fair and market, although by custom it may exist without fair or market, and is called *curia pedis pulverisati*, because for contracts made or injuries committed concerning the fair or market, justice shall be done as speedily as *the dust can fall from the feet*. It is a court of record, of which the steward is the judge, there being no suitors; and it hath cognizance of all matters of contract that can possibly arise within the precinct of that fair or market; and the cause of action must arise, be complained of, heard, and determined the same day, and within the precinct of the same fair or market, the proceedings being *de hora in horam*; and ending with the time for which the fair or market is held. And by 17. *Edw. 4. c. 2.* the several facts that the contract or other feat was made

made within the fair, and within the time of the fair, and within the boundaries of its jurisdiction, must all be verified by the *oath* of the plaintiff or his attorney, before the steward can entertain the plea; but the defendant may, notwithstanding this verification, plead to the jurisdiction of the court; and either party may bring a writ of error, in the nature of an appeal, to the courts of *Westminster*.

4. Inst. 272.  
2. Bult. 22.  
Cro. Eliz. 773.  
3. Bl. Com. 53.

2. THE COURT BARON is a court incident to every manor, and had anciently conuifance of all pleas of land within the manor, fo that no person within the manor could apply to any other jurisdiction, without a *remiffit curiam* from the lord. But at this day it is no court of record, nor can it hold plea of debt or trespafs, except where the debt or damage is under forty fhillings. It is held before the steward of the manor, who is however only as the register, for the fuitors are in law the judges of the court, even though the plea be upon a writ of right. This court, which cannot be holden out of the manor, is of two natures, The first is by the Common Law called the free-man's court, or court baron, and this is the court of which we at present treat. The fecond is a customary court, and concerns the copyholders only. The proceedings on a writ of right may be removed from this court by a writ of *tolt* into the county court, and the proceedings in all other actions may be removed into the fuperior courts by writs of *pone*, or *accedas ad curiam*. After judgment given, a writ alfo of *false judgment* lies to the courts at *Westminster*.

1. Bac. Ab. 648.  
2. Bl. Com. 34.  
4. Inst. 264.  
Co. Lit. 52.  
118.  
4. Co. 33.  
Owen, 35.  
2. Inst. 318.  
Cro. Eliz. 792.  
Cro. Jac. 562.

Finch, 248.  
Fitz. N. B. 39  
2. Inst. 73.

3. THE HUNDRED COURT. This court was derived from the county court, and hath the fame jurisdiction, being in fact only a larger court baron held for all the inhabitants of a particular *hundred* instead of a *manor*. It is no court of record, and cannot hold plea of debt or trespafs, unless under *forty fhillings*. The true procefs of this court is, at  
Common

1. Bac. Abr.  
647, 648.  
3. Bl. Com. 34.  
2. Inst. 71.  
4. Inst. 267.  
Co. Lit. 118.  
Salk. 201.

Salk. 201.  
2. Lev. 81.  
2. Keb. 116. 126.  
Carth. 54.  
Lut. 1369.

Common Law, a *distringas*; but by custom the process may be *levari facias*; and it is said, that most hundred courts have this custom.

1. Bac. Ab. 647.  
3. Bl. Com. 35.  
2. Inst. 225. 312.  
6. Co. 11.  
1. Mod. 171.  
32. Mod. 598.  
2. Ro. Ab. 317.  
Co. Lit. 118.  
2. Lev. 93.  
Ed. Ray. 1310.

3. Lev. 403. Spelm. Rem. 50. 4. Inst. 266.

4. THE COUNTY COURT is a court incident to the jurisdiction of the sheriff. By the eicheat of earldoms and baronies, the tenants of such earls and barons were to hold from the King; and not being qualified to sit in the King's own court, they composed a court in each county, under the array of the sheriff, or the King's bailiff: those were the *pares* of the county court; and hence it is that it has ever since been held, that the sheriff is not the judge, but only the suitors. This court is not a court of record, but it may hold pleas of debt or damages under *forty shillings*. By a particular writ, however, called a *justicies*, this court may hold plea of goods, debts, &c. of any value; and the process is by *attachment*, for a *capias* will not lie. But this must be understood of debts arising *ex contractu* only, and not of those which are *ex delicto*, as upon the statute of tithes, &c.; and yet it is said, that by force of a *justicies* this court may hold plea of trespass *vi et armis*. But by the statute of *Gloucester*, 6. *Edw.* 1. c. 6. this court shall have no jurisdiction where the trespass is accompanied with a maim or wounding. In replevin also, by writ or plaint upon the statute of *Marlbridge*, this court may hold plea of goods and chattels above the value of *forty shillings*. And by 12. *Geo.* 2. c. 13. s. 7. if any person shall commence or defend any action or sue out any process in the county court, who shall not be admitted an attorney or solicitor according to the 2. *Geo.* 2. c. 13. he shall forfeit TWENTY POUNDS.

Madox, ch. 9.  
1. Bac. Ab. 595.  
3. Bl. Com. 37.  
Co. Lit. 71.  
8. Co. 145.

5. THE COURT OF COMMON PLEAS, on the division of the *aula regis* into four distinct courts, towards the close of the *Norman* period, was established as one of the superior courts of record in the kingdom, for the determination of pleas merely civil; and because all civil causes between

subject

subject and subject were to be determined in this court, it was styled *communia placita*, or *common pleas*. Originally this court was ambulatory, and removed with the King wherever he went; but by MAGNA CHARTA *communia placita non sequantur curiam nostram, sed teneantur in aliquo certo loco*.

The jurisdiction of this court is founded on original writs issuing out of chancery, which are the King's mandates to the judges, for them to proceed on and determine such and such causes: and SIR EDWARD COKE calls it the lock and key of the Common Law; for herein are real actions whereupon fines and recoveries do pass; as also all other real actions by original writs. The judges of this court are at present four in number, one chief, and three *puisne* justices, created by the King's letters, who sit every day in the four Terms to hear and determine all matters of law arising in *civil causes*, whether real, personal, or mixed, and compounded of both. These it takes cognizance of, as well originally, as upon removal from the *inferior courts* before-mentioned.— But a writ of error in the nature of an appeal lies from this court into the court of King's Bench.

Gilbert's History and Practice of the Court of Common Pleas, c. 1.  
2. Inst. 21.  
1. Bac. Ab. 526.

3. Bl. Com. 40.  
4. Inst. 99.  
Raym. 475.

6. THE COURT OF KING'S BENCH, so called because the King used formerly to sit there in person, the style of the court still being *coram ipso rege*, is the supreme court of Common Law in the kingdom; consisting of a chief justice, and three *puisne* justices, who are by their office the sovereign conservators of the peace, and supreme coroners of the land. The *aula regis* was originally one great court, where the *justiciar* presided, and, as we have already mentioned, was towards the close of the *Norman* period divided into four distinct courts, *viz.* the court of Chancery, Common Pleas, and Exchequer; the court of King's Bench retaining all the power belonging to the *aula regis* after the other courts were taken from it. This court, from the very nature and constitution of it, cannot

Madox, c. 9.  
Brañton, bk. 3. c. 7.  
4. Inst. 70.  
2. Inst. 24.  
Co. Litt. 71.  
Dyer, 187.  
Crompton, 78.  
2. Hawk. P. C. 6.  
Sid. 168.  
3. Bl. Com. 42.

be

be fixed to any certain place, but may follow the King's person wherever he goes; for which reason all process issuing out of this court in the King's name is returnable "*ubicunque fuerimus in Angliâ.*" This court is termed the *custos morum* of the realm, and by the plenitude of its power, wherever it meets with an offence contrary to the first principles of justice, and of dangerous consequence if not restrained, may adapt a proper punishment to it. It has a peculiar jurisdiction not only over all capital offences, but over all other misdemeanors of a public nature, tending either to a breach of the peace, or to oppression, or faction, or any manner of misgovernment; and it is not material whether such offences, being manifestly against the public good, directly injure any particular person or not; nor is it necessary to shew a precedent of the like nature formerly punished here, agreeing in all circumstances with the present. The jurisdiction of this court is so very high and transcendent, that it 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 commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject by speedy and summary interposition. On the civil side it hath an original jurisdiction, and cognizance of all actions of trespass, or other injury alledged to be committed *vi et armis*; of actions of forgery of deeds, maintenance, conspiracy, deceit, and actions on the case which alledge any falsity and fraud; all of which favour of a criminal nature, though the action is brought for a civil remedy, and make the defendant in strictness liable to pay a fine to the King, as well as damages to the injured party. The same doctrine is also now extended to all actions on the case whatsoever; but no action of debt or detinue, or other mere civil action, can by the Common Law be prosecuted by any subject in this court by original writ

writ out of Chancery; though an action of debt given by statute may be brought in the King's Bench, as well as the Common Pleas. But this court might always have held plea of any civil action, other than actions real, provided the defendant was an officer of the court, or in the custody of the marshal or prison-keeper of the court, for a breach of the peace, or any other offence; and now by surmising that the defendant is arrested for a supposed trespass, and in the custody of the marshal, a fiction which he is not permitted to dispute, this court may hold plea of all personal actions whatsoever. This court is likewise 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*. But the judgment of this court may be removed 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.

7. THE COURT OF EXCHEQUER is an ancient court of record, for all matters relating to the revenue of the crown; but it is inferior in rank not only to the court of King's Bench, but to the Common Pleas also. In the Exchequer there are seven courts,—1. The court of pleas. 2. The court of accounts, which audits and makes up certain of the King's accounts. 3. The court of receipt, which manages the royal revenue. 4. The court of EXCHEQUER CHAMBER, being the assembly of all the judges of *England*, for matters of law. 5. The court of exchequer chamber for errors in the court of exchequer. 6. The court of exchequer chamber for errors in the court of king's bench. 7. The court of equity in the exchequer chamber. It is called the exchequer, *scaccharium*, from the chequed cloth, resembling a chess-board, which covers the table there; and on which, when certain of the King's accounts are made

4. Inst. 103.  
Madox, 109.  
Spelman, 113.  
Savil, 48.  
2. Inst. 104.  
1. Bac. Ab. 597.  
3. Bl. Com. 44.



made up, the sums are marked and scored with counters. This court acts in the double capacity of a court of law and a court of equity also. The Common Law part of this court, which is exercised by the barons of the exchequer only, being established to adjust and recover the King's revenue, it was originally confined to such persons only as were indebted to or accountants with the Crown, and to the particular officers belonging to the court. But by a fiction of law, all kinds of personal suits may now be prosecuted in the court of Exchequer by any person whatsoever. The writ upon which all the 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 less able to pay the King his debt or rent: and by this suggestion, which is become mere form and matter of course, any person may be admitted to sue in the exchequer as well as the King's accountant. From this court a writ of error lies by the 31. *Edw.* 3. c. 12. into the court of Exchequer Chamber; and after this, but not before, a writ of error lies in the *dernier resort* to the House of Lords (a).

(a) Vide an account of the Equitable Jurisdiction of this Court, post.

Ryley, 146.  
1. Bac. Ab.  
584.  
3. Bl. Com. 56.

8. THE HOUSE OF PEERS is the supreme court of judicature in the kingdom, but it has no original jurisdiction over causes, and can only take notice of them on appeals and writs of error, to rectify any injustice or mistake of the law committed by the courts below.

9. THE COURTS OF ASSIZE AND NISI PRIUS it may also be proper to mention in this place, as courts of general jurisdiction and use, which are derived out of, and act as collateral auxiliaries to the foregoing. Justices of assize derive their authority wholly from the commission under which they act, by which they are empowered to enquire of all disseisins, and to restore such as have been  
put

put out of their lands and tenements to the possession of them, by trial at the assizes. These justices of assize came into use in the room of the ancient justices in eyre, *justitiiarii in itinere*, who were regularly established in the year 1176 by the parliament of *Northampton*. The present justices of assize and *nisi prius* are derived from the statute *Westminster* 2. 13. *Edw.* 1. c. 30. and 14. *Edw.* 3. c. 16. and must be two of the King's justices, of the one bench or the other, or the chief baron of the exchequer, or the King's sergeants sworn, who are twice in every year sent all around the kingdom (excepting only *London* and *Middlesex*, where courts of *nisi prius* are holden in and after every Term before the chief or other judge of the superior courts); and by the writ of *nisi prius* which is annexed to the commission of assize, they are directed to try, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the courts of *Westminster-hall*. This was contrived for the ease of the subject, that the jury and witnesses might not be obliged to come out of their proper counties; and the manner in which this is contrived by the entry on the record, has been already described in a former part of this volume.—The judges usually make their circuits in the respective vacations after Hilary and Trinity terms; and upon these occasions to the commission of assize and writ of *nisi prius* are added the commission of *the peace*, a commission of *oyer and terminer*, and a commission of *gaol delivery*, which will be explained when we treat of courts of criminal jurisdiction.

## II. Of Courts Ecclesiastical.

I. THE ARCHDEACON'S COURT is the most inferior court in the whole ecclesiastical polity. 4. Inf. 379. Godolphin, 60. 1. Bac. Abr. 613. 3. Bl. Com. 64.  
 This court is holden by the archdeacon, or his official, in such places as the archdeacon, either by prescription or composition, hath jurisdiction in,

in, over spiritual causes within his archdeaconry. He is called *oculus episcopi*, and exercises an ecclesiastical jurisdiction, either concurrently with the bishop, or exclusively. By 24. *Hen* 8. c. 12. an appeal lies from this court to that of the bishop.

4. Inft. 338.  
1. Bac. Ab.  
613.  
3. Bl. Com. 64.

2. THE CONSISTORY COURT of each archbishop, and every bishop of every diocese within the realm, is holden before the bishop's chancellor in the cathedral church, or before his commissary in places within his diocese far remote and distant from the bishop's consistory, so as the chancellor cannot call them to consistory with any convenience, or without great travel and vexation; for which reason such commissary is called *commissarius foraneus*. By 24. *Hen*. 8. c. 12. an appeal lies to the archbishop of each province respectively.

Wood's Inft.  
429.  
1. Bac. Abr.  
611.  
3. Bl. Com. 64.  
4. Inft. 337.

3. THE COURT OF ARCHES, *curia de archibus*, because it was anciently held in *Bow* church, the steeple of which is built on pillars that are formed *archwise*, is a court of appeal belonging to the archbishop of each province. The judge of this court is called *the dean of the arches*, though properly the dean of the arches is the judge of a deanery consisting of the thirteen peculiar parishes exempted from the bishop of *London*, whereof *Bow* church is the chief (a). These peculiars are annexed to the officialty, and the jurisdiction more properly belongs to the principal official. From this court there lies an appeal to the King in chancery (that is, to a court of delegates appointed under the King's Great Seal), by the statute of 25. *Hen*. 8. c. 19.

3. Bl. Com. 65.  
1. Bac. Abr.  
612.

4. THE COURT OF PECULIARS is a branch of and annexed to the court of arches. It has a

(a) By agreement, the archbishop of *Canterbury* and the bishop of *London* remit their courts to each other, so that for matters arising within the diocese of *London*, the suit may be either in the arches, or in the consistory court of *London*. *Cro. Car.* 319. 456.

juris-

jurisdiction over all these parishes, dispersed through the province of *Canterbury*, in the midst of other dioceses, which are exempt from the ordinary's jurisdiction, and subject to the metropolitan only. All ecclesiastical causes arising within these peculiar or exempt jurisdictions, are originally cognizable by this court; from which by 25. *Hen. 8.* c. 19. an appeal lies to the King in chancery.

4. *Inft.* 338.  
*Salk.* 40.  
 6. *Mod.* 241.  
 11. *Mod.* 6.

5. THE PREROGATIVE COURT of the archbishop is that court wherein all testaments are proved and all administrations granted, where the party dying hath *bona notabilia* in some other diocese than where he dies; and it is so called from the archbishop having a prerogative throughout his whole province for these purposes. By 25. *Hen. 8.* c. 19. an appeal lies from this court also to the King in chancery.

4. *Inft.* 333.  
 3. *Burn's E. L.* 170.  
 3. *Bl. Com.* 65.  
 1. *Bac. Ab.* 612.

6. THE COURT OF DELEGATES is the great court of appeal in all ecclesiastical causes, and is so called because these delegates, *judices delegati*, do sit by force of the King's commission under the GREAT SEAL, and issuing out of chancery, to represent his royal person, and hear all appeals made to him by virtue of 25. *Hen. 8.* c. 19.—

1. Where a decree or sentence is given in any ecclesiastical cause by the archbishop or any of his officials.
2. Where any decree or sentence is given in any ecclesiastical cause in the court of peculiars.
3. Where sentence is given in the court of admiralty according to 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. *Inft.* 339.  
 2. *Burn's E. L.* 125.  
*Wood's Inft.*  
 501.  
 1. *Bac. Ab.* 613.  
 3. *Bl. Com.* 66.

7. A COMMISSION OF REVIEW. After a sentence by the delegates, the King may grant a commission of review, and such commissioners may reverse the sentence of the delegates; for the King's power is not restrained by 25. *Hen. 8.* c. 19. which says, that such sentence shall be definitive. But this is not a matter of right, which the sub-

1. *Bac. Ab.* 613.  
 4. *Inft.* 341.  
*Moor,* 463. 781.  
*Dyer,* 273.  
*Lit. Rep.* 232.  
 3. *Bl. Com.* 67.  
 2. *Peer. Wms.* 200.  
*Wood's Inft.*  
 501.

ject may demand *ex debito justitiæ*, but merely a matter of favour, and which is often, from the circumstances of the case, denied.

Wood's Inst. 499.  
4. Inst. 337.  
2. Burn's E. L. 228. and see the 25. Hen. 8. c. 21.

8. THE COURT OF FACULTIES is also a court belonging to the archbishop of *Canterbury*, the judge of which is called *the master of the faculties*; but it is not like those we have already enumerated, which are of a *contentious jurisdiction*, but is only what is called of a *voluntary jurisdiction*, and consists in doing what no one opposes, *viz.* granting dispensations, as to marry, to eat *flesh* on prohibited days, to be ordained deacon under age, for the son to succeed the father in a benefice, that one may have two or more benefices, in registering the certificates of bishops' and noblemen's chaplains to qualify them for dispensations, pluralities, non-residence, &c. &c. &c.

Godolphin's Reports, 106.  
4. Inst. 337.  
1. Bac. Ab. 612.  
Johnson, 254.  
1. Burn's E. L. 99.  
Wood's Inst. 499.

9. THE COURT OF AUDIENCE is also of a *voluntary jurisdiction*. This court is kept by the archbishop in his palace, in which are transacted matters of form only, as confirmation of bishops, elections, consecrations, the granting of the guardianship of the spiritualities, *sede vacante*, of bishops, admissions and institutions to benefices, dispensing with banns of matrimony, and the like (a).

### III. Courts Military.

3. Lev. 230.  
Shower's Cases in Parliament, 60.  
4. Inst. 125.  
7. Mod. 127.  
3. Bl. Com. 68.

1. THE COURT OF CHIVALRY was formerly held before the lord high constable and earl marshal of *England* jointly; but since the attainder of *Stafford Duke of Buckingham* under *Henry VIII.* and the consequent extinguishment of the office of lord high constable, it hath usually, with respect to civil matters, been held before the earl

(a) See upon this subject *fruct. cap. frequens v. vicarius* LYNDWOOD *de sequest. poss. et generalis.*

marshal only. By 13. *Rich.* 2. c. 2. this court hath cognizance of contracts, and other matters touching deeds of arms and war, as well out of the realm as within it; and from its sentences an appeal lies to the King in person. But this court is now grown entirely out of use.

IV. *Maritime Courts.*

1. THE COURT OF ADMIRALTY is a court for all maritime matters arising upon the high seas, and its jurisdiction is derived from the King, to protect his subjects from pirates. This jurisdiction he exercises by his lord high admiral, or those lawfully deputed for that purpose. The proceedings of this court are, according to the methods of *the civil law*, like those of the ecclesiastical courts; upon which account it is usually holden at the same place with the superior ecclesiastical courts at DOCTORS COMMONS. It is no court of record, any more than the spiritual courts. By 8. *Eliz.* c. 5. an appeal lies from the court of admiralty to the King in chancery.

3.Bl.Com.69.  
Wood's Inst.  
472.

2. THE COURT OF APPEALS. Appeals from the vice admiralty courts abroad may be brought before the courts of admiralty in *England*, as being a branch of the admiral's jurisdiction, though they may also be brought before the King in council. But in case of prize vessels taken in time of war in any part of the world, and condemned in any courts of admiralty or vice admiralty as lawful prize, the appeal lies to certain commissioners of appeals, consisting chiefly of the privy council, and not to judges delegates.

3.Bl.Com.69.  
See 22.Geo.3.  
c. 3.

See a work entitled The Laws, Ordinances, and Institutions of the Admiralty of Great Britain, published in 1767.

V. *Courts of a Special Jurisdiction.*

1. THE FOREST COURTS are instituted for the government of the King's forests in different parts

3.Bl.Com.71.  
4. Inst. 289.  
1.Bac.Ab.637.

parts of the kingdom, and for the punishment of all injuries done to the King's deer or *venison*, to the *vert* or greenward, and to the *covert* in which such deer are lodged. There are four courts incident to a forest:—1. The Justice Seat. 2. The Swainmote. 3. The Attachments. 4. The Regard. THE COURT OF JUSTICE SEAT is a court of record, held before the chief justice in eyre, 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 is so incidental to a forest, that there cannot be a forest without it; but it cannot be held oftener than every third year, and must be summoned at least forty days before sitting, by two writs, one directed to the sheriff, and the other *custodi forestæ vel ejus locum tenenti*, to call the officers and all persons that claim liberties within the forest to shew how they claim them. A writ of error lies from this court to the court of King's Bench. THE SWAINMOTE COURT is holden by the steward before the verderors as judges, thrice in the year, and the foresters are to present their attachments at the next swainmote, where the freeholders within the forest are to appear, to serve on juries. This court may enquire *de superoneratione forestarum et aliorum ministrorum forestæ, et de eorum oppressionibus populo regis illatis*, and convict the offender; but it cannot give judgment, and therefore a swainmote without a justice seat is ultimately of little use. THE COURT OF ATTACHMENTS, or woodmote court, is to be held before the verderors every forty days; and at this court the foresters bring in their attachments *de viridi et venatione*, and the presentments thereof, which it is the duty of the verderors to receive and inroll; but no man ought to be attached by his body for vert or venison, unless taken with the *mainour* within the forest, for otherwise the attachment must be by his goods. THE COURT OF REGARD, or survey of dogs, is to be holden every third year, for the lawing or expedi-

tation

See the statutes  
7 Rich. 3. c. 3.  
9. Hen. 3. c. 2.  
34. Edw. 1. c. 6.

4. Infl. 289.  
1. Bac. Abr.  
639.  
2. Bull. 298.

1. Bac. Abr.  
640.  
4. Infl. 289.  
Carth. 79.

3. Bl. Com. 72.

tation of mastiffs, which is done by cutting of the claws of the fore feet, to prevent their running after deer; but no other dogs except mastiffs are to be thus lawed or expeditated, for none other were permitted to be kept within the precincts of the forest.

2. THE COURT OF SEWERS, from *sewer*, a passage or channel of water, is a court erected by commission under the great seal, pursuant to the directions 23. *Hen.* 8. c. 5. which ordains that the lord chancellor, treasurer, the two chief justices for the time being, or any three of them, whereof the lord chancellor to be one, shall, as often as need be, direct commissions and appoint commissioners, in the form prescribed by the statute, to enquire by a jury of twelve men into 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; but this jurisdiction is confined to such county or particular district as the commission shall expressly name. The commissioners are a court of record, and may fine and imprison for contempt. By 25. *Hen.* 8. c. 10. no person shall be compelled to take upon him any such commission, unless he be a dweller in the county wherein he is appointed commissioner. By 3. & 4. *Edw.* 6. c. 6. crown lands in the occupation of subjects, shall be liable to the power of the commissioners. By 13. *Eliz.* c. 9. all commissions of sewers shall be continued in force for ten years, unless repealed by a new commission, or *superfedeas*. By 3. *Jac.* 1. c. 14. all walls, ditches, banks, gutters, sewers, gates, causeways, bridges, streams and water-courses, within two miles of *London*, shall be subject to this court. But by 7. *Ann.* c. 9. power is given to the lord mayor of *London* to appoint commissioners. And by the 7. *Ann.* c. 10. they may not only proceed according to the laws and customs of *Romney-marsh*, or otherwise, at their discretion, but may assess such rates and scots upon



the owner of land within their district, as they shall judge necessary; and if any person refuse to pay them, the commissioners may levy the same by distress of his goods and chattels; or they may sell his land, whether freehold or copyhold. But the proceedings of this court are subject to the controul of the court of King's Bench.

Crompton's  
Jurisdiction of  
Courts, 102.  
2. Inst. c48.  
4. Inst. 130.  
6. Co. 20.  
Kitchen on  
Courts, 199.

3. THE MARSHALSEA COURT was originally established for the determination of disputes between the King's servants, and was held in the *aula regis*, before the steward and marshal of the King's household, within the verge of the palace, in order that his servants might not be drawn away from their attendance on him. It is a court of record, holding plea of all trespasses committed within the verge, 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 country; and of all debts, contracts, and covenants, where both the contracting parties belong to the royal household, and then the inquest shall be composed of men of the household only. By 13. Rich. 2. st. 1. c. 3. in affirmation of the Common Law, the verge of the court, in this respect, extends for *twelve miles* round the King's place of residence. But some doubts having arisen as to the extent of the jurisdiction of this court,

Wood's Inst.  
507.  
3. Bl. Com. 76.  
4. Bl. Com.  
273.  
1. Bac. Ab.  
632.  
1. Bullst. 211.  
10. Co. 79.

4. THE PALACE COURT, or *Curia Palatii*, which is frequently confounded with the marshal's court, was erected by letters patent from king *Charles* the first, in the sixth year of his reign. This is a new court of record, to be held before the steward of the household, and the knight marshal and steward of the court, or his deputy, with jurisdiction to hold plea in all manner of personal actions whatsoever, as debt, trespass, battery, slander, trover, case, &c. &c. which shall arise between *any parties* within twelve miles of his Majesty's palace

palace at *Whitehall*. This jurisdiction was afterwards confirmed by *Charles* the second; and it is now held by virtue of letters patent from that king dated the fourth day of *October*, in the sixteenth year of his reign. This court is now held once a week in *Southwark*, together with the ancient court of marches, and hath a prison belonging to it called the *marshalsea*. The proceedings of this court are by attachment; or *capias*, but the *plaint* and not the *capias* is the commencement of the action (*a*), upon which the defendant is to give bond for his appearance at the next court; and upon his appearance he must put in bail, to answer the condemnation of the court. But by 19. *Geo.* 3. c. 70. s. 1. no person shall be arrested or held to special bail upon any process, issuing out of an inferior court, for less than TEN POUNDS; and in all cases, whether the cause of action shall amount to the sum of 10*l.* or upwards or not, the like proceedings shall be had as are directed by 12. *Geo.* 1. c. 29. The rest of the proceedings are according to the course of the Common Law. A writ of error lies from this court to the court of King's bench; but if the cause is of any considerable consequence, it is usually removed, on its first commencement, either into the King's Bench or Common Pleas by a writ of *habeas corpus cum causa*. An indictment will not lie against an officer of the palace court (*b*) for arresting a person not of the King's household, on a writ issued out of that court, although no leave to make the arrest be obtained from *the board of green cloth*; for the charter of *Charles* the second expressly provides, that all processes issuing out of this court shall be executed by the bearers of the rod of the household: and it would be very extraordinary, when such a power is given, if it could not be executed without the leave of the crown.

(a) *Ward v. Honeywood*, Hil. 19. *Geo.* 3. *Douglas*, 61.

(b) *Rex v. Stobbs*, Trinity Term, 30. *Geo.* 3. 3. Term Rep. 735.

5. THE DUTCHY COURT OF LANCASTER is held before the chancellor of the dutchy, or his  
 3. *Bl. Com.* 78. *Wood's Inst.* 509. 1. *Vent.* 157.  
 4. *Inst.* 206. 212. 2. *Danvers Abr.* 286. *Hardres*, 171. *Hob.* 77. *Plowd.* 72. *Crompton on Courts*, 134.

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deputy,

deputy, at *Westminster*. The jurisdiction of this court is for or concerning lands holden of the King, in right of his dutchy, within or without the county palatine of *Lancaster*; or concerning bonds and assurances relating to the same, or concerning the revenue of the dutchy. But whatever belongs to the jurisdiction of the dutchy may be determined in the court of Exchequer; and when this court claims jurisdiction in respect of persons, or because suitors dwell within the palatinate, or when it retains bills concerning lands lying out of the palatinate, or within the precincts of the dutchy but holden out of it, a prohibition may be awarded. The proceedings in this court are, as in the court of Chancery, by *English* bill and decree, and therefore it seems not to be a court of record.

6. THE COURTS OF THE PRINCIPALITY OF WALES. By 34. & 35. *Hen. 8. c. 26.* courts baron, hundred and county courts, are established in *Wales* as in *England*. A session is also to be held twice in every year in each 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 a manner, as in the court of Common Pleas at *Westminster*; and writs of error shall lie from judgment therein (it being a court of record) to the court of King's Bench at *Westminster*. But the ordinary original writs, or process of the King's

2. Ro. Rep. 141. courts at *Westminster*, do not run into the princi-  
 2. Bull. 156. pality of *Wales*, though process of execution  
 2. Saund. 193. does; as do all prerogative writs, or writs of  
 Raym. 206. *certiorari, quo minus, mandamus*, and the like.  
 Cro. Jac. 484.

And even in causes between subject and subject, especially in questions concerning real property, an action may be brought in the *English* courts, and tried in the next adjoining *English* county to that in which the cause of action arises.

Vaugh. 413.  
 Hardres, 66.

7. THE

7. THE COURTS PALATINATE, as *Chester*, <sup>3. Bl. Com. 76.</sup> *Lancaster*, *Durham*, and the royal franchise of *Ely*, are another species of private courts of a limited local jurisdiction, and have an exclusive cognizance of pleas, in matters both of law and equity. They are called palatinate courts, *à comitatu et palatio regis*, because the owners thereof were companions of the King in his palace, and had *jura regalia*, or King-like rights and authority. <sup>4. Inst. 213. 218. Finch, 452.</sup> These courts are superior courts of record, and exercise a jurisdiction within their own precincts in as ample a manner as the courts at *Westminster*. The King's ordinary writs do not run into these counties; but although they have *jura regalia*, <sup>1. Bl. Com. 116.</sup> they must derive their authority from the crown; <sup>Crompton of Courts, 137. Wood's Inst. 509.</sup> and at this day no palatinate jurisdiction can be erected without an act of parliament. <sup>2. Inst. 557. 4. Inst. 204. 1. Bac. Ab. 633. 1. Saund. 74. Ventris, 155.</sup>

8. THE STANNARY COURTS. These courts <sup>1. Bac. Ab. 652.</sup> were instituted for the conveniency of *tinners*, <sup>4. Inst. 229.</sup> that they might be encouraged in the making of *tin*, one of the staple commodities of the kingdom; <sup>12. Co. 10. Plowd. 327.</sup> and therefore, in *Cornwall* and *Devonshire*, where the ore or mine of which tin is made chiefly <sup>1. Ro. Ab. 547. and see the statute 16. Car. 1. c. 15. wherein the privileges of the tinner are confirmed and explained.</sup> abounds, the workers herein are allowed the privilege of suing and being sued in those places only. The jurisdiction of the court is guided by special laws, by custom, and by prescription time out of mind. No writ of error lies upon any judgment in these courts, but the party grieved must be relieved by appeal,—First, To the steward of the stannary courts where the matter lies. Secondly, To the under warden of the stannaries. Thirdly, To the lord warden of the same stannaries; and Fourthly, For want of justice there, to the prince's privy council, as Duke of *Cornwall*. Blowers, and all other labourers and workers *bond fide* in and about the stannaries of *Cornwall* and *Devon*, are within the privilege of these courts; and transitory actions between tinner and tinner, or worker and worker, though not concerning the stannaries, nor arising therein, if the defendant <sup>3. Bult. 283. Owen, 8. 1. Sid. 233. 2. Ro. Rep 44. 4. Inst. 231. Cro. Car. 333.</sup>

4. *Inft.* 231. be found within the stannaries, may be brought  
 2. *Ro. Rep.* 379. in these courts, or at Common Law; but if  
 one party only be a tinner or worker, such trans-  
 fitory actions, which concern not the stannaries,  
 nor arise therein, cannot be brought there.  
 4. *Inft.* 231. They have no jurisdiction of any local action  
 7. *Mod.* 103. arising out of the stannaries; and matters of life,  
 2. *Venn.* 483. member, and plea of land, are expressly excepted  
 out of their charter (a).

3. *Bl. Com.* 80. 9. THE COURTS IN LONDON, and other cities,  
 4. *Inft.* 247. boroughs, and corporations throughout the  
 kingdom, held by prescription, charter, or act  
 of parliament, are also of the same private and  
 limited species. THE COURT OF HUSTINGS is the  
 highest and most ancient court of record within the  
 city of *London*, and is always held at *Guildhall*,  
 before the lord mayor and sheriffs of *London*  
 for the time being; but when any matter is to be  
 argued and determined in this court, THE RECORDER  
 sits as judge, with the lord mayor and sheriffs, and  
 gives rules and judgments therein. This court hath  
 jurisdiction of all pleas, real, personal, and mixed;  
 and for this purpose it is distinguished into two  
 courts, as the judges sit one week on real actions,  
 and the other on those which are personal or  
 mixed. In this court deeds may be enrolled, re-  
 coveries may be passed, wills may be proved, and  
 replevins, writs of error, writs of right patent,  
 writs of waste, writs of partition, and writs of  
 dower, may be determined for any matters within  
 the city of *London*, or the liberties thereof. Upon  
 a judgment given in this court, a writ of error lies  
 to *St. Martin's*, before certain justices, and from  
 their determination a writ of error lies to parlia-  
 ment.—Secondly, THE SHERIFFS COURTS. There  
 are two sheriffs of *London* and *Middlesex*, each of  
 whom keeps a court of record for all personal  
 actions within the city of *London*. These courts

9. *Bac. Ab.* 658.

*Laws of Lon-*  
*don*, p. 105.

1. *Ro. Ab.* 745.  
 1. *Lev.* 309.  
 2. *Saund.* 252.  
 2. *Leon.* 107.  
*Register*, 100.  
*F. N. B.* 23.  
*Cowp.*  
*Hawk. P. C.*

(a) See a small octavo treatise "vocation or Parliament of Te-  
 entitled, "Laws of the Stannaries" nures at *Truro*, 13. Sept. 27.  
 of *Cornwall*, made at the Con- "Geo. 2."

are also kept at *Guildhall*, and in each court A STEWARD is the judge. To these courts there are two prisons called COMPTERS, the one in *Woodstreet*, the other in the *Poultry*. The process is, by summons, arrest, foreign attachment, &c. and causes may be removed from hence by *habeas corpus* to *Westminster-hall*.—Thirdly, THE COURT OF EQUITY, commonly called the COURT OF CONSCIENCE. The jurisdiction of this court arises from a custom of *London*, that if a plaint of debt be entered in the sheriff's court, upon suggestion of the defendant, the lord mayor may send for the parties and for the record, and examine the parties upon their plea, and if he finds that the plaintiff is satisfied, he may award that the plaintiff shall be bound; but he cannot examine after judgment.—Fourthly, THE COURT OF REQUESTS, which is also called the Court of Conscience, which is held before certain commissioners at *Guildhall*, and was first established by the 3. *Jac.* 1. c. 15. for recovering of debts under forty shillings, and has been new modelled by the statutes of 14. *Geo.* 2. c. 10. and 25. *Geo.* 3. c. 45. s. 7. by virtue of which two aldermen and four commoners sit twice a week, to hear all causes of debt not exceeding the value of forty shillings, which they examine in a summary way, by the oath of the parties, or other witnesses, and make such order therein as is consonant to equity and good conscience.—Fifthly, THE COURT OF ORPHANS is a court of record, established for the care and government of Orphans. The lord mayor and aldermen have the custody of orphans, under age and unmarried, of freemen or freewomen of *London* that die, and the keeping of all their lands and goods.—Sixthly, THE COURT OF COMMON COUNCIL consists of the lord mayor, aldermen, and such as are chosen by every ward out of the commonalty to represent the whole commonalty of *London*. In this court they make acts for the better execution of the laws of the corporation, but these acts must not be repugnant to the

1. Bac. Ab. 658.  
4. Inst. 248.  
Skin. 105.

1. Bac. Ab. 658.  
4. Inst. 248.  
Skin. 67.  
3. Keb. 432.

4. Bl. Com. 81.  
Green's Privileges of London, 125.  
Lex Londonensis, p. 229.  
Maitland's History of London, 226. 283. and 1210.  
12. Mo. do4.

3. Bl. Com. 81.

Wood's Inst. 517.  
4. Inst. 248.  
2. Danvers Ab. 311.  
5. Co. 73.  
1. Lev. 32.  
1. Vent. 178.  
2. Com. Dig. 605.

4. Inst. 249.  
9. Co. 66.  
Wood's Inst.  
518.

4. Inst. 249.  
Wood's Inst.  
518.

4. Inst. 250.  
3. Co. 126.  
Stra. 663.  
2. Ld. Ray.  
1410.

4. Inst. 450.

4. Hen. 7. c. 15.  
3. Jac. 1. c. 14.  
7. Ann. c. 9.  
1. Hawk. P. C.

4. Inst. 251.

the general laws of the land.—Seventhly, **THE COURT OF WARDMOTE**, or Ward Court, which resembles the country leets, every ward being as a hundred, and the parishes as towns. There are twenty-six wards, divided, for the better government of them, amongst the aldermen of the city. In every ward there is an inquest of twelve men, or more, sworn every year, to enquire of and prevent nuisances, &c.—Eighthly, **THE COURT OF HALLMOTE**, or Hall Court, is the court which every Company in *London* keeps in their hall, for the better regulation of their Company.—Ninthly, **THE CHAMBERLAIN'S COURT** is for the enrolling of the indentures of apprentices; for an apprentice may refuse to serve if his indentures are not enrolled, and may sue out his indentures in this court, or in the mayor's court, and thereby be discharged from his master. In this court, also, it is that citizens take up their freedom of the city. The chamberlain is judge in all complaints, either of the apprentice against his master, or of the master against his apprentice, and may punish the offender at his discretion.—There is also, Tenthly, **THE COURT OF CONSERVATION** for the water, and in which the lord mayor of *London* hath the rule and government. His jurisdiction extends from *Staines-bridge* to the waters of *Yessdal* and *Medway*; and he may punish such as use unlawful nets, or other unlawful engines in fishing, or who take fish under the sizes prescribed by the statutes.

10. **THE TOWER HAMLET COURT** is holden within the precincts of the Tower of *London*, before the steward by prescription, who hath cognizance of debt, trespass, and other actions of any sum. Part of the Tower Liberty is within the city of *London*, and part within the county of *Middlesex*; and this court had authority not only over the several hamlets in the county, but also over a part of the Liberty of *St. Catherine's*, for which a distinct court is kept; and which is also

also a royal jurisdiction for ecclesiastical causes, and therefore an appeal lies from thence to the King in his chancery. But by 26. *Geo.* 2. c. . the court of Tower Hamlets is put under new regulations, the extent of its jurisdiction ascertained, and the modes by which it is authorized to proceed clearly and distinctly pointed out.

11. THE COURT OF STEPNEY, or, as it is more commonly called, the Whitechapel Court, is a court of record within the county of *Middlesex*, the style of which is, “*Seneschalla curiæ nostræ de re- cordo infra manerium de Stepney et Hackney in comitatu Middlesex, hamletas et libertates eorundem, nec non capitali ballivo præhonorabilis ——— manerii sui de Stepney prædict. et eorum cuilibet salutem.*” Wood’s *Instit.* 519.

12. THE COURT OF ST. MARTIN’S LE GRAND, near Aldersgate, is a court of record for the trial of all personal actions. It is a Liberty within the deanery of *Westminster*, and subject to the Liberty thereof, having a peculiar jurisdiction within itself. Wood’s *Instit.* 519.

13. THE COURTS OF THE CINQUE PORTS. The Cinque Ports are ancient trading towns, lying towards the sea-coasts, which are held *per baroniam*. There are several courts within the Cinque Ports; one before the constable of *Dover* castle; others within the ports themselves, held before the mayor and jurats; and another, which is called *curia quinque portum apud Shepwoy*. There is also a court of chancery in the Cinque Ports, though no original writs issue thence; but it serves to decide matters of equity, and to relieve against errors on proceedings at law. The lord warden hath two jurisdictions:—First, The authority of an admiral to hold plea by bill concerning the guard of the castle, Bracton, bk. 3. fo. 118. 4. *Instit.* 222. 2. *Instit.* 558. Cro. Car. 253. 1. *Sid.* 166. 1. *Ch. Caf.* 305. Dyer, 376.



(a) See 28. Edw. 1. c. 7.  
 2. Hen. 5. c. 6.  
 27. Hen. 8. c. 4.  
 27. Hen. 8. c. 15.  
 5. Eliz. c. 5.  
 11. & 12. Will.  
 3. c. 7.  
 2. Inst. 556.  
 Dyer, 376.  
 1. Sid. 356.  
 Cro. Eliz. 910.  
 Yelv. 12.  
 2. Inst. 557.  
 1. Bac. Ab. 651.

castle, &c. (a).; and secondly, According to the course of the Common Law. The mayor and jurats of the several Cinque Ports have power to hold plea, &c. and upon their judgments no writ of error lies to the King's Bench; but they are examined by bill, in nature of a writ of error, before the lord warden, at his court of *Shepway*. The jurisdiction of the Cinque Ports is general, and therefore they may take cognizance of actions real, personal, and mixed.

14. THE COURTS OF THE UNIVERSITIES OF OXFORD AND CAMBRIDGE are also of a special and particular nature, and are granted to them by charters, confirmed by the statute 13. *Eliz.* c. 29. and their privileges extended and explained by letters patent, dated 30th *March*, 11. *Car.* 1. These courts are called the chancellors' courts, who are usually peers of the realm, and are appointed over the whole university. But the courts are kept by their vice chancellors, assessors or deputies; and causes in them are managed by advocates and proctors. Their jurisdiction extends over all matters ecclesiastical and civil, except *mayhem*, *felony*, and *freehold*, where a scholar, servant, or minister of the university is one of the parties in suit; and it has been lately determined, that a college barber at *Oxford*, though he reside in the city, out of the college, is entitled to the privileges of the university. Their proceedings are in a summary way; according to the practice of the civil law, or the laws, statutes, privileges, liberties, and customs of the universities, or the laws of the land, at their discretion. From the sentence of the chancellor's court, an appeal lies to delegates appointed by the congregation; from thence to other delegates of the house of convocation; and if they all three concur in the same sentence, it is, by the laws of the university, final. But if there be any discordance or variation in any of the three sentences, an appeal lies in the last resort to judges

Sed vide  
 Prynne's ani-  
 madversions  
 on the fourth  
 Inst. 368.

The King v.  
 Routledge,  
 Mich. Term.  
 21. Geo. 3.  
 Dougl. 531.

3. Bl. Com. 85.  
 Wood, 521.

judges delegates appointed by the crown, under the great seal in chancery.

## VI. Courts of Equity.

I. THE COURT OF CHANCERY is one of the King's superior and original courts of justice, and takes its name of Chancery, *Cancellaria*, from the judge who presides there, who, according to SIR EDWARD COKE, is so termed à *cancellendo*, from *cancellum* the King's letters patent when granted contrary to law, which is the highest point of his jurisdiction. The origin of this court is of very high antiquity, and the power of the chancellor was formerly very considerable, being eminent for his learning, revered for his virtues, high in the opinion and confidence of the sovereign, and the chief person for the administration of justice, especially in private causes, next under the prince. But towards that part of the *Norman* period when the power of the grand justiciary was broken, and the *aula regis* was divided into separate and distinct jurisdictions, it is highly probable that the authority of the chancellor became also considerably circumscribed: at present the office of chancellor or lord keeper (whose authority by 5. *Eliz.* c. 18. is declared to be exactly 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, even at this day, of the greatest weight and power of any now subsisting in the kingdom, and superior in point of precedency to every temporal lord. He is a privy councillor 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 the keeper of the King's conscience; visitor, in right of the King, of all hospitals and colleges of the King's foundation; and patron of all the King's livings under the value of twenty pounds a year in the King's books. He is the general guardian

3. Bl. Com. 46.  
4. Inst. 88.  
Sed vide Dugdale, 32.  
Camden, Coewel, Castiod.  
Ep. 6. Bk. 11.  
Pet. Pythæus, bk. 2. ad c. 12.  
and the Introduction to Mr. Williams's excellent edition of Harrison's Practice of the Court of Chancery.  
Spelman's Gloss. 106.  
Seld. Off. of Chan. f. 3.  
Dugd. 32.

3. Bl. Com. 47.

1 Ro. Ab. 385.

Seld. Off. of Chan. f. 3.  
Madox Hist. of Exch. 42.

4. Co. 54.

31. Hen. 8. c. 10.

The Court of  
Chancery con-  
sidered as an  
*Officina Bre-*  
*vium.*

4. Inst. 20, 31.

The ordinary  
legal jurisdic-  
tion of the  
Court of  
Chancery.

4. Inst. 20.

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 exercises in his judicial capacity in the court of chancery; wherein there are two distinct tribunals, the one ordinary, being a court of Common Law; the other extraordinary, being a court of Equity. The chancellor, having retained upon the division of the courts the custody of the Great Seal, retained also the right of affixing it to all patents, commissions, and writs; and hence this court is considered at this day as the great shop of justice, out of which all original writs, which give other courts a jurisdiction, do issue, and are made returnable into such courts on a common return day; and from this court do also issue all commissions of charitable uses, bankrupts, sewers, idiots, lunatics, &c.; and such writs, commissions, and patents, may be sued out at any time, as well in vacation as in Term-time, from whence this court is said to be always open. These writs (relating to the business of the subject), and the returns to them, were, according to the simplicity of antient times, originally kept in A HAMPER, *in hanaperio*; and the other relating to such matters wherein the crown was immediately or mediately concerned, were preserved in A LITTLE BAG, *parva бага*; and thence has arisen the distinction of the *hanaper office* and the *petty bag office*, both of which belong to the COMMON LAW COURT in chancery. This ordinary legal court is much more ancient than the court of equity. Its jurisdiction is to hold plea upon a *scire facias*; to repeal or cancel the King's letters patent, when made against law, or upon untrue suggestions; and to hold plea of petitions, *monstrans de droit*, traverses of offices, and the like, when the King hath been advised to do any act; or is put in possession of any lands or goods, in prejudice of a subject's right. It also appertains to this court to hold plea of all personal actions, where any officer or minister of the court is a  
party

party. It may also hold plea by *scire facias* of the tithes of forest lands, where granted by the King, and claimed by a stranger against the grantee of the crown; and of execution on statutes, or recognizances in nature thereof, by the statute 23. Hen. 8. c. 6. But if any cause come to issue in this court, that is, if any fact be disputed between the parties, the chancellor cannot try it, having no power to summon a jury; but must deliver the record *proprid manu* (a) into the court of King's Bench, where it shall be tried by the country, and judgment shall be there given thereon. And when judgment is given in chancery upon demurrer, or the like, a writ of error, in nature of an appeal, lies out of this ordinary court into the court of King's Bench.—THE EXTRAORDINARY, or equitable jurisdiction of the court of chancery, and all the other courts of equity in this kingdom, derive their establishment from so remote an antiquity, that those who have attempted accurately to describe these courts have failed; and indeed the distinction between *law* and *equity*, as administered in the different courts of justice in this country, is not at present known, nor seems to have been known in any other country at any time. It is certain, however, that the court of chancery, from the time of the dissolution of the *aula regis*, has exercised a jurisdiction in matters of equity; and it is now become the court of the greatest judicial consequence, although in its proceedings by *English* bill it is not a COURT OF RECORD. The subject of which this court takes cognizance has been generally divided into three parts, *viz.* fraud, trusts, and accident; but independent of these, specific performances of agreements, portions, powers, wills, devises, legacies, executors, and administrators, form very considerable branches of relief, which come within the cognizance of the equitable jurisdiction of this court. From this court of equity in chancery, as from the other superior courts, an appeal lies to the house of peers. But there are these differences between appeals from a court of equity,

2. Ro. Ab. 469.

(a) The delivery of the record by the hands of an officer of the court is sufficient, 2. Saund. 157.

The court of chancery considered as a court of equitable jurisdiction.

Williams, 16. 3. Bl. Com. 42.

Williams's Introduction to Harrison's Practice, p. 20.

3. Bl. Com. 55.

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and writs of error from a court of law :—FIRST, The former may be brought upon any interlocutory matter; the latter upon nothing but only a definitive judgment. SECONDLY, That on writs of error, the house of lords pronounce the judgment; on appeals, it gives direction to the court below, to rectify its own decree.

3. Bl. Com. 43.

4. Inst. 109. 118.

Wood's Inst.

469.

1. Bac. Ab. 599.

Wood, 469.

(a) See also

13. Eliz. c. 4.

14. Eliz. c. 7.

27. Eliz. c. 3.

7. Jac. 1. c. 15.

2. THE COURT OF EXCHEQUER also acts in a double capacity, as a court of law and court of equity. The court of equity is held in the exchequer chamber, before the lord treasurer, the chancellor of the exchequer, the chief baron, and three *puisne* barons; but the chancellor of the exchequer never sits, unless the barons are equally divided in opinion, in which case the chancellor comes down, hears the cause, and gives his opinion. 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, profits, or other benefits belonging to the crown. The manner of their proceeding is almost according to the practice of the high court of chancery, the leading process of this court, like that, being by *subpœna*; but the plaintiff must set forth in his bill that he is a debtor to the King: but whether he is so in fact or not, is no ways material; for as by a fiction almost all sorts of civil actions are now allowed to be brought in the King's Bench, in like manner by this fiction all kinds of personal suits may be prosecuted in the court of exchequer. By 1. *Eliz.* c. 4, the first-fruits and tenths are within the survey of the court of exchequer (a). An appeal from the equity side of this court lies immediately to the house of peers.

## VII. Courts of a Criminal Jurisdiction.

4. Bl. Com.

292.

1. THE HIGH COURT OF PARLIAMENT is the supreme court of the kingdom, not only for the

the making, but also for the execution of laws, by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. A *commoner* cannot, however, be impeached before the lords for any capital offence, but only for high misdemeanors. A *peer* may be impeached for any crime. By 12. & 13. *Will.* 3. c. 2. no pardon under the great seal shall be *pleadable* to an impeachment by the commons of *Great Britain* in parliament. The articles of impeachment is a kind of bill of indictment, is found by the house of commons, and tried by the peers; and the King, by his commission under the great seal, reciting the impeachment, usually constitutes some peer of the kingdom: but this appointment of a lord high steward does not alter the nature and constitution of the court; it is still the high court of parliament, in which every temporal peer has a right to be present during every part of the proceeding, and to vote upon every question, both of law and fact; the decision of which is guided by the majority of voices, and in which decision the lord high steward votes merely as a peer, and in no other right.

1. Bullst. 198.

Staund. 152.

4. Inst. 59.

2. Hawk. P.C.

592.

4. Bl. Com.

259.

Foster, 141.

143.

2. Hawk. P.C.

7. *in notis.*

2. THE COURT OF THE LORD HIGH STEWARD OF GREAT BRITAIN, is a court instituted for the trial of peers indicted for treason or felony, or for misprision of treason or felony. When, therefore, such an indictment is found by a grand jury of freeholders in the King's Bench, or at the assizes before justices of oyer and terminer, the King, by his commission under the GREAT SEAL, reciting the indictment, constitutes some peer HIGH STEWARD of the kingdom *pro hac vice*, and by the same commission gives him power to receive and proceed on such indictment, and requires the peers to be attendant on him, and the lieutenant of the Tower to bring the prisoner before him. The indictment is then removed into this court by writ of *certiorari*, and the steward makes a precept

4. Bl. Com.

261.

Staund. 152.

4. Inst. 59.

2. Hawk. P.C.

593.

3. Inst. 28.

4. Com. 262.

Foster, 145.

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under

2. Hawk. P.C.  
593.

4. Bl. Com.  
263.  
2. Hawk. P.C.  
595.

Postcr, 142.

3. Inst. 29.  
2. Raund. 152.  
2. Jones, 55.  
Raym. 408.  
1. St. Tr. 702.  
3. St. Tr.  
458. 957.

under his seal to the serjeant at arms appointed to serve him during the time of the commission, to summon the peers before him at such a place, day, and hour; and by the statute 7. Will. 3. c. 3. all the peers who have a right to sit and vote in parliament, shall be summoned at least twenty days before such trial, to appear and vote therein; and every lord appearing shall vote in the trial of such peer, first taking the oaths of allegiance and supremacy, and subscribing the declaration against popery. During the session of parliament, the trial of an indicted peer is not properly in the court of the lord high steward, but before the court last mentioned, of the King in parliament. In the court of the high steward he alone is the judge in all points of law and practice; the peers tryers are merely judges of the fact, and are summoned by virtue of a precept from the high steward, to appear before him on the day appointed by him for the trial, *ut rei veritas melius sciri poterit*. But in the trial of a peer in full parliament, or before the King in parliament, for a capital offence, whether upon impeachment or indictment, every peer present at the trial votes upon every question of law and fact, and the question is carried by the major vote, and the steward acts rather in the nature of a speaker *pro tempore*, a chairman of the court, than the judge of it; for the collective body of the peers are therein the judges both of law and fact, and the high steward hath only a vote therein in right of his peerage. The prisoner, when brought to the bar, is to be arraigned by the clerk of the crown, but he is not to insist on the usual ceremony of his holding up his hand; and after the prisoner hath pleaded and put himself upon God and his peers, the King's counsel go through the evidence, and the prisoner makes his defence by counsel; after which he is taken from the bar, and the lords go together to consider of their evidence; and when a majority of them, being above the number of *twelve*, are agreed, they re-

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turn to the place of trial, and the lord steward demands of them one by one, beginning with the *prifne*, whether the person arraigned be guilty or not guilty; and they answer one by one, not upon their oaths, but upon their honour and allegiances. No lord of any other country, or even of *Scotland* before the Union, nor of *Ireland*, nor the son and heir apparent of any peer, or any other man whatsoever, who is not at the time a lord of parliament, hath any right to such a trial in this kingdom. But duchesses, countesses, or baronesses, whether they be married or sole, shall be tried before the peers of the realm; and it seems agreed that a queen consort or dowager, whether she continue sole or take a second husband after the King's death, be he a peer or commoner; and also all peeresses by birth, whether they be sole or married to peers or commoners; are entitled to the same privileges, as are all marchionesses and viscountesses. It was determined in the case of the *Earl Ferrers*, that a peer indicted of felony and murder, and tried and convicted thereof before the lords in parliament, ought to receive judgment for the same according to the provisions of the 25. *Geo.* 2. c. 37. and also, that if the day appointed by the judgment for the execution, should lapse before such execution done, that a new time may be appointed for the execution, either by the high court of parliament before which such peer was convicted and attainted, although the office of the high steward be determined, or by the court of King's Bench, if the parliament is not then sitting, and the record of the attainder be properly removed into that court.

3. THE COURT OF KING'S BENCH is divided into a *crown side* and a *plea side*, the latter of which we have already considered in a former part of this Chapter. On the crown side this court is entrusted with the highest jurisdiction, not only over all capital offences, but also all other misdemeanors whatsoever of a public nature, tending either to a breach



breach of the peace or the oppression of the subject, or to the raising of faction controversy or debate, or to any manner of misgovernment; so that whatsoever crime is manifestly against the public good, it comes within the cognizance of this court, though it do not directly injure any particular person: neither can any private subject, who has not forfeited his right to the protection of the law, suffer any kind of unlawful violence, or gross injustice against his person, liberty, or possessions, from any person whatsoever, without a proper remedy from this court, not only for satisfaction for the private damage, but also for the exemplary punishment of the offender: neither is it necessary, in a prosecution for any such offence in this court, to shew a precedent of the like crime formerly punished here agreeing with the present in all its circumstances; for this court being the *custos morum* of all the subjects of the realm, whenever it meets with an offence contrary to the first principles of common justice, and of dangerous consequence to the public if not restrained, will adapt such a punishment to it as is suitable to the heinousness of it. And so high a trust doth the law repose in the justice and integrity of this court, as generally to leave it to the discretion of its judges to inflict such fine and imprisonment, and even infamous corporal punishment on offenders, as the nature of the crime, considered in all its circumstances, shall require: neither doth it confine them to the use of their own prison, but leaves them at liberty to commit offenders to any prison in the kingdom which they shall think most proper, and doth not suffer any other court to remove or bail any person condemned to imprisonment by them. Into this court, also, all indictments from all inferior courts may be removed by writ of *certiorari*, and either tried at bar or at *nisi prius*, by a jury of the county out of which the indictment is brought. This court also hath not only power to reverse erroneous judgments given by inferior courts, but also to punish

1 Bac. Ab. 591.  
Co. Lit. 71:  
Dyer, 187.

Moor, 666.  
1. Sid. 145.  
Cases Tempus  
Hardwick, 37.

Sec 6. H. 8. c. 6.  
Saver, 26. 127.  
1. Salk. 396.  
Burr. 556.  
785. 1162.

punish all inferior magistrates and all officers of justice for all wilful and corrupt abuses of their authority against the known, obvious, and common principles of national justice; but not for mere mistakes which an honest, well-meaning man may innocently fall into. The judges of this court are the supreme coroners of the kingdom, sovereign justices of oyer and terminer and general gaol delivery, and of eyre, and principal conservators of the peace; and being the principal court of criminal jurisdiction, the coming of the court of King's Bench into any county suspends the power of all former commissions of oyer and terminer and general gaol delivery: but by 25. Geo. 3. c. 18. a particular provision is made for the session of oyer and terminer and general gaol delivery holden at Newgate for the county of *Middlesex*. When this court, whose jurisdiction is original and inherent, extending all over *England*, proceeds on an offence committed in the same county wherein it sits, the *process* may be made returnable immediately; but when it proceeds on an offence removed by *certiorari* from another county, there must be fifteen days between the *teste* and the return of every process.

Lofft, 55.  
4. Bl. Com. 265  
2. Burr. 1042  
Wood's Inst. 463.  
2. Hawk. P.C. 10.  
9. Co. 118.  
Co. Lit. 134.  
1. Lev. 61.  
1. Sid. 72.

4. THE COURT OF CHIVALRY, when held before the Lord High Constable of *England*, jointly with the Marshal, is a court of criminal jurisdiction over pleas of life and member arising in matters of deeds of arms and war, as well out of the realm as within it. The office of high constable of *England*, which was anciently hereditary, being esteemed too extensive an authority to be safely intrusted in the hands of a subject, is now only created *pro hac vice* at coronations and the like; and indeed the criminal as well as civil jurisdiction of this court, being restrained by divers acts of Parliament, is now fallen into entire disuse.

4. Bl. Com. 267.  
2. Com. Dig. 599.  
2. Hawk. P.C. 12.  
Dyer, 285.  
4. Inst. 127.  
Madox, 27.  
8. Rich. 2. c. 5.  
13. Rich. 2. c. 2.  
1. Hen. 4. c. 14.  
Co. Lit. 391.  
7. Mod. 128.

5. THE HIGH COURT OF ADMIRALTY, held before the Lord High Admiral of *England*, or his deputy,

4. Bl. Com. 268.  
4. Inst. 134.  
147.

deputy, styled the Judge of the Admiralty, is a court not only of civil but of criminal jurisdiction also, and 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 by 15. *Rich.* 2. c. 3. of death and mayhem happening in great ships being and hovering in the main stream of great rivers below the bridges of the same rivers. The crime of piracy also is within the cognizance of this court; and it is said, that if committed by any person, native or foreigner, with whose country we are in amity, trade, or correspondence, whether in the narrow or other seas, Mediterranean, Atlantic, Southern, or any branches thereof, either on this or the other side of the Line, it is within the cognizance of this court. By 28. *Hen.* 8. c. 15. all felonies and robberies upon the sea, within the jurisdiction of the admiralty, shall be inquired, tried, heard, determined, and judged, in such shires and places in the realm as shall be limited by the King's commission, in like form and condition as if such offence had been committed or done in or upon the land; and such commission shall be had under THE GREAT SEAL directed to the admiral or his deputy, and to three or four such other substantial persons as shall be named by the lord chancellor, 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 twelve men, and afterwards tried by another jury, as at common law. This is now the only method of trying marine felonies in THE COURT OF ADMIRALTY; the judge of the admiralty still presiding therein, just as the lord mayor presides at the sessions in London. By 30. *Geo.* 2. c. 25. § 20. a session of oyer and terminer and gaol delivery for the trial of offences committed on the high seas within the jurisdiction of the admiralty of England, shall be held twice at least in every year, that is to say, in the months of *March* and *October*, in every year, at  
Justice

See Sir Charles  
Hedges' charge  
to the jury,  
Old Bailey,  
Admiralty  
Sessions, 8  
Will. 3.

5. St. Tr. 3.  
8. Wood, 67.  
4. Bl. Com. 71.

See Hawkins,  
Pleas of the  
Crown, 159.

Justice Hall, in the Old Bailey, *London*, or in such other places within *England* as the lord high admiral, or commissioners for executing the office, or any three or more of them, by writing under their hands, directed to the judge of the court of admiralty for the time being, shall appoint.

6. THE COURT OF ASSISES, *Affisa*, from the word *affideo*, which signifies to associate or fit together, is a court wherein THE TWELVE JUDGES, *viz.* the judges of the courts of King's Bench, Common Pleas, and the Barons of the Exchequer, are empowered to try, twice in every year, in their respective circuits, all causes, civil and criminal, in every county of *England*, except only *London* and *Middlesex*. These circuits are six in number, to each of which two judges are appointed. For *Wales* there are four circuits, including what is called the Chester circuit; and by 18. *Eliz. c. 8.* the King is authorized to appoint two persons learned in the laws to be judges in each of the Welch circuits. The judges upon these occasions sit by virtue of five several commissions:—1. The commission of Assise, which is directed to the judges and clerk of assise, to take assises; that is, to take the verdict of a peculiar species of jury called an assise, and summoned for the trial of landed disputes. 2. The writ of *nisi prius*, the nature of which we have already described. 3. A commission of oyer and terminer. 4. A commission of gaol delivery; and, 5. The commission of the peace.

7. A COURT OF OYER AND TERMINER, that is, to hear and determine, is constituted by the King's commission for this purpose, directed to two of the judges of the superior courts, and many other gentlemen of the county; but as the judges only are of the *quorum*, the rest cannot act without at least one of the judges being with them. By virtue of this commission they are empowered to "enquire, hear, and determine," all treasons, felonies,

Co. Lit. 157.  
Wood's Init.  
474.  
4. Inst. 158.  
3. Bl. Com. 52.

Wood.  
4. Bl. Com.  
270.

lonies, and misdemeanors, so that they can only proceed on an indictment found at the same assises; for they must first *enquire* by means of the grand jury or inquest, before they are empowered to *hear and determine* by the help of the petty jury. But by being also

Wood, 475.  
4. Bl. Com.  
267.  
2. Hawkins,  
Pleas of the  
Crown, 31.

See the Argu-  
ments of Coun-  
sel and the  
Judgment of  
the Court in  
the case of  
Ebenezer Plat,  
Cases in Crown  
Law, 163.

8. A COURT OF GAOL DELIVERY, they are empowered by the commission of gaol delivery to deliver every prisoner who shall be in the gaol when the judges arrive at their circuit town, whenever indicted, or for whatever crime committed; so that one way or other the gaols are cleared, and all offenders tried, punished, or delivered, twice in every year. Sometimes also, upon urgent occasions, the King issues a special or extraordinary commission of *oyer and terminer* and *gaol delivery*, confined to those offences which stand in need of immediate enquiry and punishment. By the 8. *Rich.* 2. c. 2. and 33. *Hen.* 8. c. 24. no persons could be justices of assise or gaol delivery in any county where born, under a penalty of one hundred pounds; but by 12. *Geo.* 2. c. 27. the chief justice and justices of either bench, the chief baron and other barons of the exchequer, and any other person learned in the law, may exercise the office of justice of oyer and terminer or gaol delivery in any county for which he is appointed, notwithstanding his having been born or inhabiting within such county.

Wood, Inf.  
477.  
Lambard,  
b. 4. c. 19.  
4. Bl. Com.  
271.

9. THE SESSION OF THE PEACE is a court of record held every quarter of the year, in every county, before two or more justices, one of them to be of the *quorum*, for the execution of the authority given to them by the commission of the peace, and by several acts of Parliament. In some of the counties the justices divide the shire into three or four parts, and keep four several sessions in each part. By 2. *Hen.* 5. ft. 1. c. 4. the quarter sessions is appointed to be kept in the first week after *Michaelmas-Day*, in the first week after *Epiphany*, in the first week after the *close of Easter*,  
and

and in the week after *the Translation of Thomas à Becket*, and oftener if need be. In *London and Middlesex* (a) therefore, they are held eight times in the year, and in many counties are, by custom, kept at different times than those the statute appoints. The place for keeping the quarter sessions in the county, is usually in one of the principal towns in the county, according to the discretion of the justices. This being agreed on, the sessions ought to be warned by warrant of two or more of the justices, directed to the sheriff, thereby commanding him to summon a session of the peace, to return a grand jury before them or their fellow-justices, at a certain day and place, and to give notice to all stewards, constables, and bailiffs of liberties to attend; and such a precept by any two such justices cannot be superseded by any of their fellows, but only by writ out of Chancery. The jurisdiction of this court, by 34. *Edw.* 3. c. 1. 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 case of difficulty arise, they shall not proceed to judgment but in the presence of one of the justices of the courts of King's Bench or Common Pleas, or one of the judges of assize, and therefore murder and all capital felonies are usually remitted to the assizes. There are also many offences which by particular statutes ought to be prosecuted in this court, as offences relating to the game, highways, alehouses, bastards, the poor, vagrants, servants, apprentices, &c. &c. but they cannot try any new-created offence without express power given them by the statute which creates it. This court, besides entertaining trials upon TRAVERSES, that is, where the party takes issue, or denies the chief matters of the charge, or the point of the indictment, may also make ORDERS upon the hearing of complaints; and, if disobeyed, may bind the delinquent to appear and answer the contempt, or may immediately

(a) See the 14.  
Hen. 6. c. 4.  
4. Co. 48.  
2. Stra. 832.  
865.

Wood's Inst.  
477.  
2. Ld. Ray,  
1238.

Wood, 479.

4. Bl. Com.  
271.

4. Mod. 379.  
Salk. 406.  
Ld. Ray, 1144.

Wood's Inst.  
479.  
Dalton, chap.  
185.  
2. Inst. 568.  
4. Inst. 164.

commit

commit him to prison, until he pay due obedience to its authority. But an order of the quarter sessions, as well as an indictment there found, may be removed into the King's Bench by writ of *certiorari*, and quashed for insufficiency, unless the right to this writ be specially taken away, as it is in some instances by the legislature, and the final determination of the matter left with the court. There are sometimes kept a special or petty session by a few justices for the more speedy dispatch of the business of the neighbourhood; or for licensing alehouses, taking the accounts of the overseers of the poor (a), &c. By 22. Geo. 2. c. 46. § 14. No clerk of the peace or his deputy, or under-sheriff or his deputy, shall act as a solicitor, attorney, or agent, at any general or quarter sessions for the county or place where he shall execute such office, under the penalty of fifty pounds. In most corporation towns there are quarter sessions kept before justices of their own, within their respective limits; and they have, with very few exceptions, the same authority as the general quarter sessions of the county.

(a) On a rule for an information against Mr. Joliffe for appointing overseers at his own house, it seemed to be the opinion of the court Mich. Term, 31. Geo. 3. that the justices must make the appointment at a PETTY

SESSIONS. MSS.

4. Bl. Com. 273. Mirror of Justices, ch. 1. sect. 13 and 16. 2. Inst. 70. 4. Inst. 260. 8. Co. 38. 2. Hawk. P. C. 90.

10. THE SHERIFF'S TOURN, or rotation, is a court of record, held twice every year, within a month after *Easter* and *Michaelmas*, before the sheriff in different parts of the county; being indeed only the turn of the sheriff to keep a court-leet in each respective hundred. This court is intended to redress the common grievances within the county; and although its power is considerably abridged by *Magna Charta*, chap. 17. and by 1. *Edw.* 4. c. 2. it still continues a court of record, and may impose a fine on all such as are guilty of any contempt in the face of the court.

2. Hawk. P. C. 112. 4. Bl. Com. 270. Finch. 246.

11. THE COURT LEET, or VIEW OF FRANK PLEDGE, is a court of record, holden once a year and not oftener, and having the same jurisdiction within some particular precinct which the sheriff's tourn hath in the county. Its original intent was

to view the frank pledges, that is, the freemen within the liberty, to oblige all within its jurisdiction to attend and take the oath of allegiance, and to present by jury all crimes within the district. But the business both of THE Tourn and THE LEET hath of late years declined, and fallen on the quarter sessions. 2. Hawk. P.C. 115. in notis.

12. THE COURT OF THE CORONER is a court of record to enquire, by means of a jury or inquest, where any one comes to a violent death, by felony or mischance; but the jurisdiction of the coroner is confined entirely to homicide, and does not extend to any other felony; and even this inquisition can only be taken *super visum corporis*. By the 4. Edw. 1. commonly called the statute *De Officio Coronatoris*, it is enacted, “ that the coroner, “ upon information, shall go to the places “ where any be slain, or suddenly dead or “ wounded, and shall forthwith command four of “ the next towns, or five or six, to appear before “ him in such a place; and when they are come “ thither, the coroner upon the oath of them shall “ inquire (a) in this manner; that is, to wit, if they “ know where the person was slain, whether it “ were in any house, field, bed, tavern, or com- “ pany, and who were there. Likewise it is to “ be inquired who were culpable, either of the act “ or of the force, and who were present, either “ men or women, and of what age soever they “ be (if they can speak, or have any discretion). “ And how many soever be found culpable by in- “ quisition in any of the manners aforesaid, they “ shall be taken and delivered to the sheriff, and “ shall be committed to the gaol: and such as “ be founden, and be not culpable, shall be at- “ tached until the coming of the justices, and “ their names shall be written in the coroner’s “ rolls. If it fortune any such man be slain “ which is found in the fields or in the woods, “ first it is to be inquired, whether he were slain “ in

Wood's Inst. 488.  
Staundford's Pleas of the Crown, 51.  
Coke's Pleas of the Crown, 271.  
2. Inst. 32.  
4. Bl. Com. 271.  
2. Hawk. P.C. 75.  
1. Burr. Rep. 19.  
1. Strange, 224.  
(a) If in an inquisition *super visum corporis*, the year of our Lord, in the caption is in common figures, it shall be quashed. It should be in words at length, or at least in Roman numerals.  
Strange, 261.



The several matters enumerated of which it is the duty of coroners to enquire; and the manner in which that inquisition shall be taken.

1. Hale, 432.

2. Hale, 57.

Umfreville's

Coroner, 212.

1. Sid. 204.

2. Hawk. P. C.

77.

“ in the same place or not; and if he were  
 “ brought and laid there; they shall do as much  
 “ as they can to follow their steps that  
 “ brought the body thither, whether he were  
 “ brought upon a horse, or in a cart. It shall be  
 “ inquired also, if the dead person were known,  
 “ or else a stranger, and where he lay the night  
 “ before; and if any be found culpable of the  
 “ murder, the coroner shall immediately go unto  
 “ his house, and shall inquire what goods he hath,  
 “ and what corn he hath in his grange; and if  
 “ he be a freeman, they shall inquire how much land  
 “ he hath, and what it is worth yearly, and further,  
 “ what corn he hath upon the ground. And when  
 “ they have thus inquired upon every thing, they  
 “ shall cause all the land, corn, and goods, to be  
 “ valued, in like manner as if they should be sold  
 “ incontinently, and thereupon they shall be de-  
 “ livered to the whole township, which shall be  
 “ answerable before the justices for all. And  
 “ likewise of his freehold, how much it is worth  
 “ yearly over and above the service due to the  
 “ lords of the fee, and the land shall remain in the  
 “ king's hands, until the lords of the fee have  
 “ made fine for it. And immediately upon these  
 “ things being inquired, the bodies of such per-  
 “ sons being dead or slain shall be buried.—In  
 “ like manner it is to be enquired of them that  
 “ be drowned, or suddenly dead; and after such  
 “ bodies are to be seen, whether they were so  
 “ drowned or slain, or strangled, by the sign of a  
 “ cord tied strait about their necks, or about any  
 “ of their members, or upon any other hurt found  
 “ upon their bodies, whereupon they shall pro-  
 “ ceed in the form abovesaid; and if they were  
 “ not slain, then ought the coroner to attach the  
 “ finders, and all other in company.”

The coroner upon inquisition must find the nature of the wound, &c.

“ ALSO, all wounds ought to be viewed,  
 “ the length, breadth, and deepness, and with  
 “ what weapons, and in what part of the body the  
 “ wound

“ wound or hurt is, and how many be culpable,  
 “ and how many wounds there be, and who gave  
 “ the wounds; all which things must be inrolled  
 “ in the roll of the coroners. Also horses, boats,  
 “ carts, &c. whereby any are slain, that properly  
 “ are called deodands, shall be valued and deli-  
 “ vered unto the towns as before is said.”

Holt, 167.  
 Staund. 51.  
 1. Hale, 422.  
 2. Hale, 62.

AND by 3. *Hen.* 7. c. 1. “ After the felony  
 “ found, the coroners shall deliver their inquisition  
 “ afore the justices of the next general gaol  
 “ delivery, in the shire where the inquisition is  
 “ taken; the same justices to proceed against such  
 “ murderers if they be in the gaol, or else the  
 “ same justices to put the same inquisitions afore  
 “ the King in his bench. And if any coroner do  
 “ not in such manner certify his inquisition, he  
 “ shall forfeit an hundred shillings.”

The inquisition to be trans-  
 mitted to the  
 affizes.  
 2. Hawk. P.C.  
 79, 80.

ALSO it is enacted by 1. & 2. *Phil. & Mary,*  
 c. 13. “ That every coroner, upon any inquisition  
 “ before him found, whereby any person or per-  
 “ sons shall be indicted for murder or manslaugh-  
 “ ter, or as accessory or accessaries to the same,  
 “ before the murder or manslaughter committed,  
 “ shall put in writing the effect of the evidence  
 “ given to the jury before him, being material;  
 “ and shall bind all such by recognizance or  
 “ obligation, as do declare any thing material to  
 “ prove the same, to appear at the next general  
 “ gaol delivery to be holden within the county,  
 “ city, or town-corporate, where the trial thereof  
 “ shall be, then and there to give evidence against  
 “ the party so indicted at the time of the trial;  
 “ and shall certify as well the same evidence, as  
 “ such bond or bonds in writing, as he shall take,  
 “ together with the inquisition or indictment  
 “ before him taken and found, at or before the  
 “ time of his said trial thereof to be had or made.  
 “ And, in case any coroner shall offend in any  
 “ thing contrary to the true intent and meaning  
 “ of this act, the justices of gaol delivery of the  
 “ shire,

Coroner shall  
 take deposition  
 of witnesses in  
 writing, and  
 bind them over  
 to appear and  
 give evidence.

“ shire, city, town, or place where such offence  
 “ shall happen to be committed, upon due proof  
 “ thereof, by examination before them, shall for  
 “ every such offence set such fine on every such  
 “ coroner as they shall think meet, and estreat  
 “ the same, as other fines and ameraciements assessed  
 “ before justices of gaol delivery ought to be.”

Penalty on coroners for neglect.

Salk. 377.  
 Strange, 69.

AND it is enacted by 1. *Hen. 8. c. 7.* “ That if  
 “ any coroner shall not endeavour himself to do  
 “ his office upon any person dead by misadventure, he shall forfeit forty shillings.”

Penalty on coroners being guilty of extortion.

Strange, 99.

AND it is further enacted by 25. *Geo. 2. c. 29. s. 6.*  
 “ That if any coroner who is not appointed by virtue  
 “ of an annual election or nomination, or whose  
 “ office of coroner is not annexed to any other  
 “ office, shall be lawfully convicted of extortion,  
 “ or wilful neglect of his duty, or misdemeanor  
 “ in his office, it shall be lawful for the court  
 “ before whom he shall be so convicted, to ad-  
 “ judge that he shall be removed from his office;  
 “ and thereupon if such coroner shall have been  
 “ elected by the freeholders of any county, a writ  
 “ shall issue for the amercing him from his office,  
 “ and electing another coroner in his stead, in such  
 “ manner as already directed by law; and if the  
 “ coroner so convicted shall have been appointed  
 “ by the lord or lords of any franchise or liberty,  
 “ or in any other manner than by the election of  
 “ the freeholders of any county, the lord or lords  
 “ of such liberty or franchise, or the person or  
 “ persons intitled to the nomination or appoint-  
 “ ment of any such coroner, shall, upon notice  
 “ of such judgment of amercal, nominate and  
 “ appoint another person to be coroner in his  
 “ stead.”

4 Bl. Com. 275.  
 4 Inst. 273.  
 Wood's Inst.  
 490.

13. THE COURT OF THE CLERK OF THE MARKET is incident to every fair and market in the kingdom, to punish misdemeanors therein; as a court of PIEPOWDER is to determine all disputes relating

relating to private or civil property. The principal object of the jurisdiction of this court is, to enquire of weights and measures, whether they are according to the King's standard or no.

Wood's Inst. 490.  
17. Car. 2. c. 19.  
22. Car. 2. c. 8.  
23. Car. 2. c. 12.

14. THE STEWARD'S COURT. By 3. Hen. 7. c. 14. it is ordained, that the steward, treasurer, and comptroller of the King's house, for the time being, or one of them, have full authority and power to enquire by twelve sad and discreet persons of the cheque-roll of the King's household, if any servant admitted to be his servant, in his house sworn, and his name put into the cheque-roll of his household, whatsoever he be, serving in any manner, office; or room, reputed, had, and taken under the state of a lord, make any confederacies, compassings, conspiracies, or imaginations, with any person or persons, to destroy or murder the King, or any lord of this realm, or any other person sworn of the King's council, or steward, treasurer, or comptroller of the King's house; that if it be found before the said steward for the time being, by the said twelve sad men, that any such of the King's servants as is abovesaid hath confedered, compassed, conspired, or imagined as is abovesaid, that he so found by that inquiry be put thereupon to answer, and the steward, treasurer, and comptroller, or any two of them, have power to determine the same matter according to law. And if he put him in trial, that then it be tried by other sad twelve men of the same household, and that such misdoers have no challenge but for malice. And if such misdoers be found guilty, the said offence shall be adjudged FELONY.

Co. P. C. 37.  
Co. Ent. 482.  
4. Inst. 133.

15. THE COURT OF THE LORD STEWARD OF THE KING'S HOUSEHOLD, or (in his absence) of the TREASURER, COMPTROLLER, AND STEWARD OF THE MARSHALSEA. This court is established to enquire of, hear, and determine all treasons, misprisions of treason, murders, manslaughters, bloodshed, and

4. Bl. Com. 276.  
2. Hale, 7.

M m

other

1. Hale's Pleas  
of the Crown,  
9.  
4. Co. 45.  
Co. Ent. 53.

other malicious strikings, whereby blood shall be shed in any of the palaces or houses of the King, or in any other house where the royal person shall abide. The method of proceedings, which must be both by a grand and petit jury, as at the Common Law, and the punishment on conviction, are very minutely described by the statute of 33. *Hen. 8.* c. 12. by which this new kind of jurisdiction was erected; but the act being in the affirmative, doth not exclude the jurisdiction of the King's Bench, nor of commissioners of oyer and terminer. "But," says *Lord Hale*, "I never knew but of one session held on this statute."

4-Bl. Com. 277.

16. THE CHANCELLOR'S COURT is a court belonging respectively to the universities of *Oxford* and *Cambridge*, which had authority to determine all criminal offences or misdemeanors under the degree of treason, felony, or mayhem, wherein a privileged person was one of the parties; but this jurisdiction is now, by a particular charter, dated 7. *June*, 2. *Hen. 6.* confirmed by 13. *Eliz.* c. 29. committed to the court of the lord high steward of the university. When, therefore, an indictment is found at the assizes, or elsewhere, against any scholar of the university, or other privileged person, the vice-chancellor may claim the cognizance of it; and if allowed, it then comes to be tried in the high steward's court. But the indictment must first be found by a grand jury, and then the cognizance claimed; for it cannot proceed originally *to enquire*, but only, after inquest in the Common Law courts, *to hear and determine*. When the cognizance is allowed, if the offence be a misdemeanor only, it is tried in the chancellor's court by the ordinary judge. But if it be for treason, felony, or mayhem, it is then to be tried before the high steward, under the King's special commission.

## CHAPTER THE EIGHTH:

*Terms of Law.*

**T**ERMS of Law are artificial or technical Jacob, L. D. words and terms of art particularly used in, and adapted to, the profession of the Law.

1. **ABROACHMENT** is the forestalling of a market or fair; Termes de la by purchasing the wares before they are therein exposed to sale, Lcy, 5. and then selling them by retail.

2. **ABET**, from *abettare*, to stir up or incite, signifies, in our law; as much as to encourage or set on. An abettor; therefore; is an instigator or setter-on, one that promotes or procures a crime to be committed.

3. **ABEYANCE** is derived from the *French* word *beyer*; to Co.Lit. 342.b. expect, and signifies that the fee or freehold of land is not 2.Bl.Com.107. vested in any one; but stands, in consideration of law, in waiting or expectation of an owner or proprietor; for although there be no person *in esse* in whom it can vest and abide, yet the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. The word *abeyance* Walsingham's hath been compared to what the civilians call *hereditatem* Cafe, Plowd. *jacentem*; for as the civilians say lands and goods do *jacere*, so the common lawyers say that things in like estate are *in abeyance*; or, as the logicians term it, *in posse*. Thus, in a grant to *John* for life, and afterwards to *the heirs of Richard*, the inheritance is plainly neither granted to *John* nor *Richard*, nor can it vest in the heirs of *Richard* till his death, *nam nemo est hæres viventis*: it remains; therefore; in waiting or *abeyance* during the life of *Richard*. This is likewise always the case of a parson of a church; who hath only an estate therein for the term of his life; and the inheritance remains in *abeyance*. So also when a bishop, dean, archdeacon, prebendary; parson, or any other sole corporation dies, the fee of the glebe or rectory, and the freehold of the church, whether presentative, elective, or donative, is in *abeyance*. So also if by act of parliament Dalison, 48. the King renounces an estate, and by the same act it is not vested in any other person, it remains in *abeyance*.

4. **ABIGEVUS** signifies a thief who has stolen many cattle. Bra&. b. 3. c. 6. Thus; *Bracton* says, "*si quis suam surripuit FUR erit, et si quis gregem ABIGEVUS erit.*"

1. Saund, 22.  
5. Co. Dig. 109.  
Mod. Cases, 103.  
1. Lev. 192.  
Lut. 1457. 460.
5. **ABSQUE HOC**, *without this, &c.* are the technical words of exception made use of in pleading *a traverse*. But words equipollent may be used, and therefore a traverse by the words *et non* are sufficient.
3. Bl. Com. 34.
6. **ACCEDAS AD CURIAM** is the name of a writ, which lies where a man hath a false judgment given against him in the hundred court or court baron; it is directed to the sheriff, and issued out of the chancery.
1. Bl. Com. 46.  
3. Bl. Com. 302.
7. **ADDITION** signifies in law the adding of the estate, degree, or mystery which any person is of, to their christian and surnames; for by the 1. Hen. 5. c. 5. all persons shall in law proceedings be stiled by their name and addition.
- Chancery Cases,  
temp. Talb. 227.
8. **ADEMPTION** signifies the taking away of a legacy; as if a man had bequeathed to another a bond on which money was due by a third person, and before the will takes effect, he calls in the money from the obligor.
- Jacob's Law  
Dictionary.
9. **ADNICHILED** is derived from the *Latin* word *nihil*, written of old *nichil*, and signifies, as appears by the statute 28. Hen. 8. c. . annulled, cancelled, or made void.
- Termes de la  
Ley, 25.  
Noy, 105.  
F.N.B. 121. 225.  
Vaughan, 341.  
Cro. Eliz. 267.  
1. Co. Dig. 302.  
1. Hawkins's  
Pleas of the  
Crown, 369.  
386.
10. **AD QUOD DAMNUM** is a writ which ought to be issued before the King grants certain liberties, as a fair, market, &c. which may be prejudicial to others, directing the sheriff to enquire *what damage* it may do for the King to grant such market, fair, &c. It was also the ancient method of obtaining a right to turn the course of an old road, or to make a new one; but in this respect the proceedings are now rendered more easy by the 13. Geo. 3. c. 78. s. 31.
11. **ADVOCATI** were those persons who we now call patrons of churches.
4. Co. Dig. 139.
12. **AFFERORS**, from the *French* *affier*; to affirm, are those who in court leets, upon oath, settle and moderate the fines and amerciaments imposed upon such persons as have committed faults punishable at the discretion of the court.
- Termes de la  
Ley, 30.
13. **AGE-PRIOR** is, where an action is brought against an infant for lands which he hath by descent, he by petition, plea, or motion, shews his infancy to the court, and prays that the action may stay, or, according to the more technical phrase, that the *parol may demur* until his full age.
14. **AGENT AND PATIENT** is where a person is the doer of a thing, and also the party to whom it is done. Thus, where a woman endows herself of the best part of her husband's possessions, this being the sole act of herself to herself, makes her *agent and patient*. This term is also applied to those cases where the doctrine of *remitter* prevails.

15. **AGISTMENT**, from the *French giste*, a bed or resting place, signifies to take in and feed the cattle of strangers, at a certain rate *per week*. 2. Inst. 643. Spelman's Glos.

16. **ALLODIAL** signifies an inheritance held without any acknowledgement to any lord or superior, as contra-distinguishing from an inheritance in fee, which in its general acceptation signifies land holden. In England there is no such thing as *allodial property*, for, in contemplation of law, all the lands and tenements in *England*, in the hands of subjects, are *holden* mediately or immediately of the King. Wright's Tenures, 149. Smith's Commonwealth of England, bk. 3. ch. 10. Cowel's Interpreter, Verbum

FEE. Co. Lit. f. 1. 2. Inst. 501. 4. Inst. 192. 2. Bl. Com. 105.

17. **AMENABLE**, from the *French amener*, to bring or lead unto, in a modern sense, signifies to be responsible, or subject to answer, in a court of justice. Cowel.

18. **AMICUS CURIÆ**, a friend of the court. Thus, if a judge is doubtful or mistaken in a point of law, a stranger may speak to the subject, and offer his sentiments as an *amicus curiæ*. Co. Lit. 178.

19. **ANATOCISM** signifies the taking of usurious interest for the loan of money, when the lender extorts compound interest, or joins and accumulates together the interest of several years, and requires a new interest to be paid for them, as for the first and true principal. 1. Postle. 59.

20. **APPARITOR** is the messenger who serves the process of the spiritual courts; to cite them to appear, to arrest them for contumacy, and to execute the sentence or decree of the judges. Ayliff's Parergon, 70. 2. Bull. 264.

21. **APPORTIONMENT** signifies the dividing of a rent into parts, according as the land out of which it issues is divided among one or more proprietors. Thus, where a lessor recovers part of the land, or enters for a forfeiture into part of the land, the rent shall be apportioned. Co. Lit. 148. Moor, 231.

22. **APPROVEMENT** is where a man hath common in the lord's waste, and the lord makes an *inclosure* of part of the waste for himself, leaving sufficient common, with egress and regress for the commoners. This right is regulated by the statute of *Merton*, 20. Hen. 3. c. 4. the statute of *Westminster*, 2. 13. Edw. 1. c. 46. 29. Geo. 2. c. 36, and 31. Geo. 2. c. 41. 1. Ro. Ab. 90. 405. 9. Co. 112. 2. Inst. 474. 2. Bl. Com. 34. 3. Bl. Com. 240.

23. **ATTACHMENT** is a custom in many places abroad, and particularly in *London*, whereby a creditor may attach the goods of his debtor in any hands where he findeth them, privileged persons and places only excepted.

24. **ATTORNMENT** signifies the tenant's acknowledgement of a new lord, on the sale of lands, &c. As where there is tenant for life, Co. Lit. 316.



life, and he in reversion grants his right to another, it is necessary the tenant for life should agree to it, which is called *attornment*. But by the 4. *Ann.* c. 16. and 11. *Geo.* 2. c. 19. attornments are, in almost every case, rendered unnecessary.

Park's Marine  
Insurances.  
99. 121. 124.

25. **AVERAGE** is said to signify service which the tenant owes to his lord by horse or carriage; but is more commonly used to signify a contribution that merchants and others make towards their losses who have their goods cast into the sea for the safe-guard of the ship, or of the other goods and lives of those persons who are in the ship during a tempest.

3. Bl. Com. 309.  
4. Bl. Com. 334.

26. **AVERMENT** is, in pleading, the positive assertion of some fact, or an offer to do some act. Thus, where a man pleads a plea in abatement of the writ, or in bar of the action, which he saith he is ready to prove, as the court shall award; this offer to prove the plea is called an averment: "*et hoc est paratus verificare.*"

2. Bl. Com. 177.

27. **AUTRE DROIT** is where a person does or suffers a thing in the right of another. Thus, executors, administrators, &c. act in *autre droit*, that is, in right of their testator or intestate, and not in their own right.

## B.

1. Hawk. P. C.  
482.

28. **BADGER** signifies a person who buys *corn* or *vituals* in one place, and carries them to another to sell, and make profit by them. By 5. *Eliz.* c. 12. no person shall be a *badger*, unless licensed by the sessions; but by 12. *Geo.* 3. c. 71. which repeals all the acts against ingrossing, forestalling, and regrating, this character seems to be abolished.

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

Kitchen, 95.

30. **BASE COURT** is any inferior court that is not of record; as the court baron, &c.

F. N. B. 596.  
p. Inst. 122.

31. **BEAU PLEADER**, *pulchrè placitando*, fair pleading, is a writ upon the statute of *Marlbridge*, 52. *Hen.* 3. c. 11. to prohibit a fine that used formerly to be assessed for not pleading fairly or aptly to the purpose;—the course now being, to punish the party by making him pay the costs of improper pleadings, under an order of the court in which they are filed.

F. N. B. 222.  
and see Booth  
on Real Actions.

32. **BESAILE**, *bisaveul*, *proavus*, the father of the grandfather; and, at Common Law, it signifies a writ that lies where the great-grandfather was seised the day that he died, of any lands or tenements in fee-simple, and after his death a stranger enters the same day and keeps out the heir.

33. **BONA**

33. **BONA NOTABILIA** is where a person dies, having at the Perkins, 489. time of his death goods in any other diocese, besides his goods <sup>2.</sup> Bl. Com. 509. in the diocese where he dies, amounting to the value of *five pounds* at least.

C.

34. **CALLING THE PLAINTIFF** is the ceremony which takes place when a plaintiff is nonsuited. It is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or to withdraw himself; whereupon the crier is ordered to *call the plaintiff*, and if neither he nor any one for him appears, he is *nonsuited*, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. But this is not, like a *retraxit* or a *verdict*, a bar to another action. <sup>3.</sup> Bl. Com. 296. 316. 376.

35. **CAPTION** is when a commission is executed, the commissioners subscribe their names to a certificate when and where the commission was executed, which in law is called *a caption*, or *taking* of the thing ordered to be done.

36. **CASTIGATORY** is the name of the instrument by which a woman is punished when convicted of being a common scold. It is also called *the trebucket* or *cucking-stool*, which is frequently corrupted into *ducking-stool*, because part of the judgment is, that when the offender is placed in it, she shall be plunged into water. <sup>3.</sup> Inst. 319. <sup>4.</sup> Black. Com. 169. and see Jacob's Law Dictionary, where it is said, that although this mode of punishment has been long disused, Mr. Morgan, the editor of that work, had seen the remains of one on the estate of a relation in Warwickshire, which consisted of a long beam or rafter, moving on a *fulcrum*, and extending to the centre of a large pond, on which end the stool used to be placed.

37. **CASUS OMISSUS** is where any particular thing is omitted out of or not provided for by a statute, &c.

38. **CEPI CORPUS** is the return made by the sheriff upon F. N. B. 26. *a capias* or other process to the like purpose, that he hath *taken the body* of the party.

39. **CESTUI QUE TRUST** is he who hath the trust of lands or tenements committed to him for the benefit of another. <sup>Gilbert's Tracts, 3.</sup>

40. **CESTUI QUE USE** signifies him to whose use any other man is enfeoffed of lands or tenements. <sup>Perk. 97. Co. Lit. 133.</sup>

41. **CESTUI QUE VIE** is he for whose life any lands or tenements are granted. <sup>Perk. 97.</sup>

42. **COGNOVIT ACTIONEM** is where a defendant acknowledges or confesses the plaintiff's cause against him to be just and true, and, either before or after issue, suffers judgment to be entered against him without trial. And in this case *the confession* generally extends to no more than is contained in the declaration; but the defendant may confess more if he will. <sup>1. Roll. 919. Hob. 178. 3. Bl. Com. 304. 397.</sup>

Carth. 90. 43. COLLOQUIUM, à *colloquendo*, signifies a talking together or affirming a thing. Thus, for words spoken, it must be laid in the declaration, in an action of slander, that the speaking was of the declaration, in an action of slander, that the speaking was of *and concerning* the plaintiff.

Modern Cases, 203. and see the case of Rex v. Herne, Cowp. Rep. 10. Co. 88. 90. 44. COLOUR signifies a probable plea, but which is in fact false; and it hath this effect, to draw the trial of the cause from the jury to the judges.

Cro. Jac. 122. Lutw. 1343. 1. Co. 79. 1. 8. 3. Bl. Com. 309. Lit. sect. 420. 45. CONGEABLE is derived from the *French congé*, leave or permission; and signifies in our law, that a thing is lawful, or lawfully done, or done with permission.

Termes de Ley, 2. Lev. 64. Lutw. 1312. 3. Bl. Com. 212. 46. CONTINUANDO is a word used in a special declaration of *trespass*, when the plaintiff would recover damages for several trespasses in the same action.

Cro. Jac. 351. 47. CORAM NON JUDICE is where a cause is brought and determined in a court, of which cause the judges have no jurisdiction.

Plowd. 546. Brownl. 182. Bridg. 112. 3. Co. 83. Co. Lit. 357. 1. Roll. Ab. 621. 2. Inst. 713. 48. COVIN, *covina*, is a compact between two or more, to deceive or prejudice others; as if tenant for life, or in tail, conspire with another, that he shall recover the land which he the tenant holds, in prejudice to him in reversion.

Shepherd's Eptome, 682. 49. CURIA ADVISARE VULT is the entry made when the court take time to deliberate upon any point of difficulty, before they give judgment in a cause.

6. Co. 64. 50. CURTILAGE signifies a court-yard, back-side, or piece of ground lying near or belonging to a dwelling-house; as the yard, garden, and, in short, every thing that is within the homefall or fence by which the mansion-house is surrounded.

## D.

3. Salk. 10. 51. DAMNUM ABSQUE INJURIA signifies that sort of loss or damage which a man may sustain, without thereby receiving a legal injury. Thus, if a man keep a school in a particular place, and another person opens a seminary in the same place, whereby the first loses scholars that he would otherwise have had, this is to his *damage*, but it is not that sort of injury for which the law affords any redress; but if his rival take improper methods to draw those scholars he has already got away, an action on the case lies to recover *damages* for the consequential *injury* he may thereby receive.

Cro. Eliz. 68. Lofi. 333. 2. Term. Rep. 719. Mr. Tidd's Practice of the Court of King's Bench, page 232. 52. DE BENE ESSE is a phrase which signifies to accept or allow any thing as well done for the present, but when it comes

to be tried or more fully examined, to stand or fall according to the merit of the thing in its own nature. Thus, on all process returnable before *the last return* of any Term, when no affidavit is made or filed of the cause of action, the plaintiff may file or deliver a declaration *de bene esse*, or *conditionally*.

53. DEDIMUS POTESTATEM is a writ or commission given to one or more private persons, for speeding some act appertaining to a judge, or to some court. It is granted, most commonly, upon suggestion that the party who is to do the act is so weak that he cannot travel; as where a person lives in the country, to take an answer in chancery, to examine witnesses, to levy a fine, to swear in a justice of the peace, &c. &c.

Natura Bre-  
vium, 55.  
1. Bl. Com. 352.  
2. Bl. Com. 351.  
3. Bl. Com. 417.

54. DUCES TECUM is a writ commanding a person to appear at a certain day in the court of chancery, and to bring with him such writings, evidences, or other things as the court would view. So also, SUBPOENAS *duces tecum* are often sued out at Common Law, to compel witnesses to produce, on trials at *nisi prius*, deeds, bonds, bills, notes, books, and memorandums, in their power or custody, relating to the issue in question. But if the document required be in the power of the opposite party, or his attorney, it is usual to give them notice to produce them, and on proof of such notice, the court will, if necessary, compel the production.

E.

55. EMBLEMENTS signify properly the profits of lands sown, but the word is sometimes used more largely for any products that arise naturally from the ground, as grass, fruit, &c.

5. Co. 116.  
Co. Lit. 55, 56.  
Cro. Eliz. 463.  
Cro. Car. 515.

56. ENURE signifies, in law, to take place or be available, and is as much as *affectum*. Thus, a *release* made to a tenant for life shall *enure*, and be of force and effect to him in reversion.

57. ESCROW is an instrument delivered to a *third person*, to be the deed of the party making it upon a future condition, whenever that condition shall be performed, and then it is to be delivered to the party to whom it is made. Therefore, to deliver an *escrow*, signifies that the deed delivered shall be considered only as a *scrowl*, or writing, until the condition be performed, and then, and not till then, it shall take effect as a *deed*.

2. R. II. Abr. 25.  
Co. Lit. 31. 36.  
2. Bl. Com. 387.

58. ESPLEES are the products which hereditaments, corporeal or incorporeal, yield; as the hay of meadows, the herbage of pasture, and the corn of arable lands; the rents and services of tenures, the tithes in gross of advowsons, the timber and brushes of woods, the fruits of an orchard, the toll or dish service of a mill, &c. all which, and such like issues, are termed *esplees*; and in a writ of right, it must be averred that the party claiming, or the ancestor under whom he claims, took the *esplees*;

Termes de la  
Ley, 258.  
F. N. B. 78. 459.  
Co. Lit. 52.

Daly v. King, Easter Term, 28. Geo. 3. in C.B. H. Black. Rep. 1. *esplees*; for this writ cannot be maintained without shewing actual seisin, by taking the *esplees*, either in the demandant or his ancestor.

Bracton, bk. 3. tract. 2. cap. 18. 1. Bl. Com. 441. 1. Lev. 6. 59. ESTOVERS signify to supply with necessaries, and is generally used in law for allowances of wood made to tenants, comprehending house-bote, hedge-bote, cart-bote, plough-bote, &c. for repairs.

F. N. B. 60. 60. ESTREPEMENT is where any spoil or *waste* is made by a tenant on lands, to the prejudice of him in reversion; as by continual plowing and drawing away the heart of the land, and neglecting to manure it, or not using it with good husbandry, whereby it is impaired.

Kitchen, 352. 17. Co. 451. 61. EX MERO MOTU are words used in the *King's charters* and *letters patent*, to signify that he grants them *of his own will and motion*, without petition or suggestion of any other; and the intent and effect of these words is, to bar all exceptions that might be taken to the charters or letters patent, by alledging that the King in granting them was abused or misled by false suggestions: therefore, whenever the words *ex mero motu* are used in any royal grant, they shall be taken most strongly against the King.

Dalton, 270. 62. EX OFFICIO is a phrase used to signify the power which any person possesses, *by virtue of an office*, to do certain acts of his own accord, without application to him for the purpose. Thus, a justice of the peace may not only grant surety of the peace, upon the complaint or request of any person, but he may demand and take it *ex officio*. Thus, also, the Attorney General may, by virtue of his office, file informations at the suit of the King, without applying to the court, as every other person must do, for leave so to do.

63. EX PARTE signifies an act done or proceeding had by one party only.

5. Co. 22. 8. Co. 146. 64. EX POST FACTO is used in law to signify something done after another thing that was *committed* before.

Termes de la Ley. Co. Lit. 147. Vaugh. 40. Dyer, 147. 1. Co. 96. 12. Co. 81. Cro. Eliz. 594. 8. Co. 136. Plowd. 184. 1. Salk. 384. 65. EXTINGUISHMENT signifies a *consolidation*. Thus, if a man hath a yearly rent out of lands, and afterwards purchase the land out of which the rent issues, so that he hath as good an estate in the *land* as he hath in the *rent*; the land and rent are then consolidated or united in one possessor, and therefore the rent is said to be *extinguished*. So also, by purchasing lands wherein a person hath common appendant, the common is extinguished. Thus, also, if *feme sole* debtee take the debtor to husband; or if there be two joint obligors in a bond, and the obligee marries one of them; in these cases the *debt* will be *extinguished*.

66. FEIGNED

F.

66. FEIGNED ISSUE. If in a suit in equity any matter <sup>3. Bl. Com. 452.</sup> *of fact* be strongly contested, the court usually directs it to be tried by a jury; as whether *A.* is heir at law to *B.* or the existence of a *modus decimandi*, or real and immemorial composition for tithes. But as a jury cannot be summoned to attend a court of equity, the fact is usually directed to be tried at *the bar* of the court of King's Bench, or at *the assizes* upon a *feigned issue*. For this purpose a feigned action is brought, wherein *the pretended plaintiff* declares that he laid a wager of *five pounds* with the defendant, that *A.* was heir at law to *B.* and then averring that he *is so*, brings his action to recover the five pounds. The defendant allows the wager, but avers that *A.* is not heir at law to *B.* and thereupon the issue, which is directed out of the court of Chancery to be tried, is joined. And thus the verdict of jurors in a court of law determines the fact in a court of equity.

67. FILUM AQUÆ is the *thread* or middle of the *stream* <sup>3. Mon. Angl. to. 1. fo. 390.</sup> where a river parts two lordships. Thus also, *file de mer* signifies the middle or high tide of the sea.

68. FLOTSAM is where a ship is sunk or cast away, and the goods are *floating* on the sea. *Flotsam*, *jetsam*, and *ligan*, are <sup>149.</sup> generally mentioned together; *jetsam* being the things *thrown out* <sup>5. Co. 106. F. N. B. 122.</sup> of a ship to prevent her sinking; and *ligan* are those goods <sup>1. Keble, 657. See 12. Ann. c. 18. and 26. Geo. 2. c. 19.</sup> which, so thrown overboard, sink to the bottom.

69. FORMA PAUPERIS is where any person has just cause of suit, and is so *poor* that he is not worth five pounds after all his debts are paid; and excepting the property in question; on oath made of this fact, and a certificate from some *lawyer*, that he hath good cause of action, the court will admit him to sue in *forma pauperis*, without paying any fees to counsel, attorney, or clerks in court. <sup>See the statutes of 11. Hen. 7. c. 12. 1. Mod. 268. 23. Hen. 8. c. 15. 3. Bl. Com. 400.</sup>

G.

70. GARNISHMENT. If an action of detinue of charters <sup>Termes de la Ley, 309.</sup> be brought against one, and the defendant saith that they were delivered to him by the plaintiff and another person, upon certain conditions, and prays that the other may be warned to plead with the plaintiff, the writ of *scire facias* which goes against him is called *garnishment*: and when he comes, he shall plead with the plaintiff, which is called *the interpleader*.

71. GLEBE are *lands* of which a rector or vicar is seised <sup>Termes de la Ley, 379.</sup> *in jure ecclesiæ*.

72. GROS BOIS is such wood which properly, in some places, <sup>2. Inst. 642. Cro. Eliz. 1.</sup> either by custom or Common Law, signifies *timber*.

73. HER-

## H.

73. HERBAGE AND PANNAGE. *Herbage* is the green pasture and fruit of the earth, provided by nature for the bite or food of cattle; and *pannage* is that food which the swine feed on in the woods, as the malts of beech, acorns, &c.

Crompt. Jurif. 197.  
See Dougl. Rep. 302. 304.

## I.

74. JEOFAIL is a word derived from the French *j'ai faille*, that is, *ego lapsus sum*, and signifies an oversight in pleading, or other law proceedings. By the allowance of these mistakes being found to interrupt and retard the course of justice, the legislature has, by the statutes 32. Hen. 8. c. 30. 18. Eliz. c. 14. 21. Jac. 1. c. 13. 16. & 17. Car. 2. c. 8. 4. & 5. Ann. c. 16. and 5. Geo. 1. c. 13. prevented them from taking effect whenever they are mere matter of *form*, after a verdict has established on which side, in the opinion of the jury, the right in question lies.

3 Bl. Com. 406.  
4. Bl. Com. 369. 432.

75. IN ESSE signifies any thing *in being*. Things are in law distinguished into those that are *in esse*, and those that are only *in posse*. Thus, any thing that is not in actual being, but may by possibility exist, is said to be *in posse*, or *in potentia*; but what is apparent and visible is alledged to be *in esse*, or actual being. A child, for instance, before it is born is *in posse*; after it is born it is *in esse*, or actual being.

Co. Lit. 342.  
Aule, 532.

76. INNUENDO is a word used in law proceedings to ascertain the *meaning* of any doubtful word or expression, by *averring* that the sense appropriated to it is the true meaning. Thus, for instance, in an action of slander, by speaking of *A.* to *B.* "He is a traitor," it must be *averred*, under an *innuendo* in the declaration, that the pronoun *he* means the person *A.* and that *traitor* means that the said *A.* had been guilty of an offence against the duty of his allegiance: but an *innuendo* cannot so enlarge the meaning of *doubtful* words as to render that *certain* which was *uncertain*. Thus, if a man says of another, "He hath burned my barn," the *innuendo* cannot explain it to mean, "my barn full of corn;" for that is adding a new term, and making the import of the words quite *different* from those that were in fact spoken.

4. Co. 17.  
Hob. 2. 6. 45.  
5. Mod. 345.  
Hutton, 44.  
1. Danvers  
Abridgement,  
158.  
And see the  
King v. Horne,  
Cowper, 672.  
and Rex. v.  
Aylett, 1. Term  
Rep. 68. where  
the law respect-  
ing *innuendos* is  
fully discussed.

77. JOURNIES ACCOUNTS, *dietae computatae*, is a term in law thus understood: If a writ abates by the death of the plaintiff or defendant, or by any defect of form, the surviving party shall have a new writ within as little time as he possibly can after the abatement of the first writ; and this is called having a writ by *journeys accounts*.

Termes de la  
Ley.  
6. Co. 10.  
2. Lilly, 83.  
1. Lutw. 297,  
Cro. Jac. 590.

L.

78. LEVANT ET COUCHANT are terms in law for cattle that have been so long in the ground of another, that they have *lain down* and are *risen again* to feed. The usual time in which cattle are said to have been *levant et couchant*, is supposed to be *a day and a night*.

Termes de la Ley.  
2. Lilly, 167.  
Wood's Inst. 190.  
3. Bl. Com. 239.

M.

79. MAINOUR, in a legal sense, denotes the thing that a thief taketh away or stealeth; so that when it is said that a thief is taken *in the mainour*, it means that he is taken with the thing stolen *in his hands* or possession.

Plowd. 179.  
4. Bl. Com. 303.

N.

80. NEGATIVE PREGNANT is a term in special pleading signifying a negative proposition including an implied affirmative. Thus, if a declaration charge the defendant with having done an act on a particular day, or in a particular place, and he plead that he did not do it *modo et formâ*, in the *manner and form*, as stated in the declaration, it may be implied affirmatively, that he did it in some other manner or form than that stated. Thus, also, if a man be charged with having *aliened* land, and he reply, that he hath not aliened *in fee*, this is a *negative pregnant*, for he may have aliened *in tail*. This mode of pleading is faulty, but there must be a *special demurrer* to a *negative pregnant*; for the court will intend every plea to be good until the contrary appear.

Dyer, 17. pl. 95.  
Kitchen, 232.  
2. Leon. 248.  
Cro. Jac. 559.  
5. Com. Dig.

81. NOMINE POENÆ is the penalty incurred for not paying rent, &c. at the day appointed by the lease or agreement for the payment thereof.

2. Lilly, 222.  
Hobart, 82.  
8. Ann. c. 17.

82. NUDE CONTRACT is a bare *naked contract* without a consideration; it is also called *nudum pactum*. A consideration is the material cause of every contract or agreement, or that thing in expectation of which each party is induced to give his consent to what is stipulated reciprocally between both parties. Thus, if one buy of me a house or other thing for money, and no money be paid, nor earnest given, nor day set for payment, nor the thing delivered; here no action lies for the money or the thing sold, but the owner may sell it to another if he will; for such provisions or contracts are deemed *nuda pacta*, there being no consideration or cause for them but the covenants themselves, which will not yield an action: and this agrees with the definition of *nudum pactum* as given by the civilians, namely, *nudum pactum est ubi nulla subest causa præter conventionem*.

The Year Book, 11. Hen. 4. pl. 33.  
Plowd. 302. 309.  
Dyer, 30.  
Fitz. "Debt," 126.  
Ld. Ray. 909.  
3. Burr. 1663.  
2. Bl. Com. 444.  
Powel on Contracts, Vol. 1. p. 330. to 344.

83. PARA-



## P.

1. Ro. Ab 911. 83. PARAPHERNALIA is derived from the Greek *Παρεμν*,  
Nov's Max. 168. *praeter*, and *Περνν*, *dos*, and signifies in law those goods which a  
2. L. on. 166. wife challenges *over and above her dower* or jointure, after her  
Cro. Car. 347. husband's death; as furniture for her chamber, wearing apparel  
2. Bl. Com. 435. and jewels, which are not to be put into the inventory of her  
1. Com. Dig. husband's effects.

F. N. B. 135. 84. PARAVAIL, *per availle*, signifies the lowest tenant of the  
2. Inst. 296. fee, or he who is immediate tenant to one who holds over an-  
2. Bl. Com. 60. other; and he is called *tenant paravail*; because it is perceived  
that he hath *profit and avail* by the land.

Wood's Insti- 85. PECULIAR signifies a particular parish or church that  
tutes, 504. hath jurisdiction within itself, and power to grant administration,  
4. Inst. 338. probate of wills, &c. exempt from the ordinary.  
Hob. 185.  
2. Ro. Rep. 357. 5. Mod. 239. 3. Bl. Com. 65.

1. Co. 123. 86. PERNANCY, from the French verb *prendre*, to take, signi-  
Raym. 17. fies a taking or receiving; as *tithes in pernancy* are tithes taken,  
Co. Lit. 589. or that may be taken in kind. Thus, also, the person who receives  
2. Bl. Com. 163. or takes the profits of lands, is called the *pernor of the profits*.

Lambard, 313. 87. POSSE COMITATUS, the power of the county, which  
Crompton, 62. includes the aid and attendance of all knights, and other men  
Dalton, c. 46. above the age of fifteen, within the county; but ecclesiastical  
2. Inst. 193. persons, and such as labour under any infirmity, are not com-  
1. Hawk. F. C. pellable to attend. This power is in the hands of the sheriffs,  
113. who may call it forth to enable them to execute the process of  
1. Bl. Com. 343. the law, and to do other acts for the furtherance of justice.  
4. Bl. Com. 122.

Co. Lit. 14, 15. 88. POSSESSIO FRATRIS is where a man hath a *son* and a  
3. Co. 42. *daughter* by one woman or *wenter*, and a *son* by another woman  
Cro. Car. 347. or *wenter*, and dies; if the first son enter upon the estate of his  
601. father, and die seized without issue, the *daughter* shall have the  
Biaſon, bk. 2. land as heir to her brother, although the son by the second *wenter*  
fo. 63. is heir to the father; for *possessio fratris de feodo simplici facit*  
Britton, c. 119. *sororem esse heredem*: but if the eldest son die without issue, not  
Eleta, bk. 6. c. 1. having made an actual entry and seisin, the younger brother by  
the second wife, as heir to the father, shall enjoy the land, and  
not the *sister*.

2. Lilly's Abr. 89. POSSIBILITY is defined to be, "*an uncertain thing*,"  
336. which may or may not happen; and a possibility is either *near*  
15. Hen. 7. pl. 10, or *remote*. Thus, for instance, where an estate is limited to one  
Hardsnes. 417. after the death of another, this is a *near possibility*; but a limita-  
2. Co. 50. tion to a man if he shall marry *A.* and after her death shall  
marry *B.* is a possibility so *remote*, that the law pays no regard to it.  
4. Co. 66. It was formerly held that a possibility, mere right, or *chose in*  
10. Co. 48. *action*, could not be granted over; but it has been lately determin-  
3. Term Rep. 88. ed, that a *possibility* coupled with an interest is devisable.

90. POSTEA

90. **POSTEA** is a term in law signifying the return of the judge, made upon the record, of what was done in the cause after the issue between the parties is joined.

91. **PRENDER** is the power or right to take a thing *before* it is offered. Sir John Peters' Case, 1. Co. Rep.

92. **PRIVIES** is a term signifying the situation of those who are partakers, or have any interest in any action or thing, or who stand in a certain relation to another. Of *privies* there are five kinds :---1. Privies in blood ; as the *heirs*, whether general or special, to the *ancestor*. 2. Privies in representation ; as the *executor* to the *testator*, or the *administrator* to the *intestate*. 3. Privies in estates ; as joint-tenants ; the *donor* to the *donee* ; the *lessor* to the *lessee*, &c. So if a fine be levied, the *heirs* of him who levies it are privies. 4. Privies in contract ; as when the lessee assigns all his interest. 5. Privies of estate and contract ; as when the lessee assigns his interest, and the lessor has not accepted the assignee. F. N. B. 117.  
3. Co. 23. 123.  
4. Co. 123.  
Latch. 260.  
2. Bl. Com. 355.  
Tidd's Practice of the King's Bench, p. 11, 12.

93. **PROCHEIN AMY**, *proximus amicus*, is used in law for him who is the *next friend*, or next of kin to a child in his nonage, and is therefore allowed to interpose in favour of the infant in the management of his affairs. 1. Bl. Com. 464.

Q.

94. **QUE ESTATE** signifies *which estate*, and is a plea where one man intitling another to land, &c. says that the same estate such other *had*, he *has* from him. Thus, in *quare impedit*, the plaintiff may alledge that two persons were seised of the lands to which the advowson was appendant in fee, and presented to the church, which afterwards became void ; *which estate* of the said two persons he now has, and by virtue thereof presented, &c. Co. Lit. 121.  
1. Co. 46.  
1. Lev. 190.  
3. Lev. 19.  
Lutw. 81.  
1. Mod. 232.  
2. Mod. 144.  
3. Mod. 52.  
Cro. Jac. 673.

95. **QUOAD HOC** is often used in law pleadings and arguments to signify, *as to the thing* named the law is so and so, &c.

R.

96. **REALTY** is the abstract of *real*, as distinguished from *personalty*.

97. **RECOURE** signifies the keeping back or stopping some-thing which is due, and in law it is used for *defalk* or *discount*. Thus, if a person hath a rent of ten pounds issuing out of certain lands, and he disseises the tenant of the land, if the disseisee recover the land and damages, the disseisor shall *recoure* the rent in damages. Termes de la Ley.  
Dyer, 2.  
1. Cro. 196.

98. **SCI-**

## S.

See Lord Ho-  
bart's Reports,  
171, 172.  
Poph. 201. 204.  
Cro. Jac. 618.

98. **SCILICET**, an adverb signifying *that is to say, to wit.* It is not a direct and separate clause, nor a direct and intire clause; but *intermedia*: neither is it a substantive clause of itself, but is made use of to usher in the sentence of another, and to particularize that which was too general before, or to explain that which was doubtful and obscure. But it must neither increase nor diminish, for it gives nothing of itself. It may, however, make a restriction, where the precedent words are not so very exprefs but that they may be restrained.

Shepherd's Epi-  
tome, 1130.

99. **TANTAMOUNT** is where one thing amounts to another, and then it is all one as if it were the same. Thus, *a lease and release amount to a feoffment.*

## U.

2. Lilly, 629.  
Cro. Jac. 479.

100. **VARIANCE** signifies any alteration of a thing before laid in a plea, or where a declaration in a cause differs from the writ, or from the deed on which it is founded.

9. Co. 70.  
3. Bl. Com. 301.

101. **UNCORE PRIST** is a plea in nature of a plea in bar. Thus, in an action of debt on bond, the defendant may plead that he tendered the money at the day and place, and that there was nobody there to receive it, and that he is also *still ready* to pay the same.

Termes de Ley,  
581.

102. **VOIR DIRE** is the name of a particular oath administered to a witness, that he shall say the truth, whether he is so far interested in the cause that he shall get or lose any thing by the event.

## W.

Termes de Ley,  
590.

103. **WITHERNAM** is the taking or driving a distress to a hold, or out of the county, so that the sheriff cannot upon *replewin* make delivery thereof to the party distrained:

THE END.

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